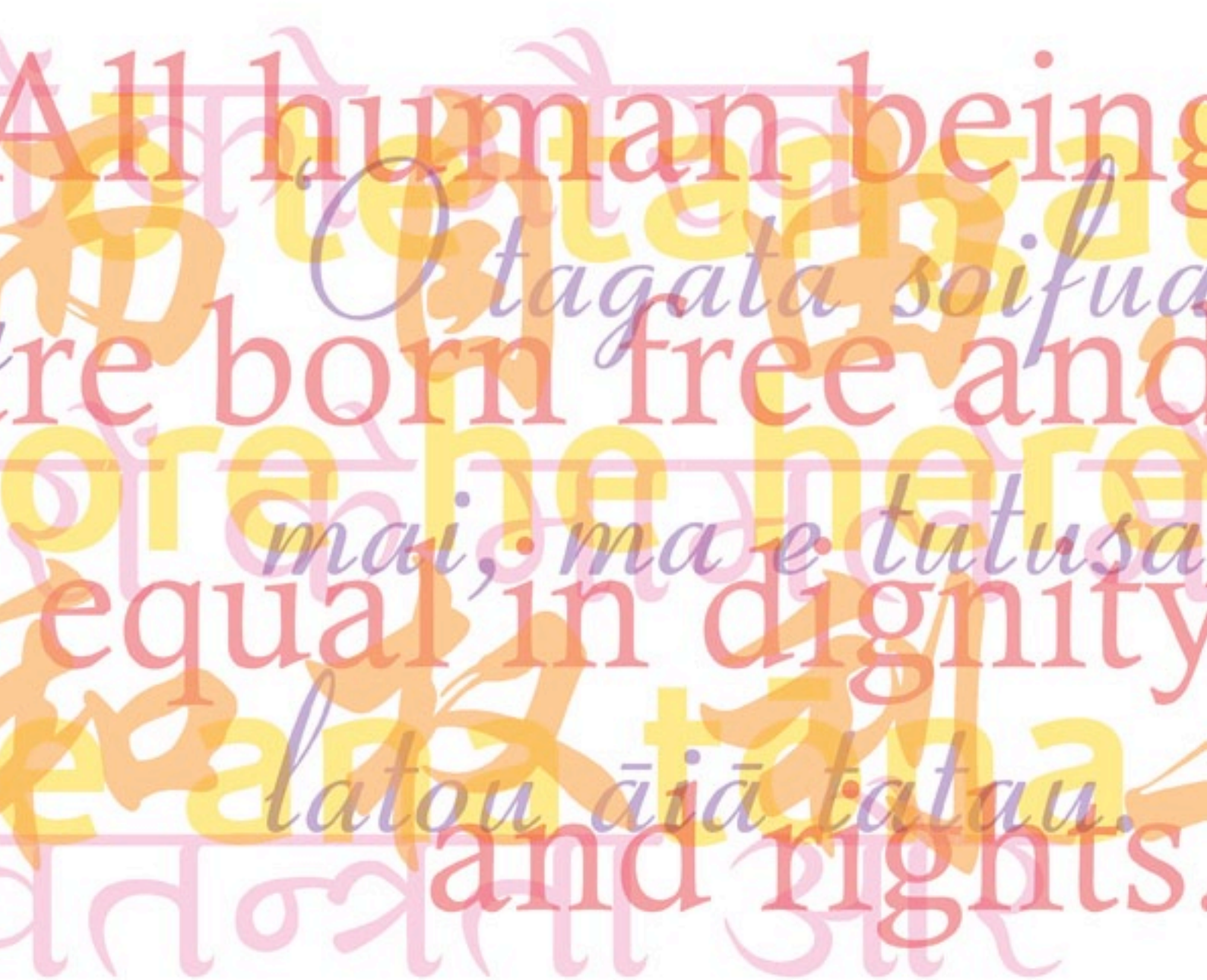
Human Rights Commission
Te Kāhui Tika Tangata

2010

Human Rights in New Zealand

Ngā Tika Tangata O Aotearoa



The plain English version of Article 1 of the Universal Declaration of Human Rights has been translated into the heritage languages of the five major population groups in New Zealand. They are Pakeha/European, Māori, Samoan, Chinese, Indian.

All human beings are born free and equal in dignity and rights.

I te whānautanga mai ō te tangata, kāhore he here, e ōrite ana tōna tapu, tōna mana, me ōna tika, ki te katoa.

‘O tagata soifua ‘uma ‘ua sa’oloto lo latou fānanau mai, o latou tūlaga aloa’ia fa’apea a latou āiā tatau.

人人生而自由，
在尊严和权利上
一律平等。

सभी मनुष्यों को गौरव और अधिकारों के मामले में जन्मजात स्वतन्त्रता और समानता प्राप्त है।

2010

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Te Kāhui Tika Tangata

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Human Rights Commission
Te Kāhui Tika Tangata

Te Kāhui Tika Tangata is the korowai or cloak of the Human Rights Commission.

Te kāhui embraces those who gather together under the kaupapa of human rights and symbolises both their protective role and the Commission's role in promoting them.

Tika tangata refers to our human rights and responsibilities, suggesting the highest imperatives of respect and conduct.

The design of the Commission's logo derives from the traditional art of Tāniko, the weaving used to make korowai. Tāniko is a uniquely New Zealand art form.

In particular, the knots and hanging threads at the bottom of the cloak are characteristic of the design.

The Commission's logo symbolises the many muka or strands that are woven together, representing both the uniqueness of individuals and our collective identity – our diversity and our unity. The muka emphasise our inter-connectedness and interdependence. The pona (knot) secures the threads. Together they make up the korowai of our human rights and responsibilities.

He tangata kē koutou
He tangata kē mātou
I roto i tēnei whare
Tātou tātou ē

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Foreword

Mihi

Ko Ranginui, ko Papatuanuku te marae tangata o te ao.

Ki ngā maunga iringa kōrero, ki ngā awa rerenga roimata, ngā reo, ngā mana, ngā waka o te motu, tēnā koutou katoa.

Tai Pari, tai timu, taihoa e haere. I te hokinga atu o te ngaru, ka kite āhau kua ngaro koutou. Haere rā koutou te hunga wairua, haere oti atu ki tua o te ārai, ki te huinga o te kahurangi, ki te wheiao, ki te ao mārama. Haere, haere, haere.

Ki a koutou rā te hunga ora, ngā rangatira, ngā mātua, ngā tamariki, e pupuri nei i ngā taura here ō ngā whakapapa, tū te ao, tū te pō. Whiria te muka tangata i takea mai i Hawaiki Nui. Tū tangata tonu tātou i ngā wā katoa.

He pānui tuku tēnei, i kōkiritia, i rangahaua, i tuhia hei taunga mo te wā. Maha noa ngā kaupapa. E marino ana te takoto o ētahi, tutū ana te puehu ki ētahi engari mau tonu ana te rongo ki te nuinga o te iwi whānui.

Ehara taku toa i te toa takitahi, he toa takitini. He mihi ki ngā kaiwhakarite o tēnei pānui, na koutou ka rangatira tātou.

Nā reira puritia te Mana i Waitangi, i tohua nei e ngā rangatira hei punga herenga waka mo Aotearoa. Whāia kia mau, kia tīna, tihei mauriora.

He kōrero whakamutunga.

"Kotahi anō te kōhao o te ngira e kuhu ai te miro mā, te miro pango, me te miro whero."

Pōtatau Te Wherowhero, Te Kīngi Tuatahi

Tēnā koutou katoa,

Te Amokapua
Te Kaihautū o te Kāhui Tika Tangata

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1. Introduction

Kōrero whakataki

Human Rights in New Zealand 2010 maps how well human rights are promoted, protected and implemented in New Zealand.

This is the second comprehensive report undertaken by the Human Rights Commission to assess how well New Zealand meets international human-rights standards and where we fall short. It highlights improvements since the first assessment in 2004 and identifies where there has been some deterioration. It pinpoints areas of fragility, persistent and entrenched inequalities, and gaps in human-rights protections.

What is clear, as it was in 2004, is that human rights matter. Their realisation is vital to our expectations about life, education, health, work, our personal security, equal opportunity and fair treatment, and to our system of government. They affect the lives of everyone in New Zealand. Respect for each other's human rights is a pre-requisite for harmonious relations among the diverse groups that make up contemporary New Zealand. Human rights are equally vital to peace, security and sustainable development worldwide.

In 2004 the Commission found that there was much to celebrate about New Zealand's human rights record; that New Zealand had the key elements essential for the protection, promotion and fulfilment of human rights; and that most people experienced the fundamental rights and freedoms in their daily lives and had the opportunity to participate in all aspects of society.

The most pressing human-rights issues identified in 2004 were the poverty and abuse experienced by a significant number of children and young people; the pervasive barriers that prevented disabled people from fully participating in society; the vulnerability to abuse of those in detention and institutional care; the entrenched economic and social inequalities that continued to divide Māori and Pacific people from other New Zealanders; and the

THIRTY PRIORITY AREAS FOR ACTION ON HUMAN RIGHTS IN NEW ZEALAND: SECTION ONE – GENERAL

International Human Rights Framework	Parliament	1	Strengthening Parliament's human-rights responsibilities by establishing a Human Rights Select Committee and tabling human-rights reports in Parliament
	Civil society	2	Establishing a fund to support civil-society participation in international human-rights mechanisms
Equality and Freedom from Discrimination	Substantive equality	3	Incorporating a specific reference to equality in the Bill of Rights Act and the Human Rights Act
Human Rights and the Treaty of Waitangi	Pathways to partnership	4	Developing and implementing new pathways to partnership between Tangata Whenua and the Crown
	Declaration on the Rights of Indigenous Peoples	5	Promoting awareness of the United Nations Declaration on the Rights of Indigenous Peoples in New Zealand
Human Rights and Race Relations	Structural discrimination	6	Investigating the extent to which structural discrimination underlies entrenched racial inequalities, and developing programmes to address it
	Languages	7	Developing and implementing a national languages policy

challenge of the Treaty of Waitangi now and in the future.

Human Rights in New Zealand 2010 confirms that New Zealand continues to meet and often surpasses human-rights standards in many respects. It highlights steady improvements since 2004, but also reveals the fragility of some of the gains and areas where there has been deterioration. It makes clear that there is no room for complacency and that New Zealand continues to face serious human-rights challenges. These are challenges that can be met where there is political will and strong civil-society commitment and engagement.

PRIORITY AREAS FOR ACTION

The Commission has selected thirty priority areas – from over a hundred identified by the research and public consultation process undertaken in preparing *Human Rights in New Zealand 2010*. In these 30 areas, further action is essential over the next five years to strengthen human-rights protections and better ensure the dignity, equality and security of everyone in New Zealand.

The thirty priority areas focus on strengthening New Zealand's constitutional and legal framework; tackling entrenched inequalities and systemic structural discrimination; and more explicitly and effectively implementing civil, political, economic, social and cultural rights. The 30 priority areas highlight what needs to be done to better protect groups of people who are particularly vulnerable to human-rights abuses, or subject to structural discrimination.

In selecting the areas for action the Commission recognised that while the State is primarily responsible for ensuring that human rights are promoted, protected and fulfilled, it does not have the sole responsibility. Responsibility to respect human rights extends beyond central government – to regional and local government, to the business and community sectors, to voluntary groups and organisations. The report highlights the critical role individuals, community groups and other civil society organisations play in creating an environment of respect for human rights and harmonious race relations.

THIRTY PRIORITY AREAS FOR ACTION ON HUMAN RIGHTS IN NEW ZEALAND: SECTION TWO – CIVIL AND POLITICAL RIGHTS

Democratic Rights	**Representation**	8	Increasing the representation of Māori, Pacific and other ethnic groups in local government
Right to Justice	**Evidence from vulnerable people**	9	Developing more appropriate methods for taking and recording of evidence from vulnerable victims and witnesses in criminal proceedings
Life, Liberty and Security of Person	**Programme of action**	10	Implementing in partnership with civil society a comprehensive strategy and programme of action to address the drivers of crime
Freedom of Opinion and Expression	**Section 61, Human Rights Act 1993**	11	Reviewing section 61 of the Human Rights Act to ensure it fulfils its legislative purpose
	Human rights and the Internet	12	Promoting debate about access to the internet as a human right and a Charter of Internet Rights
Freedom of Religion and Belief	**Guidelines**	13	Developing guidelines for respecting diversity of religion and belief in specific contexts

Across *Human Rights in New Zealand 2010* a number of themes have emerged.

INTERNATIONAL HUMAN-RIGHTS STANDARDS

The international human-rights framework has a welcome and growing visibility in government and among some sectors of New Zealand society. During the period under review, there have been three new international human-rights instruments of direct interest to New Zealand: the Optional Protocol to the Convention against Torture; the Convention on the Rights of Persons with Disabilities; and the Declaration on the Rights of Indigenous Peoples. The Commission's report shows that the ratification by New Zealand of the first two has already had an effect on the wellbeing of disabled people and those held in detention. Ratification has served to raise expectations among different communities about their implementation.

Human Rights in New Zealand 2010 also reveals increasing references to human rights and specific covenants and conventions in New Zealand law. But for the most part these continue to be ad hoc, and there is still no comprehensive incorporation of ratified treaties in New Zealand's domestic law.

THE TREATY OF WAITANGI

The question of the place of the Treaty of Waitangi in New Zealand's constitutional arrangements remains unresolved. The Government issued in May 2010 a statement of support for the Declaration on the Rights of Indigenous Peoples, a document that offers an international perspective that could assist a national conversation on the contemporary and future significance of the Treaty of Waitangi.

PARTICIPATION

Participation emerges as critical issue for a robust democracy and harmonious race relations. Lack of

THIRTY PRIORITY AREAS FOR ACTION ON HUMAN RIGHTS IN NEW ZEALAND: SECTION THREE – ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Right to Health	**Capacity**	14	Amending the Mental Health (Compulsory Assessment and Treatment) Act 1992 to better reflect the concept of capacity in line with international standards
Right to Education	**Human Rights values**	15	Implementing the human rights values explicit in the New Zealand curriculum, Te Marautanga o Aotearoa and Te Whāriki, to ensure that early childhood services and schools respect diversity, are free from violence and enable full participation by children and young people
Right to Work	**Equal Employment Opportunities framework**	16	Implementing a new framework for equal employment opportunities that addresses access to decent work for disadvantaged groups such as Māori, Pacific youth and disabled people
Right to Housing	**Homelessness**	17	Developing and implementing regional and national strategies to reduce homelessness
	Social housing provision	18	Increasing the supply and diversity of social housing
Right to Social Security	**Poverty Reduction**	19	Reducing child poverty through a co-ordinated and integrated approach, with specific attention to Māori, Pacific and disabled children
	Adequacy of core benefits	20	Reviewing and addressing the adequacy of core benefit rates

participation and representation that reflects fairly the diversity of New Zealand society are barriers to the development of sustainable social and economic policy. They also contribute to alienation, marginalisation and ultimately conflict.

POVERTY, ENTRENCHED INEQUALITIES AND STRUCTURAL DISCRIMINATION

Poverty, entrenched inequalities and structural discrimination continue to severely limit the ability of significant numbers of young people to develop and achieve to their

THIRTY PRIORITY AREAS FOR ACTION ON HUMAN RIGHTS IN NEW ZEALAND: SECTION FOUR – RIGHTS OF SPECIFIC GROUPS

Rights of Children and Young People	United Nations Convention on the Rights of the Child obligations	21	Ensuring that legislation reflects New Zealand's obligations under the United Nations Convention on the Rights of the Child, including recognising the interests of the child, the age of criminal responsibility, protection under the Children, Young Persons. and Their Families Act, age discrimination protections and adoption procedures
	Participation	22	Increasing avenues for children to participate and have their views heard
Rights of Disabled People	Measuring outcomes	23	Developing a full range of social statistics to ensure that key outcomes for disabled people are measured
	Implementing the Convention on the Rights of Persons with Disabilities	24	Ensuring an integrated and co-ordinated government response to implementing the Convention on the Rights of Persons with Disabilities with the full participation of disabled people
Rights of Women	Pay and employment equity	25	Timetabling pay and employment-equity implementation with a minimum target of halving the gender pay gap by 2014 and eliminating it by 2020
	Sexual and family violence	26	Reducing sexual and family violence through target-setting and fully resourcing a national programme of action
Rights of Sexual and Gender Minorities	Legal equality	27	Completing the legislative steps needed for formal legal equality, including rights to found and form a family, regardless of sexual orientation or gender identity
Rights of Migrants	Employment	28	Addressing barriers to the employment of migrants, and ensuring that the rights of temporary, seasonal and rural workers and those on work-to-residence visas are respected
Rights of Refugees	Comprehensive strategy	29	Completing a comprehensive whole-of-government resettlement strategy for convention refugees, quota refugees and family reunification
Rights of People Who Are Detained	Māori imprisonment	30	Committing to specific targets and timelines for reducing the disproportionate number of Māori in prison

full potential, particularly those of Māori, Pacific heritage and people who are disabled. The Commission's report identifies incremental, but insufficient, progress. It notes that in some cases progress has halted or even reversed as a consequence of the global economic recession.

VIOLENCE

Violence, bullying and harassment are violations of the most fundamental of human rights – security of the person. Their persistence constitutes one of the most difficult and intractable human rights challenges we face in New Zealand.

DATA

While *Human Rights in New Zealand 2010* has been able to draw on a range of statistics and data to provide empirical evidence to complement the legal and policy analyses, data is severely limited in relation to disabled people and for sexual and gender minorities.

WHAT HUMAN RIGHTS IN NEW ZEALAND 2010 COVERS

The Commission assesses how well human rights are recognised, respected and fulfilled against the civil and political, economic, social and cultural rights proclaimed in the Universal Declaration of Human Rights and as enacted as international law in United Nations Covenants and Conventions and in the International Labour Organisation's fundamental labour standards.

This report updates *Human Rights in New Zealand Today, Ngā Tika Tangata O Te Motu*, published in September 2004. It assesses progress against the priorities set out in the New Zealand Action Plan for Human Rights 2005–2010. It draws on significant work undertaken by the Human Rights Commission since 2005 and its coverage extends beyond that of its 2004 predecessor.

The publication begins with a general section, 'Tirohanga Whānui', introducing New Zealand's human-rights framework, which includes international human-rights law and the Treaty of Waitangi. The chapter on human rights and the Treaty of Waitangi is new. Section 1 also covers race relations, demonstrating the centrality of respect for human rights to harmonious relations.

Section 2, 'Tikanga Tangata me te Tikanga Tōrangapū', covers civil and political rights. The emphasis is on participation in central and local government as a right and a responsibility; on access to justice and on tackling the drivers of crime; and on practical steps to ensure freedom of religion and belief in the workplace and other domains. The chapter on freedom of opinion and expression introduces a new focus on human rights and the Internet.

Economic, social and cultural rights, 'Tikanga Ōhanga, Pāpori me te Ahurea', are assessed in Section 3. As well as updating the 2004 assessment of the rights to health, education, work and housing, Section three contains a new chapter on the right to social security, a key element of the right to an adequate standard of living.

Section 4, 'Tikanga Uepū', focusses on seven specific groups of people who are particularly vulnerable to human rights abuses and the effects of structural discrimination. The separate chapters on 'Women' and 'Sexual and Gender Minorities' are new to the 2010 review.

Each chapter introduces the specific right or topic, summarises the international law and context, canvasses the New Zealand legal and policy context, and then assesses the situation in New Zealand against the relevant standards. Each concludes with key areas for action to progress the rights under consideration, which have been identified following consultation with stakeholders and members of the public.

PROMOTING AND PROTECTING HUMAN RIGHTS TODAY

In New Zealand human rights have never been protected by a single constitutional document or superior legislation. Instead, as this report graphically illustrates, a raft of disparate laws, policies and programmes provides elements of protection. Similarly no single institution of the State or government agency has sole or even primary responsibility for the promotion and protection of human rights.

Further, even where there are supportive laws and policies, the extent to which people enjoy their human rights in their everyday lives depends on the extent to which those they come in contact with, whether family members, whānau, neighbours, friends, work colleagues, service providers or government officials, reflect basic human-rights principles and values in their behaviour and practices.

Human Rights in New Zealand 2010 provides the evidential foundation and catalyst for the further work that must be done by Parliament, the Government, the business and community sectors, and the Human Rights Commission to develop detailed plans of action and programmes of work that will strengthen laws, policies and practices in the critical areas it has identified.

THE HUMAN RIGHTS COMMISSION 2010

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Commissioner
Kaihautū

Richard Tankersley
Commissioner
Kaihautū

2. International Human Rights Framework

Pou Tarāwaho Tika Tangata o te Ao

We recognise the inherent dignity and the equal and inalienable rights of all members of the human family.

Universal Declaration of Human Rights, Preamble (edited)

Introduction
Tīmatatanga

When the Commission undertook its review of human rights in New Zealand in 2004, it recorded New Zealand's engagement in the development of the international human rights standards and ratification of the six major human rights treaties. Since then, a further convention, the United Nations Convention on the Rights of Persons with Disabilities (CRPD), has been added to the international human rights framework, together with the Optional Protocol to the Convention Against Torture (OPCAT). A new process for examining states' performances under the international framework, the Universal Periodic Review (UPR), has been introduced, and the Declaration on the Rights of Indigenous Peoples (UNDRIP) has been adopted by the United Nations General Assembly.

There is also greater recognition of corporate responsibility and the role that multinationals, in particular, play in the protection and promotion of human rights, and there have been some significant shifts in how national sovereignty is viewed. It is no longer conceived of as entirely unfettered – a state's treatment of its citizens has become the subject of legitimate inquiry, and increasingly justifiable intervention by the international community. [1]

Despite these advances, however, the relationship between international human rights standards and what happens in practice is still not well understood. This chapter provides an introduction to the international human rights framework and New Zealand's response to it in the 21st century.

WHAT ARE HUMAN RIGHTS?

Human rights, as presently conceived, have their origin in the Universal Declaration of Human Rights (the Declaration). The Declaration is based on the Charter of the United Nations. [2] The preamble to the charter reads:

> **We the peoples of the United Nations determined…to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small…**

The charter includes the following goals:

> **…to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion…**

UNIVERSAL DECLARATION OF HUMAN RIGHTS

The declaration drew on earlier initiatives, such as those of the International Labour Organisation (ILO). [3] It marks the beginning of the transformation of human rights from moral or philosophical imperatives into rights that are legally recognised internationally and, increasingly, across nations. The UN General Assembly proclaimed the declaration as

> **…a common standard of achievement for all peoples and all nations.** [4]

The declaration clarifies that individuals also have responsibilities. Article 29, for example, states:

> **…everyone has duties to the community in which the free and full development of his personality is possible.**

This translates into the duty of individuals to:

- respect, promote and protect human rights

1 Ministry of Foreign Affairs and Trade (2008), *The New Zealand Handbook on International Human Rights* (3rd ed) (Wellington: MFAT), p 16

2 The charter was unanimously adopted on 25 June and signed on 26 June 1945. Poland was not represented at the conference. The United Nations officially became an institution with the ratification of the charter on 24 October 1945.

3 The ILO, which was founded in 1919 by the Treaty of Versailles, was transformed into a specialised agency of the United Nations under an agreement with the Economic and Social Council (ECOSOC) in 1946.

4 UN General Assembly (1948), Universal Declaration of Human Rights, Preamble.

◀ New member of the human family Elsie Alexander, 5 weeks old, greets a new day.

- exercise their rights responsibly
- recognise they also have general duties to others and their community. [5]

International context
Kaupapa ā taiao

To give the standards in the declaration legal force, two major covenants were developed. The International Covenant on Civil and Political Rights (ICCPR) deals with civil and political rights, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) with economic, social and cultural rights. Both were adopted by a special resolution of the UN General Assembly in 1966 and came into effect in 1976 when the necessary number of countries had ratified them. [6] The two covenants and the declaration are often referred to as the International Bill of Rights.

The rights in the ICCPR take effect as soon as a state ratifies the Covenant. They apply to everybody equally, without discrimination. The rights may be limited only in situations of public emergency, where the life of the nation is under threat, and "to the extent strictly required by the exigencies of the situation". [7] Some articles also include limitation clauses. For example, Article 19 (which relates to freedom of expression) can be restricted to protect the rights or reputations of others, in situations of public emergency, and if prescribed by law.

The rights in the ICESCR must also be provided equally and on a non-discriminatory basis. They are, however, subject to the concept of progressive realisation and resource limitations. Given the potential cost, compliance with the substantive rights is expected to happen incrementally or, to use the language of the covenant, "progressively", depending on the resources available and the competing claims and priorities on those resources. [8]

To avoid this being used as reason for non-compliance, states must demonstrate that they have made every effort to use the resources at their disposal to satisfy at least the minimum or core obligations as a matter of priority. It follows that there is a strong presumption against any deliberately retrogressive measures. Further, a state cannot commit itself to the covenant and then delay for too long taking steps towards meeting the commitments it has assumed.

In addition to the two major treaties, there are a series of instruments that apply to thematic issues, such as racial discrimination or discrimination against women. These include the International Convention on the Elimination of All Forms of Racism (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (UNCROC), the Convention on the Rights of Migrant Workers and their Families (MWC) and the Convention on the Rights of Persons with Disabilities (CRPD).

There are also a large number of United Nations resolutions or declarations that are not binding in the same way as treaties but establish standards of practice and can acquire significant status as a result of their moral force and specific application. The most recent of these is the Declaration on the Rights of Indigenous Peoples (UNDRIP).

THE PROCESS OF RATIFICATION

International treaties are developed through a process of negotiation among member states of the United Nations. Individual states then decide whether to accede to or ratify the final treaty.

Ratification is acceptance by a State that it will be bound by the terms of a treaty. In ratifying a treaty, a

5 International Council on Human Rights Policy (1999), *Taking duties seriously: individual duties in international human rights law* (Versoix: International Council), p 16. Accessible online at www.ichrp.org/files/reports/10/103_report_en.pdf

6 The 1993 Vienna World Conference reaffirmed that human rights are indivisible and interrelated and that no right is superior to another (the 1993 Vienna Declaration and Programme of Action, Article 5). For a discussion on the concept of interdependence in the context of human rights, see Scott C (1989), 'The interdependence and permeability of human rights norms: towards a partial fusion of the international covenants on human rights', *Osgoode Hall Law Journal 27*, p 769. It follows that individual rights should not be considered in isolation, since the enjoyment of one will often depend on the realisation of another. For example, the right to vote is closely linked to the right to education.

7 ICCPR, Article 4

8 ICCPR, Article 4. See also Alston P and Quinn G (1987), 'The nature and scope of States Parties' obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, 9(2), 156–229

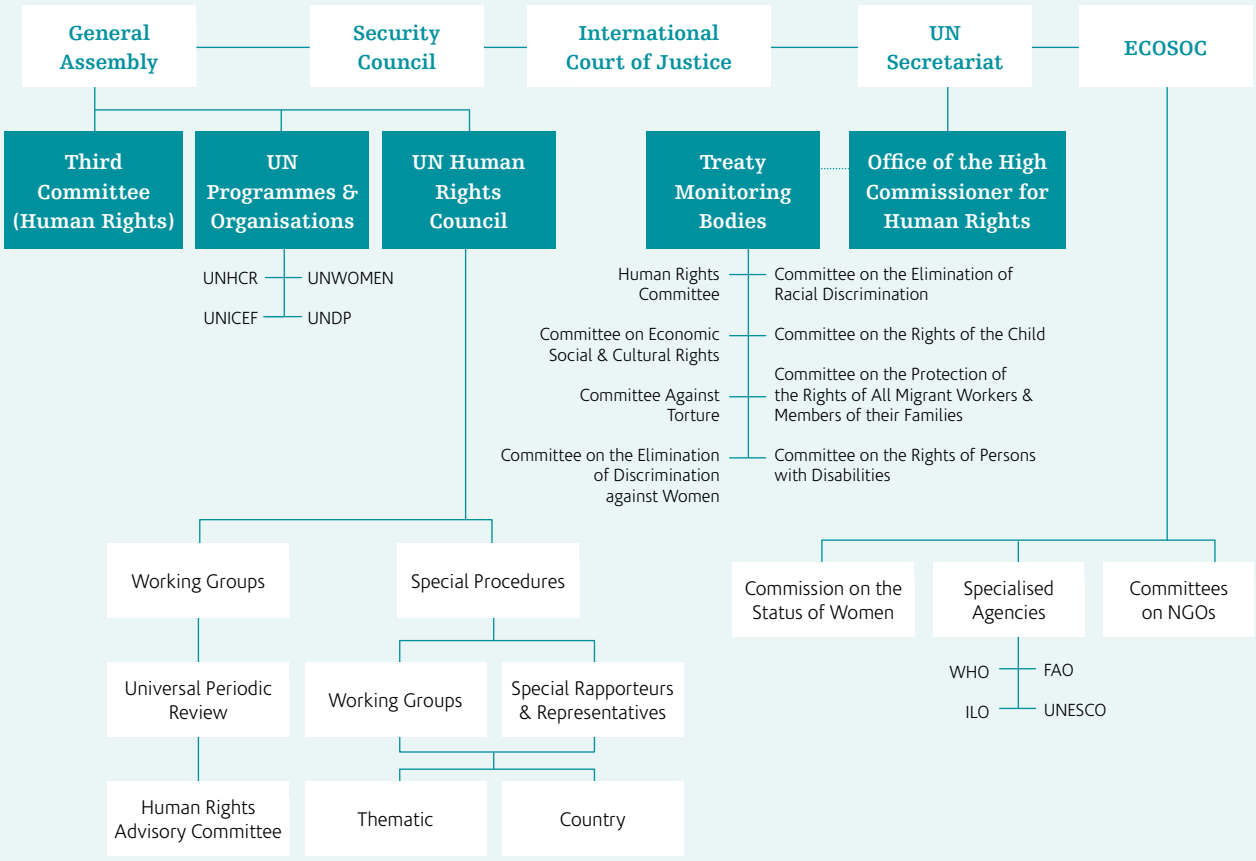
state recognises it as international law and accepts an obligation to respect, protect, promote and fulfil the rights within it. The duty to respect a right requires the state to refrain from carrying out any actions which violate it. The duty to protect requires action by that state to prevent violation by others. The duty to promote means a state should raise awareness of the right, and the duty to fulfil requires the state to take steps to ensure the full realisation of the right.

States approach ratification differently. Some ratify with the intention of working towards implementing the objectives and standards of the documents. Others ratify only when their laws substantially comply with the instrument. Where a country cannot bring its domestic legislation into line with all the articles in a particular convention or covenant before ratification, a state can register a unilateral reservation "…whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state". [9] Countries such as New Zealand, which postpone ratification until their domestic legislation is principally compliant with the treaty in question, tend to seek few reservations.

INTERNATIONAL ACCOUNTABILITY

Once a state has ratified a treaty, it does not have an unfettered discretion in how it goes about giving effect to

FIGURE 1: ELEMENTS OF THE UNITED NATIONS HUMAN RIGHTS FRAMEWORK [10]



9 Vienna Convention on the Law of Treaties,1969. A reservation cannot be registered against an essential (or non-derogable) provision of a treaty, since this would defeat the purpose of ratifying it in the first place.

10 Ministry of Foreign Affairs and Trade (2008), p 2. The diagram was amended in 2010 to reflect changes to the UN structure since 2008.

the resulting commitments. There are a variety of ways in which the performance of states is monitored.

Reporting standards

A state's treatment of its citizens can be the subject of legitimate enquiry by a UN body. The major way this is done is through the treaty reporting process. Most treaties provide for international review of a country's performance by a United Nations Committee of Experts. The committee's reports provide an indication of how well a country is observing its international obligations. Non-compliance can attract the censure of the United Nations.

Complaints to UN bodies

Some of the treaties are supplemented by optional protocols. These create a mechanism to allow individuals to make complaints directly to the relevant UN body about a breach of the treaty if they have exhausted their domestic remedies. The ICCPR, for example, requires states to ensure that a person has an effective remedy for a violation of the covenant. [11] The optional protocol to ICCPR therefore allows individuals to complain directly to the UN Human Rights Committee about the violation of an ICCPR right. In 2008, after lengthy deliberation, a broadly similar complaints procedure in relation to ICESCR was adopted by the General Assembly. The optional protocol to the CAT establishes a process for monitoring places of detention at national and international level. The intention of this is to prevent torture by providing objective assessments and enabling dialogue between visiting experts and states' parties. [12]

Special procedures

There are also 'special procedures' which deal with specific issues or thematic matters. They may be individuals (known as special rapporteurs or special representatives) or a working group of up to five people, and are designed to promote and ensure compliance with human-rights standards. [13]

Universal Periodic Review

In 2007, the United Nations Human Rights Council agreed to a new package of procedures to complement the older reporting mechanisms. The most significant was the introduction of the Universal Periodic Review (UPR) mechanism, which is designed to review the human rights performance of member states in a way that ensures universality of coverage. The UPR is a regular, inclusive process that assesses the human rights situations of individual UN member states. It provides an opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and fulfil their human rights obligations, as well as commit to further improvements. The process involves a state-to-state peer review, based on a dialogue that is intended to be co-operative and constructive.

Civil Society and National Human Rights Institutions

As the process of reporting has developed, provision has been made for a greater role to be taken by civil society organisations (CSOs) and, more recently, NHRIs. They may provide 'shadow' or 'parallel' reports to a treaty body and to the UPR process, and meet with representatives from the relevant committee before or during the course of dialogue sessions. They may also be invited to take part in discussions around particular themes. CSOs and NHRIs can facilitate domestic discussion during the preparation of the state report, influence the 'list of issues' prepared by the committee, advise on what might be included in the concluding observations, and monitor their implementation nationally. [14]

Despite the strengths of the UN system, the proliferation of treaties and ratifications without increases in funding means that the system is in need of reform. This would ensure that it is more effective in protecting human rights at the domestic level, and there is greater congruence in the work of the treaty bodies themselves. [15] In 2009, a group of past and present representatives of the treaty bodies issued the 'Dublin Statement' on the strengthening

11 ICCPR, Article 2(3)(a)

12 Ministry of Foreign Affairs and Trade (2008), p 53

13 Ministry of Foreign Affairs and Trade (2008), p 31

14 Bedggood M (2010), 'The International Law Dimension of Human Rights in New Zealand', in Bell S (ed), *Brookers Human Rights Law* (Wellington: Brookers), para IHRL3.04

15 O'Flaherty M (2010), 'International treaty body reform should protect human rights on the ground', *HRLRC Bulletin*, 51, pp 1–3

FIGURE 2: THE UNIVERSAL PERIODIC REVIEW PROCESS

of the UN human rights treaty-body system. [16] This identifies what the authors consider to be the key elements for reform and engagement of all relevant stakeholders. The current range of treaty body practices and their interaction with NHRIs and civil society, in particular, is considered to be challenging, and to reduce their ability to contribute effectively to the work of the treaty body system.

In the recent 'Marrakech Statement' on the strengthening of relationships between national human rights institutions and the human rights treaty-body systems, NHRIs recognised that the treaty-body system was under considerable stress. NHRIs also recognised that the multiple challenges confronting treaty bodies impact on NHRIs' ability to interact effectively with them, in a way that strengthens the authority of their reports and increases the ability to use those reports to make a real difference to the promotion and protection of human rights on the ground. The statement makes a number of proposals to treaty bodies, UN member states, the Office

16 The Dublin Statement is accessible online at www.nottingham.ac.uk/hrlc/documents/specialevents/dublinstatement.pdf

of the High Commissioner for Human Rights, and NHRIs themselves. Those recommendations include the holding of treaty-body meetings in UN regional centres outside of New York and Geneva. [17]

DOMESTIC ACCOUNTABILITY

Protection by the courts

A country's commitment to its international obligations is also addressed through the domestic court system.

While the role of the courts in upholding the rule of law relating to civil and political rights is well accepted, their role in relation to economic and social rights is less clear. Historically, courts have been unwilling to provide a remedy for aggrieved individuals claiming a violation of their economic and social rights. As such decisions almost inevitably involve the allocation of resources – a function considered to belong more properly to the executive arm of government – it is thought that the courts should not become involved. That is, the issue is not justiciable.

In Lawson v Housing New Zealand, [18] the complainant sought judicial review of a government policy to increase the rent of state housing to market levels, claiming that she was unable to pay the rent and, as a consequence, would be forced to leave her home. This amounted to depriving her of affordable shelter and breaching the right to an adequate standard of living and, therefore, Article 1 of ICESCR. Williams J in the High Court held that the matter involved "strong policy considerations and was [therefore] not amenable to judicial review".

Despite this, economic and social rights are increasingly being viewed as justiciable, and assumptions that courts are ill-equipped to deal with such rights are seen as questionable and not able to withstand robust scrutiny. [19] It is also considered that a legal process for hearing and adjudicating claims is an inherent part of a state's accountability under ICESCR. The Committee on Economic, Social and Cultural Rights, for example, has explicitly stated:

> **[W]ithin the limits of the appropriate exercise of their function of judicial review, courts should take account of covenant rights where this is necessary to ensure that the state's conduct is consistent with its obligations under the covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.** [20]

Optional protocols

As noted already, a state may be held accountable through the optional protocol process. While optional protocols exist for a variety of international instruments, the complexities of the social and economic rights, and the potential economic implications if a state is found to have not fulfilled its responsibilities in relation to such rights, hampered the development of an optional protocol for ICESCR. In 2008, however, the UN General Assembly adopted an optional protocol to ICECSR. This deals with progressive realisation and resource limitation by the incorporation of a reasonableness test, which explicitly recognises that states may employ a range of possible policy measures to determine the best use of their resources to meet their obligations.

Policy-making

A state's commitment to its international human rights obligations is also reflected in how it develops policy. The relationship between international obligations and the development of economic and social policy tends to be poorly understood. As a result, social policy is often

17 The Marrakech Statement on Strengthening the Relationship between NHRIs and the Human Rights Treaty Bodies System (2010) is accessible online at http://www.nhri.net/2010/Marrakech%20Declaration%20Jun%202010%20(EN).pdf

18 [1997] 2 NZLR 474

19 See, for example, Nolan A, Porter B, and Langford M (2007), 'The justiciability of social and economic rights: an updated appraisal', paper prepared for the Human Rights Consortium, Belfast. Accessible online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434944. See also Hanks P, Walker K and Hill G (2009), 'ESC Rights: Legal Opinion on Justiciability of ESC Rights in an Australian Human Rights Act (Dec 2009)', Human Rights Law Resource Centre website. Accessible online at www.hrlrc.org.au/content/topics/esc-rights/esc-rights-legal-opinion-on-justiciability

20 CESR (1998), general comment no. 9, 'The Domestic Application of the Covenant' (19th session, 1998) UN Doc.E/C.12/1998/24, para 14

based solely on needs, rather than on human rights. However, needs and rights are not mutually exclusive, and complement each other in a number of ways.

A human rights approach stresses the moral importance of the interests at stake and emphasises the priority they should be accorded in the allocation of resources, the status of the rights-holder (as an autonomous and empowered holder of entitlements), and the prescriptive (rather than merely aspirational) nature of the duties imposed on the state with respect to realisation.[21] A human rights approach also prioritises the rights of the most vulnerable groups.

While the development of a human rights approach to social policy will still be subject to limitations of progressive realisation and resource constraints, it emphasises the importance of the relevant right. This can influence its priority in terms of resources, as well as ensure principled decisions about resource allocation and progressive realisation that take account of human rights standards.

The role of civil society

Civil society organisations (CSOs) play a critical role as watchdogs of human rights. The UN has made strong statements about the importance of CSOs, and some are accredited to the UN. Arguably, without the monitoring of CSOs, international standards and process could remain unobserved. The persistent campaigning by CSOs (for example, the initiatives which led to the banning of land mines) has played a large part in the community of nations agreeing to the international code of rights, which has evolved over recent decades.

In New Zealand, CSOs contribute to, and monitor compliance with, international conventions by participating in the preparation of New Zealand's periodic reports to the UN committees. CSOs may also provide independent commentaries on the country reports and monitor the implementation of the concluding observations of the committee. Similarly, the impact of international human rights in New Zealand is directly related to the vitality of the national civil-society community and their knowledge of human rights law.[22] For example, the Human Rights Foundation and Amnesty International New Zealand played a role in promoting the case of Ahmed Zaoui;[23] various women's organisations have had a significant part in the CEDAW reporting process; and Māori groups have a major impact on how New Zealand's compliance with CERD is viewed, as well as on perceptions of the Declaration on the Rights of Indigenous Peoples.

National human rights institutions

NHRIs have an internationally recognised role in advocating for, contributing to the implementation of and monitoring the delivery of human rights within their own jurisdiction. Based on the UN Paris Principles,[24] NHRIs are considered to offer higher levels of accessibility than the courts.[25]

In recent years, NHRIs have developed networks to share information and promote their work. The Office of the UN High Commissioner for Human Rights (UNHCHR) has a national institutions unit designed to foster the establishment and development of NHRIs in a variety of countries, and acts as the national secretariat to the International Co-ordinating Committee (ICC), which grants accreditation. The Chief Commissioner of the New Zealand Human Rights Commission is the current ICC Chair.

NEW ZEALAND'S INTERNATIONAL COMMITMENTS

New Zealand has actively supported the development of international human rights law through the UN. It played a significant role in the deliberations on the declaration in 1948 and, most recently, chaired the Working Party on the Convention on the Rights of Persons with Disabilities.

New Zealand has ratified most of the major treaties with few reservations, and is committed to removing most

21 Geiringer C and Palmer M (2007), 'Human Rights and Social Policy in New Zealand', *Social Policy Journal of New Zealand*, 30, pp 12–41

22 Bedggood M (2010), 'The International Law Dimension of Human Rights in New Zealand', in Bell S (ed), *Brookers Human Rights Law* (Wellington: Brookers), para IHRL1.3

23 See Zaoui v Attorney-General (no. 2) [2005] NZSC 38, [2006] 1 NZLR 289

24 The Paris Principles were established in 1991 at a meeting of NHRIs in Paris and later adopted by the UN General Assembly. The principles are broad-ranging, but establish certain fundamental criteria which NHRIs are required to meet to obtain accreditation.

25 Ministry of Foreign Affairs and Trade (2008), p 70

Universal Declaration of Human Rights (UDHR)	1948
Convention relating to the Status of Refugees	1960
Protocol relating to the Status of Refugees	1973
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	1972
International Covenant on Civil and Political Rights (ICCPR)	1978
International Covenant on Economic, Social and Cultural Rights (ICESCR)	1978
Convention on the Prevention and Punishment of the Crime of Genocide	1978
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	1985
Declaration on the Right to Development	1986
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	1989
First Optional Protocol to International Covenant on Civil and Political Rights	1989
Second Optional Protocol to International Covenant on Civil and Political Rights	1990
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities	1992
Declaration on the Elimination of Violence Against Women	1993
Convention on the Rights of the Child (UNCROC)	1993
Optional Protocol to CEDAW	2000
Optional Protocol to CAT	2007
Convention on the Reduction of Statelessness	2006
Declaration on the Rights of Indigenous Peoples (UNDRIP)	2007
Convention on the Rights of Persons with Disabilities (CRPD)	2008

of those that remain. The major international treaties to which New Zealand is a party (together with the year of ratification) are listed above, along with some of the most important declarations and the year in which they were adopted by the UN General Assembly:

New Zealand has reservations against articles in the following treaties:

- ICESCR: Article 8 on trade unions. The reservation on 10(2) relating to parental leave was withdrawn in 2003.
- ICCPR: Articles 10(2)(b) and 10(3) on the separation of juveniles and adults in prisons, 14(6) on compensation for people pardoned for an offence, 20 on the need for further legislation on national and racial hatred, 22 on trade unions and the declaration[26] under Article 41.
- CAT: Article 14 on compensation to torture victims; declaration under Articles 21 and 22
- UNCROC: general reservation[27] and Articles 32(2), on minimum age of employment, and 37(c), on separation of children and adults in detention; general declaration.

The reservation on Article 11(2)(b) in CEDAW was

26 A declaration sets out a state's intentions about how it intends to go about applying the provisions of a treaty – for example, in relation to territories under its control.

27 This reservation reserves the right of the Government to provide different benefits and other protections in the convention "according to the nature of their authority to be in New Zealand".

withdrawn in 2003. The reservation against the recruitment or service of women in armed combat or situations of violence was withdrawn in relation to New Zealand in 2008, although it remains in place for Niue and Tokelau.

New Zealand has also been a strong supporter of the ILO and has ratified the following six of the eight major or 'fundamental' ILO conventions:

- Convention 29 on Forced Labour (1938)
- Convention 98 on the Right to Organise and Collective Bargaining (2003)
- Convention 100 on Equal Remuneration (1983)
- Convention 105 on the Abolition of Forced Labour (1957)
- Convention 111 on Discrimination (Employment and Occupation) (1983)
- Convention 182 on the Worst Forms of Child Labour (1999).

Although New Zealand complies substantially with Convention 87 on Freedom of Association and Protection of the Right to Organise and Convention 138 on the Minimum Age for Admission to Employment,[28] it has ratified neither and in its UPR report indicated that it has no intention of doing so. In August 2006, the Government stated that no further decisions have been made concerning Convention 87, but it was continuing to monitor both national and international developments, including ILO jurisprudence, with a view to future ratification. With regard to Convention 138, a proposal is currently being prepared describing possible reforms that might ensure compliance of New Zealand law, practice and policy with the Convention.[29]

New Zealand has also not ratified ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries.

NEW ZEALAND'S REGIONAL COMMITMENTS

New Zealand has a particular interest and involvement in the promotion and protection of human rights in the Pacific.[30] The promotion and protection of human rights are considered to be at the core of stability in the region. While there has been some progress in addressing human rights issues in the Pacific, the protection has been described as "fragile" and efforts to promote human rights as "variable".[31]

The Pacific has not developed a regional human rights instrument. Ratification of human rights instruments is low, with a correspondingly low level of engagement with the treaty bodies. Most of the Pacific states are party to UNCROC and CEDAW. Some are party to the ICCPR, ICESCR and CERD. None, however, is party to the CAT or the Convention on the Rights of All Migrant Workers and their Families (CRMW). Among the reasons given for non-ratification are the demands of the reporting requirements, the conflict between customary practices and human rights, and the limited resources, capability and capacity of the Pacific States generally.[32]

Until 2007, Fiji had an accredited NHRI. As a result of events following the coup in 2006, there is now no accredited NHRI in the Pacific, other than those of Australia and New Zealand.

The Asia Pacific Forum, the Office of the UNHCHR, the Pacific Islands Forum (PIF) (as the region's intergovernmental organisation) and the New Zealand Commission have all played a major role in promoting and protecting human rights in the region. In 2007, PIF and the Commission published the first in a series of human rights publications aimed at intensifying regional co-operation as a basis for dialogue among countries of the PIF.

28 See the 'Right to Work' chapter for further information on this issue.

29 ILO Committee on Legal Issues and International Labour Standards: GB.300/LILS/7 (2007), accessible online at www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_084298.pdf

30 Pacific encompasses the 14 members of the Pacific Islands Forum: Australia, New Zealand, Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

31 Liddicoat J (2007), *Pacific Human Rights Issues Series 1: National Human rights institutions – pathways for Pacific States* (Suva and Wellington: Pacific Islands Forum Secretariat and New Zealand Human Rights Commission), p 14

32 Baird N (2009), 'The Universal Periodic Review as a legacy of the Universal Declaration of Human Rights: potential Pacific impact', in Alley R (ed), *Celebrating human rights: sixty years of the Universal Declaration* (Wellington: Human Rights Commission), p 54. See also Ministry of Foreign Affairs and Trade (2008), p 67

The Cook Islands, Niue and Tokelau have a special relationship with New Zealand. All three are part of the realm of New Zealand and their citizens have full rights of New Zealand citizenship. New Zealand also has a high domestic population of people from the Cook Islands, Niue and Tokelau. This population is likely to increase, given that it is probable Pacific states will be disproportionately affected by global warming and climate change. New Zealand's constitutional relationships with the Cook Islands and Niue and its administration of Tokelau will be relevant in the proposed review of New Zealand's constitutional arrangements.

The UPR has created an impetus for Pacific States that may lead to the emergence of a regional approach to engaging both with the UPR itself and with human rights generally. At least four states (Papua New Guinea, Samoa, Nauru and Palau) are actively considering the establishment of an NHRI.

New Zealand context
Kaupapa o Aotearoa

The strongest commitment a state can make to protecting the human rights of its citizens is to embed them in a constitution, creating a statutory regime to enforce the international standards.[33]

Although the New Zealand Bill of Rights Act 1990 (BoRA) affirms New Zealand's commitment to the ICCPR, it is not supreme law. Despite arguments that it has attained a "constitutional status", because of the nature of the rights that it protects, the BoRA [34] can still be overridden by Parliament. However, New Zealand's policy of not ratifying a treaty until the necessary laws are in place, and its longstanding commitment to social welfare, has meant that its domestic law generally provides a framework for enforcing the international standards. [35]

Section 4 of the act deals with the concept of parliamentary sovereignty and makes it clear that the courts cannot override an act of parliament. Since 2001, the Human Rights Review Tribunal has had the ability to issue a declaration of inconsistency in relation to legislation that is incompatible with the right to freedom from discrimination in section 19 of BoRA under the HRA. [36] The first declaration of inconsistency, Howard v Attorney–General (No.3), was issued in 2008.

Under section 7, the Attorney-General is required to report to Parliament on any apparent inconsistencies between proposed legislation and the rights in the BoRA. Section 7, therefore, provides a tool for ensuring transparency in the development of legislation. It is discussed further in the chapter on the right to justice.

Some legislation gives an organisation or agency a role in overseeing compliance with the international instruments. The most obvious example is the Human Rights Act, which provides the statutory basis for the Human Rights Commission. The long title of the HRA refers to the role of "better protect[ing] human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights". The functions of the Commission are laid out in more detail in section 5 of the HRA. These include promoting respect, understanding and appreciation of human rights in New Zealand. They also include the ability to report to the Prime Minister on the desirability of legislative or administrative action to ensure better compliance with the standards in the international instruments on human rights, or the desirability of New Zealand becoming bound by any international instrument on human rights. The Commission also has responsibility for promoting human rights generally, including providing education on the role of the treaty bodies and monitoring their recommendations.

New Zealand today
Aotearoa i tēnei rā

New Zealand has become more active and has engaged internationally over the period since 2004, with cabinet ministers participating in treaty-body processes and

33 Ministry of Foreign Affairs and Trade (2008), p 23

34 Rishworth P, Huscroft G, Optican S and Mahoney R (2003), *The New Zealand Bill of Rights* (Auckland: OUP)

35 Not all of the rights contained in the international Bill of Rights are given explicit domestic legal expression or protection. It does not include property rights or the right to privacy.

36 HRA, section 92J. To date, there have been two findings of inconsistency; Howard v Attorney-General (No.3) (2008) 8 HRNZ 378, and Atkinson v the Ministry of Health HRRT 33/05, decision no. 01/2010.

fronting country reports such as CEDAW, ICCPR and the UPR. The Commission has become more involved in the treaty reporting process and monitoring the outcomes.

In 2006, the UN General Assembly adopted the UN CRPD.[37] The first treaty of the 21st century, the CRPD is designed to ensure people with disabilities can enjoy the same rights as everyone else. Although the Convention does not create any new rights, it reformulates existing rights to reflect the experience of persons with disabilities. New Zealand ratified the CRPD in 2008, following an exercise in which domestic legislation was examined for compliance with the Convention. This led to changes to a wide variety of legislation that contained provisions premised on the assumption that people with certain disabilities were unable to carry out particular statutory roles.

Changes made to the Human Rights Act prior to ratification of the CRPD include:

- amending section 36 (which relates to partnerships) by adding provisions for reasonable accommodation and mitigation of harm
- making similar changes to sections 37, 39 and 41, which relate to professional associations, vocational training bodies and bodies that confer qualifications
- amending section 56 to ensure reasonable accommodation in residential accommodation
- extending section 60 to reasonably accommodate people with disabilities in educational establishments.

New Zealand became a party to the 1961 Convention on the Reduction of Statelessness in 2006, although it has still not ratified the earlier Convention on the Status of Stateless Persons. It was felt that accession to the 1961 convention demonstrated an active commitment to ensuring that statelessness is avoided for people who already have an established link to New Zealand.[38]

New Zealand ratified the Optional Protocol to the Convention against Torture (OPCAT) in March 2007. This followed the enactment of the Crimes of Torture Amendment Bill, which made a number of changes to the principal act, including providing for the establishment of certain organisations as National Preventive Mechanisms (NPMs). The Human Rights Commission is the central co-ordinating body. The Office of the Ombudsmen is the NPM with responsibility for prisons, immigration detention, health and disability places of detention, and youth justice facilities. The Children's Commissioner deals with children and young people in youth justice residences. The Independent Police Conduct Authority has responsibility for people held by the police, and the Inspector of Service Penal Establishments monitors custody arrangements of the defence forces.

New Zealand has withdrawn reservations to some treaties as part of an ongoing review process. Following introduction of the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002, the reservations to Article 10(2) of ICESCR and Article 11(2)(b) of CEDAW, relating to paid parental leave, were withdrawn in 2003, as it was considered that New Zealand was able to fulfil its obligations in this respect. The CEDAW reservation relating to employment of women in the armed forces in conflict situations was removed in 2007, following the repeal of section 33 of the HRA. The Government has also recently indicated that it is working towards amending regulations on detention, to permit the withdrawal of reservations to Article 10(2)(b) and (3) of ICCPR.[39]

The Optional Protocol to ICESCR was adopted by the UN General Assembly in 2008. While New Zealand engaged constructively in the negotiation of the optional protocol, it has not agreed to ratification, although it has indicated it may consider reviewing this position – along with its position on the Optional Protocol to CRPD – in due course.[40]

The UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP) in September

37 International Convention on the Rights of Persons with Disabilities and its Optional Protocol UNGAOR 61st session, Item 67(b), UNDoc. A/61/611(6/12/06) accessed 4 November 2010 from www.un.org/esa/socdev/enable/rights/convtexte.htm

38 Foreign Affairs, Defence and Trade Committee (2003), *International Treaty Examination of the 1961 Convention on the Reduction of Statelessness* (Wellington: House of Representatives), p 2

39 Consideration of reports submitted by states parties under Article 40 of the covenant: 'Concluding observations of the Human Rights Committee', CCPR/C/NZL/CO/5, para 5

40 National report submitted in accordance with paragraph 15(A) of the annex to Human Rights Council, resolution 5/1, para 2.1

2007. The UNDRIP is aspirational and does not contain binding legal obligations. Although New Zealand was actively involved in negotiations on UNDRIP, it was one of only four counties that voted against the final text. In 2010, the Government pledged its support for UNDRIP.

In terms of reporting commitments, the introduction of the UPR signals a new mechanism for monitoring human rights. Under the UPR mechanism, the human rights situation of all UN member states will be peer-reviewed every four years. The examination by a group of fellow member states is based on reports by states, NGOs and NHRIs and a summary of treaty-body and special-procedures recommendations to the country concerned. It deals with both advances and challenges in the country under examination. New Zealand submitted its first report in March 2009 and was examined in May 2009. There has also been increasing recognition of the importance of involving civil society and national human rights mechanisms in the reporting process.

SInce 2004, there have been a number of communications (individual complaints) to the UN Human Rights Committee alleging breaches of covenant rights by the New Zealand Government. In one case, [41] the committee found (with one member dissenting) that the author's right to an expeditious trial was violated under Article 14, and that measures should be taken to ensure such violations did not recur. In 2010, the committee remained unconvinced that the author had not received reparation for the breach of his rights, while in another [42] it found that the author's inability to challenge the justification for his preventive detention breached Article 9 (right to approach a court for determination of the lawfulness of the detention period).

Conclusion
Whakamutunga

New Zealand has a good record of ratification of and compliance with its international obligations. It has demonstrated some commitment to considering further constitutional protection of human rights. There has also been strengthened engagement in the treaty-body reporting process and growing input from civil society. However, New Zealand's human rights obligations are not reflected in a single entrenched constitutional instrument, but simply remain part of the ordinary statutory scheme and the common law. Parliament is able to disregard them and they are therefore much less secure than they should be.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance New Zealand's international human rights commitments:

Constitutional arrangements

Identifying opportunities to give greater effect in New Zealand's constitutional arrangements to the Treaty of Waitangi and human rights protections generally.

Parliament

Strengthening Parliament's human rights responsibilities by the establishment of a Human Rights Select Committee and by tabling in Parliament New Zealand's reports on implementation of human rights covenants and conventions and subsequent treaty-body recommendations as well as those of the Human Rights Commission.

Domestic legislation

Fully incorporating ratified international human rights standards in domestic legislation, policy development and in public-sector professional development and training.

Civil society

Ensuring wider and more active civil-society participation in international human rights mechanisms by advocating for a range of mechanisms, including establishment of a fund to support civil society to more effectively engage with the international treaty processes.

41 EB v New Zealand, United Nations Human Rights Committee, CCPR/C/89/D/1368/2005 (21/06/2007)

42 Dean v New Zealand, United Nations Human Rights Committee, CCPR/C/95/D/1512/2006 (29 March 2009)

3. Equality and Freedom from Discrimination

Te Ōritenga me te Whakawāteatanga

All human beings are born free and equal in dignity and rights.

Universal Declaration of Human Rights, Article 1

Introduction
Tīmatatanga

The principles of non-discrimination and equality are fundamental to human rights law. They are referred to in the International Covenant on Civil and Political Rights (ICCPR); [1] the International Covenant on Economic, Social and Cultural Rights (ICESCR); [2] and the international treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families, and persons with disabilities. [3] Other treaties require the elimination of discrimination in specific areas, such as employment and education. [4] Article 26 of the ICCPR also guarantees equal and effective protection before, and of, the law.

In 1989, the United Nations Human Rights Committee issued a general comment relating to discrimination under the ICCPR [5] that defined 'discrimination' in the covenant as:

> **...any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.**

Discrimination can be direct or indirect.

'Direct discrimination' occurs when an individual is treated less favorably than someone else in a similar situation, for a reason related to a prohibited ground. Direct discrimination also includes detrimental acts or omissions even where there is no comparable situation (for example, in the case of a woman who is pregnant).

'Indirect discrimination' describes the situation where an apparently neutral practice or condition has a disproportionate, negative impact on one of the groups against whom it is unlawful to discriminate, and the practice or condition cannot be justified objectively. [6]

International context
Kaupapa ā taiao

The international instruments require states to ensure both formal and substantive equality. Formal equality is equal treatment before the law. It reflects the Aristotelian notion that, to ensure consistent treatment, like should be treated alike. [7] However, equal treatment does not always ensure equal outcomes, because past or ongoing discrimination can mean that equal treatment simply reinforces existing inequalities. To achieve substantive equality – that is, equality of outcomes – some groups will need to be treated differently. It follows that not all different treatment will be considered discriminatory. As the UN Human Rights Committee notes:

1 ICCPR, Article 2

2 ICESCR, Article 2

3 See the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention relating to the Status of Refugees; the Convention relating to the Status of Stateless Persons; the United Nations Convention on the Rights of the Child (UNCROC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on the Rights Of Persons With Disabilities (CRPD); and the Convention Against Enforced Disappearances. The texts of the international human rights instruments are available on the website of the Office of the High Commissioner for Human Rights, accessible online at www.ohchr.org. The text of most of the instruments New Zealand has ratified can be found in Ministry of Foreign Affairs and Trade (2008), *The New Zealand Handbook on International Human Rights* (3rd ed), (Wellington: MFAT).

4 ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation (1958); and the UNESCO Convention against Discrimination in Education

5 United Nations Human Rights Committee (1989), general comment 18, 'Non-discrimination: Compilation of general comments and general recommendations adopted by human rights treaty bodies' (UN Doc.HRI\GEN\1\Rev.1, para 26).

6 Committee on Economic, Social and Cultural Rights, general comment No.20: E/C.12/GC/20 (2 July 2009), para 8

7 Fredman S (2002), 'Equality: Concepts and Controversies', in Fredman, *Discrimination Law* (Oxford: OUP), p 7

Lynda Stoneham, a plaintiff in what has become known as the parents as caregivers case, with her daughter Kelly. The plaintiffs in this landmark discrimination case, had a resounding decision in their favour in the Human Rights Review Tribunal, however the decision has been appealed by the Crown.

> **The principle of equality sometimes requires states to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the covenant. For example, in a state where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the state should take specific action to correct those conditions.** [8]

The most recent definition of discrimination in an international treaty is found in the Convention on the Rights of Persons with Disabilities, which defines discrimination as including denial of reasonable accommodation. The Convention also clarifies that specific measures which might be required to promote equality do not amount to discrimination.

Effectively, therefore, a state's obligation to respect, protect, promote and fulfil the right to freedom from discrimination is not limited simply to avoiding negative measures, but includes taking positive measures to ensure equal results. In a democracy such as New Zealand, where the courts play a significant role in interpreting constitutional concepts, the convergence between parliamentary sovereignty and the rule of law takes place through the litigation process.

New Zealand context
Kaupapa o Aotearoa

EQUALITY

> **Equality is the most powerful idea in modern political thought; it underlies all major political theories, and animates the very idea of a bill of rights: individuals have rights because each individual matters, and matters equally.** [9]

The clearest statement on equality in New Zealand is found in Article 3 of the Treaty of Waitangi, in which the Crown extended to Māori the Queen's protection and imparted to them "all the rights and privileges of British subjects". Apart from this, there is no specific reference in New Zealand law to equality, a fact that the United Nations Committee on Human Rights has consistently criticised in assessing New Zealand's compliance with international standards on equality and freedom from discrimination.

The New Zealand Bill of Rights Act 1990 (BoRA) does not address equality, and affirms it only indirectly by referring to the ICCPR in the long title. It is not an accident that there is no reference to equality in the BoRA. The idea of including an equality statement was considered during the drafting of the BoRA, but was rejected for a variety of reasons. The white paper [10] recorded concerns about the vagueness and uncertainty of what was actually meant by 'equality before the law' or, for that matter, 'equal protection of the law'. However, this position has changed over recent years, and a human rights approach to equality based on the idea of 'treatment as an equal, not equal treatment' has gained ascendency. In 2009, the Human Rights Commission recommended to the Minister of Justice that an explicit reference to equality in the Human Rights Act 1993 (HRA) and the BoRA was now necessary to ensure equal outcomes, not just equal treatment.

RIGHT TO FREEDOM FROM DISCRIMINATION

The principle of non-discrimination has been described as a substantial contributor to a society based on equality, and a core feature of a society based on democracy and freedom, where each individual is valued as a person worthy of dignity and respect. [11]

Although closely related, equality and the right to freedom from discrimination are not the same:

> **Discrimination and equality are terms that are often used to describe the opposite conclusions that may be reached in analysing government action. Distinctions thought wrongful are said to be discriminatory, while**

8 United Nations Human Rights Committee (1989), general comment 18, Non-discrimination: Compilation of general comments and general recommendations adopted by human rights treaty bodies (UN Doc.HRI\GEN\1\Rev.1, para 10)

9 Rishworth P, Optican S and Mahoney R (2003), the New Zealand Bill of Rights (Melbourne: OUP)

10 Palmer G (1985), *A Bill of Rights for New Zealand: A White Paper* (Wellington: AJHR 1, A6), para 10.8

11 Butler P and Butler A (2005), *The New Zealand Bill of Rights Act: A Commentary* (Wellington: LexisNexis), para 17.4.1

those considered appropriate are said to respect equality. This has led some to suppose that freedom from discrimination and equality are the same thing. But a world without discrimination is not necessarily a world of equality. [12]

New Zealand courts have identified links between freedom from discrimination and the concept of equality in international human rights standards. In Quilter v Attorney-General, [13] for example, the Court of Appeal noted that equality is one of the core principles underlying New Zealand's law on discrimination.

STATUTORY PROTECTION OF FREEDOM FROM DISCRIMINATION

The New Zealand Bill of Rights Act 1990 (BoRA)

The BoRA affirms New Zealand's commitment to the ICCPR, although there is no explicit reference to equality before the law. [14] The right to privacy or reputation and family and children's rights (which are also found in the ICCPR) are not found in the BoRA, but are partly addressed in other legislation.

Although the BoRA is not entrenched legislation and it does not confer the power on the Courts to strike down inconsistent legislation, it has acquired special status as a result of the rights it protects. The BoRA is directed principally at public-sector activity, including actions of the legislature, the executive and the judiciary. It is made up of three parts. Part 1 directs how the act is to be interpreted; part 2 identifies the substantive rights (including freedom from discrimination on the same grounds as in the HRA); and part 3 deals with miscellaneous matters.

While both the HRA and the BoRA protect the right to freedom from discrimination, they do it differently. The BoRA affirms a general right to freedom from discrimination, but allows it to be restricted if the restriction can be established as a justified limitation. The HRA, on the other hand, makes it unlawful to treat people differently in certain areas unless a specific exception applies.

In 2001 an amendment to the HRA meant that for the first time since the "new grounds" were introduced in 1993, [15] the public sector became accountable on all the grounds of discrimination. As the BoRA standard was thought more appropriate to address government compliance, for the purposes of Part 1A, the procedures of the HRA apply, but the interpretation of the right to be free from discrimination is decided by reference to the BoRA.

Human Rights Act 1993 (HRA)

The HRA makes it unlawful to discriminate on the grounds of sex (including pregnancy and childbirth), marital status, religious belief, ethical belief, colour, race, ethnic or national origin (including nationality or citizenship), disability, age, political opinion, employment status, family status and sexual orientation. The grounds apply if they are assumed to relate to a person, relative or associate, and if they exist at present or have existed in the past (for example, if a person has recovered from an illness but is treated as though they still have it).

Although the grounds substantially reflect New Zealand's international commitments, the international monitoring bodies have been critical of the omission of 'language' as a ground of unlawful discrimination. The omission of social origin or social class is also considered significant. During the consultation process for this chapter, a number of submitters suggested increasing the grounds of prohibited discrimination to include type of employment, [16] social class and size. The Commission itself considers that the existing grounds could be clarified to make explicit that the HRA covers trans people and women who breast-feed.

12 United Nations Human Rights Committee (1989), general comment 18, Non-discrimination: Compilation of general comments and general recommendations adopted by human rights treaty bodies (UN Doc.HRI\GEN\1\Rev.1, para 368)

13 [1998] 1 NZLR 523

14 ICCPR, Article 26

15 Until 1993 it was only unlawful to discriminate on the grounds of sex, marital status, religious or ethical belief, colour, race, and ethnic or national origin. After 1993 there were 13 grounds: sex (including pregnancy and childbirth), marital status, religious belief, ethical belief, colour, race, ethnic or national origin (including nationality or citizenship), disability, age, political opinion, employment status, family status and sexual orientation.

16 Submission by the Prostitutes Collective to the Review of Human Rights in New Zealand (2010). The collective noted that the inability to complain about discrimination leaves their members particularly vulnerable and makes it difficult to transition out of the industry.

APPLICATION OF THE HRA

Part 1A

Part 1A applies to the actions of the legislative, executive or judicial branches of Government, as well as to the actions of any person or body performing a public function, power or duty conferred or imposed by law.

An action will be discriminatory under part 1A if it involves a distinction based on a prohibited ground that leads to disadvantage and cannot be justified under section 5 of the BoRA. A limitation will be justified under section 5 if it serves a purpose that is sufficiently important to justify some limitation of the right, is rationally connected to that purpose, impairs the right no more than is reasonably necessary to achieve what it sets out to do, and is in due proportion to the objective it seeks to achieve. [17]

Part 2

An action will be considered discriminatory under part 2 if a person is treated differently because of a prohibited ground resulting in disadvantage, and a statutory exception does not apply. Part 2 of the HRA deals with services offered to the public by the private sector. It applies only to certain areas: employment (including partnerships, and discrimination by industrial and professional associations, qualifying bodies and vocational training bodies); access to public places and vehicles; the provision of goods and services; the provision of accommodation; and access to educational establishments. The employment provisions in part 2 apply to both the private and public sectors.

Part 2 also includes sexual and racial harassment and exciting racial disharmony. To establish racial disharmony, the material or comment concerned must be not only threatening, abusive or insulting, but also likely to excite hostility against people, or bring them into contempt, because of their colour, race, or ethnic or national origins. The critical factor is whether the material is likely to provoke a reaction in those who hear the words, or read the material. Section 61 must be balanced against the right to freedom of expression. For practical purposes – albeit for good reason – the combination of the criteria in the HRA and the protection of freedom of expression [18] create a threshold that is almost insurmountable.

The exceptions in part 2 are both specific and general and have the effect of legitimising behaviour that would otherwise be discriminatory.

'Specific exceptions' apply to particular areas. For example, in the area of employment, there are exceptions for domestic employment in private households, or where one of the prohibited grounds is a characteristic required to do a job, such as being over a certain age in order to work in a public bar. All the areas include exceptions relating to disability, which permit disabled people to be treated differently if the position could be performed only with adjustments to the workplace, or the work environment is such that there is a risk to the person or others.

'General exceptions' apply to the HRA more generally. They include reasonable accommodation, genuine occupational qualifications or genuine justifications, and special measures to ensure equality.

Reasonable accommodation [19]

'Reasonable accommodation' or 'reasonable measures' refers to the provision of goods and services and employment. In the employment context it is used to describe changes to a workplace to ensure that a person with a disability, family commitments or religious requirements can do a job. This may be as simple as swapping shifts with another employee to accommodate religious observance, or installing a ramp for a person in a wheelchair. Whether an employer must make such changes is balanced against the unreasonable disruption that may result.

If a person requires special services or facilities (for example, relocation of an office) that cannot reasonably be provided, then the employer or service provider is not obliged to provide them. In addition, if there is a risk of harm to the individual or others, but measures can be taken to reduce the risk without unreasonable disruption, then the provider or employer should take those measures. If it is not reasonable to take the risk or the measures necessary to reduce the risk to a normal level are unreasonable, then an employer or provider may be justified in discriminating.

17 R v Hansen [2007] 3 NZLR 1

18 In addition to the civil sanction in section 61, the HRA provides for criminal prosecution under section 131.

19 'Reasonable accommodation' is a term used to describe the creation of an environment that will ensure equality of opportunity for people with disabilities, family commitments or particular religious practices.

Genuine occupational qualification or genuine justification

Section 97 allows the Human Rights Review Tribunal to declare that an act that would otherwise be unlawful under part 2 is permissible because it amounts to a genuine occupational qualification, or is a genuine justification. For example, in Avis Rent A Car Ltd v Proceedings Commissioner,[20] the tribunal accepted that the practice of rental car companies passing on to the client the higher insurance cost they incurred hiring vehicles to drivers under 25 was justified.

Special measures to ensure equality

Both the HRA[21] and the BoRA[22] provide for special measures. The provisions are similar. Both require any measures to be taken in good faith and permit actions that would otherwise be unlawful. The person or groups must also need, or be reasonably supposed to need, assistance in order to achieve an equal place in the community.

EXAMPLES OF SPECIAL MEASURES

- **An imbalance of doctors of a particular ethnicity, because it has been difficult for members of that group to access higher education in the past, could be redressed by reserving a specific number places at medical schools for that group.**
- **Where gender inequality is a feature of a particular trade, then special measures could be justified as a way of attracting people from the under-represented group to join the industry.**

As a consequence of Amaltal Fishing Co Ltd v Nelson Polytechnic (No. 2)[23] – at present the only case on special measures – it is necessary to establish that the target group does not occupy an equal place in a community and the measure is necessary for them to achieve equality with others. However, if a law, policy or practice under s.19(2) does not meet the Amaltal criteria, it may still be justified under section 5 of the BoRA. For example, if a policy advantages a particular group against whom it is unlawful to discriminate, and its purpose is not to assist persons who are disadvantaged by discrimination, it may still be lawful if it is done in good faith and there is a rational connection between the purpose of the scheme and what it seeks to achieve.

Special measures are referred to in many international treaties.[24] Although the wording may differ, there is international agreement on the need for such measures to advance the cause of vulnerable or disadvantaged groups or address historical disadvantage. The international instruments stipulate that special measures should not unfairly benefit any one group, and should last only as long as necessary to achieve equality.

Part 3

Part 3 of the HRA covers dispute resolution. Dispute resolution services of the HRA are free and confidential. If a complaint falls within the Commission's jurisdiction – that is, it appears to involve discrimination on one of the prohibited grounds – it will be referred to a Commission mediator, who will attempt to help the parties resolve the issue in the most efficient, informal and cost-effective manner. Most complaints are resolved either informally or through mediation. Settlement may involve an apology, an agreement not to repeat the action, education, training or compensation.

20 Avis Rent A Car Ltd v Proceedings Commissioner (1998) 5 HRNZ 501

21 HRA section 73, provides that anything that would otherwise amount to unlawful discrimination will not be unlawful if it is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful; and those persons or groups need or may reasonably be supposed to need assistance to achieve an equal place with other members of the community.

22 The BoRA, section 19(2), states that measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of part 2 of the Human Rights Act 1993 do not constitute discrimination.

23 Amaltal Fishing Co Ltd. v Nelson Polytechnic (No. 2) (1996) 2 HRNZ 225

24 ICERD, Article 4(1)), and CEDAW, Article 4(1)), in the jurisprudence of the ILO supervisory bodies, and in ILO instruments such as ILO Convention 111 concerning Discrimination in Employment and Occupation, Article 5(2)

The mediation process has many positive aspects, but some challenges remain. The Commission is required to provide a neutral, objective service. In doing so it actively promotes understanding of the HRA to the parties involved. The mediators, as well as the process itself, mitigate any power imbalance to a large extent; but at times individuals will come up against well resourced organisations (including in the state sector) with access to legal advice, which can cause some individuals to find it difficult to advocate for their position without similar support.

If mediation is unsuccessful, the parties can take their complaint to the Human Rights Review Tribunal. The Office of Human Rights Proceedings provides free legal representation (subject to certain criteria) to applicants who have been unable to resolve their complaint through mediation.

Access to the tribunal itself is designed to reduce barriers to participation. There are no filing fees, and procedures are reasonably informal and inclusive, although costs can be awarded against an unsuccessful applicant. Legal representation is unnecessary, but it can be difficult for lay litigants to fully comprehend the technicalities involved, and may result in an unfair outcome if one or both parties are not legally represented. In Howard v Attorney-General (No. 3),[25] for example, the tribunal observed that:

> **… there are dangers in trying to resolve novel and complex issues in a situation in which there has, in effect, been argument on one side only.**

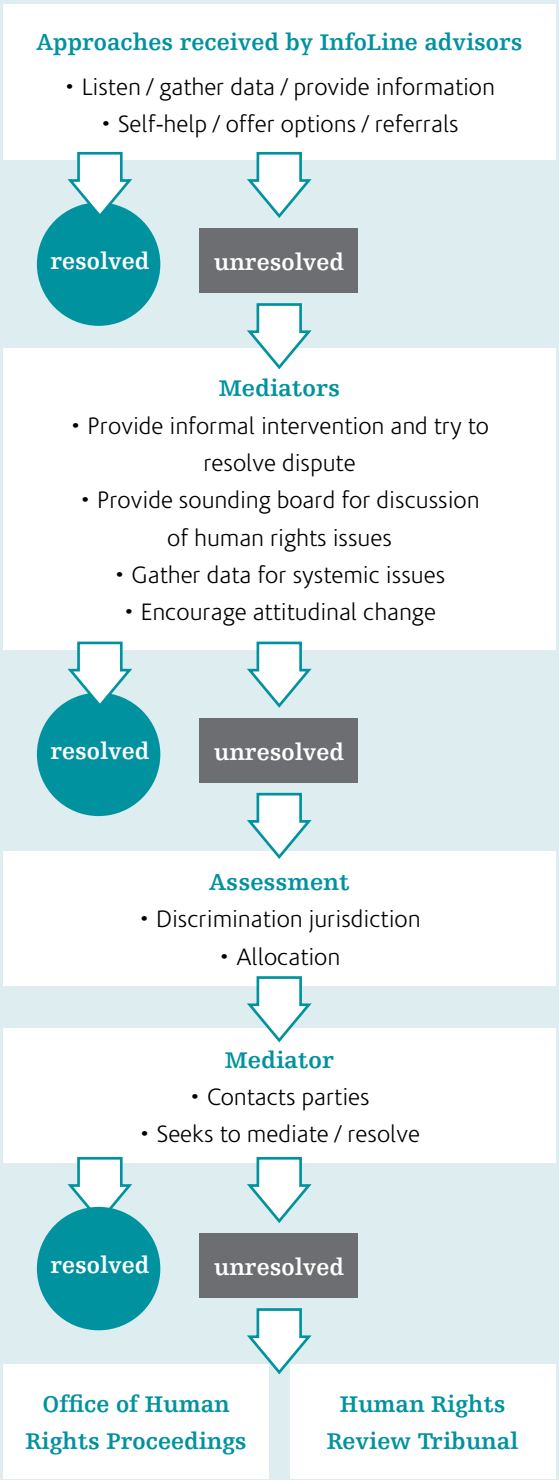
INDICATORS OF INEQUALITY AND DISCRIMINATION

International treaty bodies have repeatedly expressed concern about inequalities in New Zealand. For example, the most recent report of the Committee on Economic, Social and Cultural Rights commented on the persistent inequalities between Maori and non-Maori in access to education, and the high drop-out rates, especially among Maori children and young people and disadvantaged and marginalised groups.[26] It also commented

25 (2008) 8 HRNZ 378

26 CESCR E/C.12/1/Add.88 (2003), para 20

HUMAN RIGHTS COMMISSION'S DISPUTE RESOLUTION PROCESS – DISCRIMINATION COMPLAINTS



on the gap in employment conditions between men and women, particularly in the area of pay equity. [27] In 2010 the UN Human Rights Committee raised concerns, in its concluding observations on New Zealand's performance under the ICCPR, [28] about the low representation of women in high-level and managerial positions and on the boards of private enterprises.

It is difficult to report on compliance with international obligations, in the absence of an agreed-on reporting framework and comprehensive analysis of available data across the range of human- rights standards. The UN General Assembly recently issued a compilation of guidelines of the monitoring committees of the major treaties on the form and content of reports to be submitted by state parties. [29] This is designed to reinforce accountability of states, and harmonise reporting by developing cross-cutting norms as a guide to identifying what data is necessary. It is generally agreed that to reflect the human rights norms of non-discrimination and equality, a starting point is to seek disaggregated data by prohibited grounds of discrimination, such as sex, age, disability, religion, language, social, economic, regional or political status. [30]

Reporting of discrimination in New Zealand has improved over recent years. The Ministry of Social Development's Social Report includes a section on perceived discrimination. [31] Statistics New Zealand now includes a specific question on discrimination in the New Zealand General Social Survey, which provides information about key social and economic outcomes.[32] The Commission publishes an annual report on race relations, and a biennial benchmarking report on women's progress in senior levels of governance and management. [33]

The Commission has also improved how it records its own data. [34] The system is now more sophisticated, allowing a greater range of inquiries to be recorded other than just discrimination. For example, concerns about other human rights issues, legal advice about the effect of the HRA or the BoRA or requests for some other form of engagement are now recorded. Some limitations remain, however, as it is not always possible to obtain disaggregated data about complainants and complaint types, because the information is either not provided or cannot be easily obtained.

Despite these advances, the extent of discrimination remains difficult to gauge nationally, as there is no complete record of who complains, where they complain and what they complain about. A range of statutory agencies, such as the Employment Relations Service, the Office of the Ombudsmen, and the Health and Disability Commissioner, also have responsibility for dealing with complaints about discrimination, but employ different criteria to record those complaints. It is difficult, therefore, to provide a comprehensive national overview of the extent of unlawful discrimination.

Although there have been improvements in the collection of data over the past five years, there is still no framework for evaluating data overall in order to allow assessment and analysis of the extent of discrimination nationally, or identification of trends or developments.

27 CESCR E/C.12/1/Add.88 (2003), para 14

28 CCPR/C/NZLCO/5 (2010), para 9

29 HRI/GEN/2/Rev.6 (3 June 2009)

30 Inter-committee meeting of human rights treaty bodies, Report on Indicators for Monitoring Compliance with International Human Rights Instruments HRI/MC/2006/7[11/5/06]

31 However, it does not measure actual discrimination, making it difficult to conclude whether levels of discrimination have increased or decreased. Ministry of Social Development (2009), Social Report 2009 (Wellington: MSD), accessed 4 November 2010 from www.socialreport.msd.govt.nz/2009/civil-political-rights/perceived-discrimination.html

32 Statistics New Zealand (2009), *New Zealand General Social Survey: 2008* (Wellington: StatsNZ)

33 Human Rights Commission (2004, 2006, 2008), *New Zealand Census of Women's Participation* (Auckland: HRC), 2004 census accessible online at www.hrc.co.nz/hrc_new/hrc/cms/files/documents/11-Aug-2005_21-35-04_CensusofWomens_Participation.pdf, 2006 census accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/29-Mar-2006_17-46-13_2006_Women_Census_of_Womens_Participation.pdf, 2006 census accessible online at www.hrc.co.nz/hrc_new/hrc/cms/files/documents/28-Mar-2008_12-59-39_2008_Census_of_Womens_Participation.pdf

34 The number of complaints over the past five years has been relatively consistent: Part 1A complaints have ranged from 398 (2007) to 343 (2009), and part 2 complaints from 1505 (2006) to 898 (2008)

New Zealand today
Aotearoa i tēnei rā

There have been some significant developments in the area of discrimination law since 2004, including changes to part 2 of the HRA – principally in the employment-related provisions – to ensure that the act complies with the United Nations Convention on the Rights of Persons with Disabilities.

There have also been a number of cases involving the interpretation of discrimination and aspects of the HRA, partly as a result of the ability to challenge discriminatory legislation and policy under part 1A. Recognising the power and importance of litigation, the Commission has taken a more proactive approach since its 2004 review of human rights in New Zealand, developing a litigation strategy and identifying areas where it could usefully intervene or initiate proceedings to contribute to the development of a more substantial body of jurisprudence, so as to better inform understanding of human rights.

CASES

Over the past five years the following cases have addressed issues relating to the interpretation of discrimination and aspects of the HRA:

- **Howard v Attorney-General (No. 3)**[35] was the first case under Part 1A. Mr Howard complained that the Injury Prevention Rehabilitation and Compensation Act discriminated against him on the ground of age because he was no longer eligible for rehabilitation when he turned 65. The Tribunal agreed that it was discriminatory and could not be justified.
- **Child Poverty Action Group Inc v Attorney-General (CPAG)**[36] involved an application by CPAG for a declaration that aspects of the Income Tax Act relating to the eligibility for tax credits under the Working for Families scheme discriminated against families on benefits. While the tribunal found that the policy was discriminatory, it considered it could be justified under section 5 of the BoRA. The tribunal also endorsed a test for identifying discrimination – namely, it is enough to establish different treatment on one of the prohibited grounds (not whether it is wrong), and then to establish if it can be justified (citing the test in **R v Hansen**[37]). This clarified certain procedural issues, including whether a complainant had to actually experience detriment in order to make a complaint, and affirmed that the Government does not have an unfettered discretion to legislate in a discriminatory manner in the area of social policy.[38]
- In **Attorney-General v Human Rights Review Tribunal**,[39] the High Court affirmed that it was not essential for a complainant to have personally suffered detriment to bring a complaint, noting that "… the complainant need not act in a representative capacity for an aggrieved person … it has always been the case that anyone may lodge a complaint with the Commission".
- In **Atkinson & Ors v the Ministry of Health**,[40] parents who were caring for family members with disabilities challenged the Ministry of Health's policy of not paying them as discrimination by reason of family status. The tribunal agreed that it was discriminatory and that it could not be justified under section 5 of the BoRA.

35 (2008) 8 HRNZ 378

36 16/12/08 HRRT Decision 31/08

37 United Nations Human Rights Committee (1989), general comment 18, Non-discrimination: Compilation of general comments and general recommendations adopted by human rights treaty bodies (UN Doc.HRI\GEN\1\Rev.1, para 368)

38 16/12/08 HRRT Decision 31/08, para 214

39 (2006) 18 PRNZ 285

40 HRRT 33/05, Decision No. 01/2010

- **McAlister v Air New Zealand Ltd** [41] involved a pilot who was demoted by Air New Zealand when he turned 60, because he could no longer fly to countries which were signatories to the ICAO. Captain McAlister complained that he had been discriminated against because of his age. To establish discrimination, it was necessary to identify that he had been treated less favourably by reason of his age than those in a comparable situation. The Supreme Court stated that the comparator selected should not be so complicated and technical that it ruled out discrimination at an early stage of an inquiry, this being inconsistent with the purpose of anti-discrimination legislation. Although McAlister was decided in the context of employment legislation, the process for defining discrimination is now much clearer.
- **Trevethick v Ministry of Health** [42] involved an application for a declaration that the Ministry of Health's funding policy discriminated on the ground of disability, because Ms Trevethick would have received greater support under the ACC scheme if her disability had been caused by an accident. The plaintiff was unsuccessful but, of necessity, the case involved consideration of the definition of 'disability'. The High Court recognised that the definition needs to be considered in the context of the legislation as a whole. While the definition is exhaustive, there is still scope for argument about the meaning of terms such as 'disability', 'impairment', 'illness' and 'abnormality'.
- **Bissett v Peters** [43] and **Easton v Human Rights Commission & Anor** [44] both, in different ways, endorsed the Commission's approach to section 61 and the need to balance the inciting of racial disharmony against the right to freedom of expression.
- **Talleys Fisheries Ltd v Lewis** [45] was a landmark sex-discrimination case that found a major employer had segregated women into work which, although substantially similar to that performed by men, was paid less.
- In **Re AMM and KJO**, [46] the High Court held that the word 'spouses' can be read as applying to a de facto couple of the opposite sex, in respect of an application made under the Adoption Act 1955.

Conclusion
Whakamutunga

New Zealand generally meets the international standards for protection of the right to freedom from discrimination through the HRA and the BoRA. The prohibited grounds of discrimination are reasonably comprehensive by international standards, and discriminatory legislation can be challenged by obtaining a declaration of inconsistency from the Human Rights Review Tribunal.

There have also been some significant developments in the area of discrimination law, including a number of cases which have clarified the interpretation of aspects of the HRA. However, the body of jurisprudence is still not large. The Commission has therefore adopted a more proactive approach to this area of work since 2004. It has developed a litigation strategy, and identifies cases where it can intervene or initiate proceedings to contribute to a more substantial body of local jurisprudence, so as to better inform the understanding of human rights.

Despite this (as can be seen throughout this review), discrimination persists and inequalities remain.

41 [2009] NZSC 78

42 [2008] NZAR 454

43 10/08/04 HRRT Decision 33/04

44 HC WN CIV-2009-485-762 (10/2/10), para 25

45 (2007) 8 HRNZ 413

46 HC WN CIV-2010-485-328 (28/6/10)

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to progress equality and freedom from discrimination:

Substantive equality

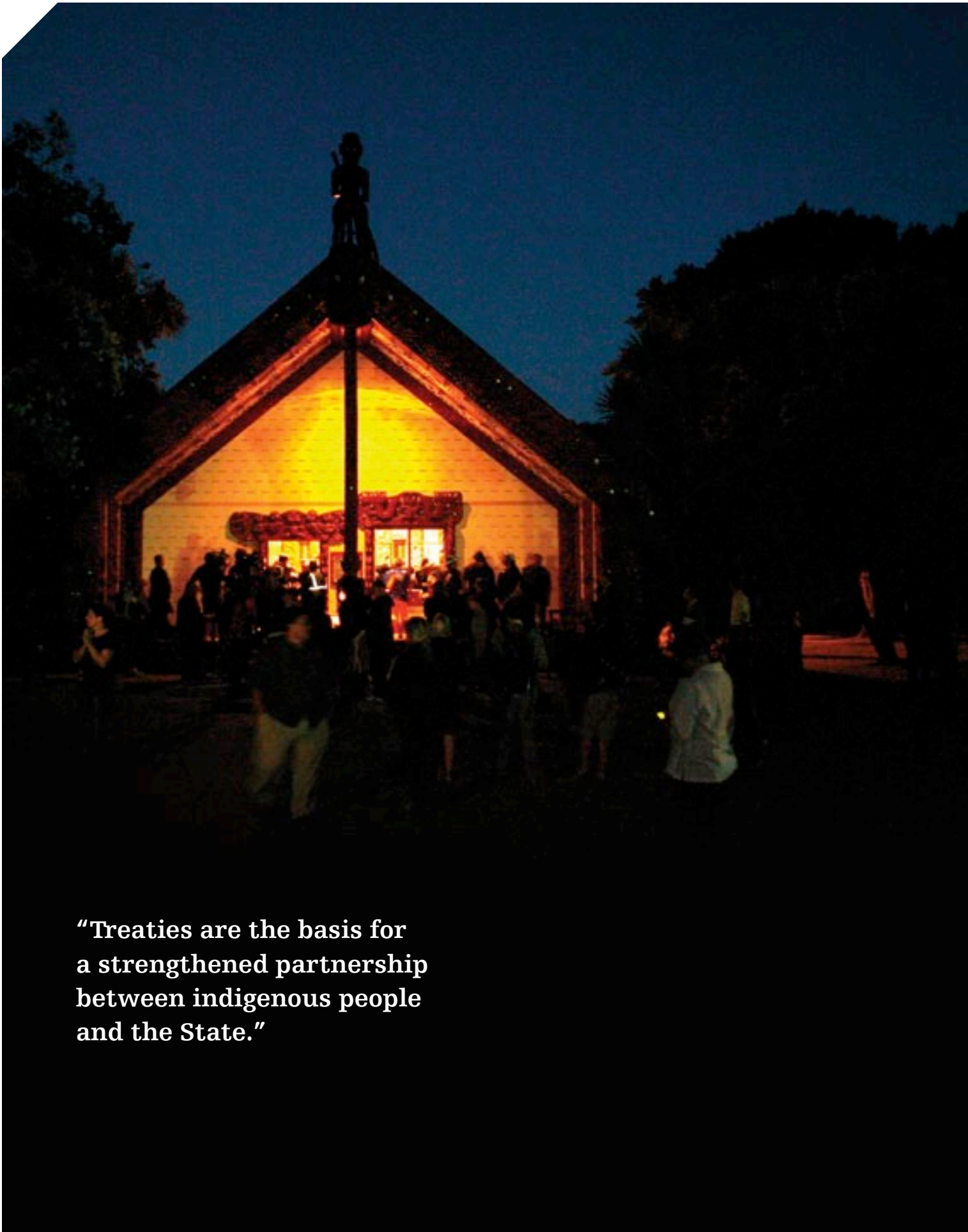
Incorporating a specific reference to equality in the Bill of Rights Act and the Human Rights Act to promote substantive equality.

Strengthening legal protection

Extending the Human Rights Review Tribunal and the courts' power to make a declaration of inconsistency under the Human Rights Act to other rights and freedoms in the Bill of Rights to strengthen the legal protection of human rights in New Zealand.

4. Human Rights and the Treaty of Waitangi

Te Mana I Waitangi



"Treaties are the basis for a strengthened partnership between indigenous people and the State."

Treaties are the basis for a strengthened partnership between indigenous people and the state.

UN Declaration on the Rights of Indigenous Peoples, Preamble (edited)

Introduction
Tīmatatanga

The Treaty of Waitangi is the founding document of New Zealand. As outlined in its Preamble, the Treaty was signed between representatives of the British Crown and several rangatira (Māori chiefs) on 6 February 1840. It enabled subsequent migration to New Zealand and the establishment of government by the Crown. The Preamble sets out the purpose of the Treaty: to protect Māori rights and property, keep peace and order, and establish government. New Zealand's history since the signing of the Treaty has been marked by repeated failures to honour these founding promises.

The Treaty is also important as a 'living document', central to New Zealand's present and future, as well as its past. It establishes a relationship "akin to partnership" between the Crown and rangatira, and confers a set of rights and obligations on each Treaty partner. [1] This relationship has been described as "the promise of two peoples to take the best possible care of each other". [2]

Although there are areas of disagreement between the English and Māori texts of the Treaty, there are important areas where the texts do agree. Article 1 is essentially about the Crown, Article 2 is about rangatira, and Article 3 is about all citizens and residents (including Māori, Pākehā and other subsequent migrants). These Articles give each party both rights and responsibilities and invest them with the authority to act. These rights and responsibilities include:

- the rights and responsibilities of the Crown to govern (Article 1 – kāwanatanga/governance)
- the collective rights and responsibilities of Māori, as Indigenous people, to live as Māori and to protect and develop their taonga (Article 2 – rangatiratanga/self-determination) [3]
- the rights and responsibilities of equality and common citizenship for all New Zealanders (Article 3 – rite tahi/equality).

Although it is not part of the text of the Treaty, Lieutenant-Governor Hobson, in response to a question from Catholic Bishop Pompallier, made the following statement prior to the signing of the Treaty: "The Governor says that the

THE TREATY AND MULTICULTURALISM

The Preamble to the Treaty enabled the first non-Māori people – immigrants 'from Europe and Australia' – to settle in New Zealand. In doing so, it set the stage for further waves of immigrants from around the world. While the Treaty established a bicultural foundation for New Zealand – which has still to be fully realised – it simultaneously established a basis for multiculturalism. Given the Crown's responsibilities under Article 1 to govern and make laws for all New Zealanders, this could include the establishment of multicultural policies.

There have been many engagements between Māori as tangata whenua and recent migrants, for example in citizenship ceremonies and marae visits. It is vitally important to the future of New Zealand that all groups in the community engage with the Treaty. The New Zealand Federation of Multicultural Councils has, for example, made a clear commitment to uphold the Treaty of Waitangi and "to raise the consciousness among ethnic communities of the needs, aspirations and status of Māori".

1 New Zealand Māori Council v Attorney-General [1987] NZLR 641

2 Bishop Manu Bennett, cited in Human Rights Commission (2003), Human Rights and the Treaty of Waitangi: Te Mana i Waitangi (Auckland: Human Rights Commission)

3 Article 2 of the Treaty also gave the Crown the right of pre-emption or hokonga (buying and selling). This gave the Crown the exclusive right to purchase land which tangata whenua wished to sell. In effect, this established 'property rights' in the European sense over the land.

Hundreds of people gather at the whare on the Treaty Grounds at Waitangi on a clear morning in the Bay of Islands to mark Waitangi Day, 6 February, 2008. (New Zealand Herald Photograph by Greg Bowker)

several faiths (beliefs) of England, of the Wesleyans, of Rome, and also Māori custom shall alike be protected." This is sometimes referred to as Article Four of the Treaty, and relates to the right to freedom of religion and belief (wairuatanga).

The Treaty has been described as having two key elements. The first relates to Articles 1 and 3, which give all people the right to live as citizens of New Zealand (under one law). The second focusses on Article 2, which affirms for Māori the right to live as Māori, with particular responsibilities for protecting and developing those things valued by Māori (ngā taonga katoa). Neither of these rights is exclusive of the other. What binds the two parts of the Treaty together is the concept of tūrangawaewae (a place to stand), which articulates one of the most important elements of the Treaty debate: the right of all peoples to belong, as equals.[4] This means that the Treaty belongs to all New Zealanders, and all New Zealanders have responsibilities towards each other based on belonging to this place.

WHAT IS THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE TREATY OF WAITANGI?

The Treaty of Waitangi is New Zealand's own unique statement of human rights. It includes both universal human rights and indigenous rights. It belongs to, and is a source of rights for, all New Zealanders.

The Universal Declaration of Human Rights (UDHR) affirms the value of every human life (for example, the right to dignity and the right to equality). Human rights do not exist in the absence of a collective environment where rights are acknowledged and duties recognised. Recent human rights developments – in particular, the work on the rights of Indigenous peoples – have built greater understanding of the interrelationship between individual and collective rights.

The Treaty (1840) and the UDHR (1948) therefore complement each other: both govern relationships between peoples in New Zealand and between peoples and the Crown, and both underpin New Zealand's constitutional framework. In doing so, they set out a foundation for good government that respects the rights of all New Zealanders.

The Treaty does not, as is sometimes claimed, confer 'special privileges' on Māori, nor does it take rights away from other New Zealanders. Rather, it affirms particular rights and responsibilities for Māori as Māori to protect and preserve their lands, forests, waters and other treasures for future generations. In 2005, United Nations Special Rapporteur Rodolfo Stavenhagen commented that he had been asked several times during his visit to New Zealand whether he thought Māori benefitted from 'special privileges'. He responded that he "had not been presented with any evidence to that effect, but that, on the contrary, he had received plenty of evidence concerning the historical and institutional discrimination suffered by the Maori people".[5]

The United Nations Declaration on the Rights of Indigenous Peoples (2007) explicitly refutes the notion that recognition of indigenous rights may somehow put other peoples' rights at risk, and stipulates that indigenous rights are to be exercised in a manner that respects the human rights of others.

This chapter is primarily concerned with the indigenous rights guaranteed under Article 2 of the Treaty, and the specific aspects of Article 1 and 3 that pertain to Māori. General rights under Articles 1 and 3 are discussed in other chapters. Chapters of particular relevance to the Treaty of Waitangi include those on democratic rights; the right to justice, equality and freedom from discrimination; the rights of people who are detained; as well as those relating to economic, social and cultural rights: to education, to health, to an adequate standard of living and to work. Some of the areas for action identified in these chapters are also relevant to the full realisation of human rights and the Treaty of Waitangi.

CHANGES SINCE 2004

Internationally, the most significant event regarding human rights and the Treaty since 2004 was the

4 Turangawaewae "enables a person to say with confidence, 'I belong'." Hiwi and Pat Tauroa (1986), Te *Marae: A Guide to Customs and Protocols* (Wellington: Reed Methuen), p 129.

5 United Nations (2006), Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Accessed 15 June 2010 from http://iwgia.synkron.com/graphics/Synkron-Library/Documents/InternationalProcesses/Special%20Rapporteur/SRreportNewZealand2005.pdf

HUMAN RIGHTS COMMISSION INITIATIVES

Since 2004, the Commission has:

- **delivered the Te Mana i Waitangi programme, to promote better understanding of human rights and the Treaty, including publication of a discussion document, 45 regional symposia and over 200 community dialogues**
- **established a Te Mana i Waitangi network; published a regular newsletter, Whitiwhiti Korero; and developed case studies on Crown-Tangata Whenua partnerships**
- **published the Declaration on the Rights of Indigenous Peoples in te reo Māori and English**
- **published an annual review of developments in relation to the Treaty, in the Commission's Race Relations Report**
- **worked with Te Taura Whiri i te Reo Māori and Te Puni Kōkiri to promote and support Te Wiki o Te Reo Māori – Māori Language Week.**

adoption of the Declaration on the Rights of Indigenous Peoples by the United Nations in 2007. Twenty years in the making, the declaration provides a clear set of standards that apply existing human rights treaties to the specific situation of Indigenous peoples. It affirms treaties, agreements and partnerships between states and Indigenous peoples, and reiterates the full range of civil, political, economic, social and cultural rights. In doing so, it provides guidance to New Zealand on ways in which the Treaty partnership can be interpreted in the 21st century.

The Māori Party was formed in 2004 in response to the foreshore and seabed controversy. In 2008, it entered into a confidence-and-supply agreement with the newly elected National Government, which has led to the review of the Foreshore and Seabed Act, a planned constitutional review, and the launch of the Whānau Ora policy.

The Māori Party's role in government indicates that a heightened political role for Māori has the potential to strengthen the Treaty partnership and advance the human rights of Māori. The diversity of Māori voices, both within Parliament and in the wider community, is testament to strengthened Māori leadership and the development of iwi authorities.

In the community, the realisation of the human rights of Māori as Indigenous people has improved since 2004. This is particularly evident in the steady improvement of overall socio-economic indicators for Māori and in the growth of the Māori economy and asset base. The latter has grown in part due to progress in Treaty settlements, including further implementation of the fisheries settlements and major settlements relating to aquaculture and forestry. An acceleration in the pace of Treaty settlements since late 2007 (in response to ambitious settlement targets of 2020 and now 2014) has the potential to further strengthen the Māori economy and empower Māori organisations.

In the health sector, services have been devolved to Māori providers, with some success. In education, the establishment of the Treaty as a foundational principle of the new New Zealand curriculum, coupled with the development of its partnership document *Te Marautanga o Aotearoa*, marks an important step in developing the Treaty partnership for future generations.

With regard to language and cultural revitalisation, both the growth of the Māori economy and government initiatives have contributed to the increased number of te reo speakers, as shown in the reports on the health of the Māori language. Since the establishment of the Māori Television Service in 2003, the indigenous broadcaster has significantly contributed to linguistic and cultural revitalisation, and to increasing diversity in the media.

International context
Ki ngā kaupapa ā taiao

Something that's dear to my heart is kaupapa Māori. I was excited to realise it lined up with the human rights kaupapa – respect for others, right to shelter (our marae), food (kai – an important part of tikanga), education (traditionally, this was a must), freedom of speech (marae hui) and health (hauora).

(Paula Pirihi, Human Rights Commission Kaiwhakarite, March 2009)

This section outlines the rights standards relevant to the specific collective situation of Indigenous peoples. Indigenous peoples are entitled to all the rights and protections set out in the International Covenants on Civil and Political Rights (1968) and Economic, Social and Cultural Rights (1968), the Convention on the Elimination of Racial Discrimination (1966), and other international human rights treaties. International instruments specifically expressing these rights, as they apply to Indigenous peoples, have been adopted by the International Labour Organisation (ILO Convention 169 on Indigenous and Tribal Peoples, 1991) and the United Nations General Assembly (the UN Declaration on the Rights of Indigenous Peoples, 2007).

The 2007 Declaration is particularly relevant to the Treaty of Waitangi, as it affirms that Indigenous people have the right to the recognition, observance and enforcement of existing treaties and agreements (Article 37). In affirming the foundational status of the Treaty of Waitangi, the Declaration therefore upholds the rights conferred by that agreement, including the Crown's right to govern and to make laws (as envisaged in Article One of the Treaty).

INTERNATIONAL COVENANTS ON CIVIL AND POLITICAL RIGHTS (ICCPR) AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

The first Article of both ICCPR and ICESCR states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development." This fundamental right is reiterated in the Preamble to the 2007 Declaration on the Rights of Indigenous Peoples, which acknowledges both ICCPR and ICESCR, and affirms "the fundamental importance of the right to self-determination of all peoples". This echoes the right to self-determination (rangatiratanga) in Article 2 of the Treaty.

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)

ICERD affirms the rights to equality and freedom from discrimination also contained in ICCPR and ICESCR. The Convention requires governments to eliminate racially discriminatory policies, prohibit racial discrimination, encourage intercultural communication, and undertake, where required, special measures to achieve equality. It declares all people, without distinction as to race, colour, national or ethnic origin, to be equal before the law and in the enjoyment of civil, political, economic, social and cultural rights. This reaffirms the guarantee of equal rights in Article 3 of the Treaty.

ILO CONVENTION 169 ON INDIGENOUS AND TRIBAL PEOPLES [6]

Respect and participation are the core principles of ILO Convention 169. Several articles provide for states to respect Indigenous peoples' culture, spirituality, social and economic organisation, and identity. Article 6 requires governments to establish means by which Indigenous peoples can freely participate at all levels of decision-making in elective and administrative bodies. Article 7 states that Indigenous peoples have the right to decide their own development priorities and to exercise control over their own economic, social and cultural development. These rights affirm the right to self-determination contained in Article 2 of the Treaty.

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly of the United Nations in 2007. As a declaration, it is not ratifiable by or binding on states. By bringing together the various existing provisions of binding human rights treaties, however, it forms part of the international human rights framework. International human rights bodies – such as the Committee on the Elimination of Racial Discrimination [7] – have affirmed that the declaration should be used when interpreting states' human rights obligations, regardless of a country's position on the declaration. New Zealand initially voted against the declaration in 2007. In 2010, however, New Zealand reversed its position and the Government indicated its support for the declaration as "both an

6 This convention has been so far been ratified by 20 states, but not New Zealand.

7 Concluding observations of the Committee on the Elimination of Racial Discrimination (2008). USA, CERD/USA/CO/6.

affirmation of existing rights and [an] expression of new and widely supported aspirations".[8]

Indigenous peoples have the same human rights as all others, and "indigenous rights" express how these are interpreted and applied in the context of their specific collective situation. Indigenous rights affirm that Indigenous peoples, like other peoples, are entitled to their distinct identity. They recognise the historical and ongoing circumstances that have prevented them from fully enjoying their rights on an equal basis with others.

The rights set out in the declaration are to be interpreted as minimum standards (Article 43). The declaration cannot be construed as diminishing any other rights which Indigenous peoples have (Article 45); and it is to be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith (Article 46).

With its strong focus on the reciprocal relationships between Indigenous people and the State, many of the Declaration's provisions reinforce the Treaty principles that provide for co-operation, good faith, consultation and partnership. For example, the Declaration:

- encourages co-operative relations based on principles of justice, democracy, respect for human rights, non-discrimination and good faith (Preamble, para 18)
- recognises treaties, and the relationship they represent, as the basis for strengthened partnerships (Preamble, para 15)
- affirms Indigenous peoples' rights to the observance and enforcement of treaties (Article 37)
- obliges states to take positive steps to "promote tolerance, understanding and good relations among Indigenous peoples and all other segments of society" (Article 15(2)).

In this reciprocal context, the Declaration sets out the individual and collective rights of Indigenous peoples, including rights to self-determination, culture, identity, language, employment, health, education, land and resources. It emphasises the rights of Indigenous peoples to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their needs and aspirations. For example, the Declaration affirms that Indigenous peoples have the right to:

- enjoyment of all their human rights (Article 1)
- equality and freedom from discrimination (Article 2)
- self-determination of political status and economic, cultural and social development (Article 3)
- maintain and strengthen their distinct institutions (Article 5)
- practise and revitalise their cultural traditions and customs (Article 11) and language (Article 13)
- establish and control their own educational systems and institutions (Article 14)
- establish their own media and access non-indigenous media without discrimination (Article 16)
- participate in decision-making in matters that affect their rights through their own representatives (Article 18)
- improvement of their economic and social conditions (Article 21), particularly for women and children (Article 22)
- maintain and strengthen their distinctive relationships with traditional lands (Article 25)
- their lands, territories and resources which they have traditionally owned (Article 26)
- redress and just, fair and equitable compensation for lands and resources taken (Article 28)
- maintain, control, protect and develop traditional knowledge and cultural expressions (Article 31)
- determine and develop priorities and strategies for land and resource development (Article 32).

The Declaration sets out the responsibilities of states to assist Indigenous peoples in realising those rights, including:

- taking effective measures for prevention of, and redress for, dispossession, forced assimilation or rights violations (Article 8)

8 Announcing New Zealand's reversed position at the UN Permanent Forum on Indigenous Issues in April 2010, the Minister of Māori Affairs noted that the Government also "reaffirmed the legal and constitutional frameworks that underpin New Zealand's legal system". See Hon Pita Sharples, Minister of Māori Affairs (2010), 'Supporting UN Declaration Restores New Zealand's Mana', 20 April. Accessed 14 June 2010 from http://www.beehive.govt.nz/release/supporting+un+declaration+restores+NZ039s+mana

- providing redress with respect to cultural, intellectual, religious or spiritual property taken without consent (Article 11)
- enabling access and/or repatriation for ceremonial objects or human remains (Article 12)
- taking effective measures to ensure language revitalisation use and development and provision of interpretation (Article 13)
- taking effective measures to ensure that State-owned media reflects indigenous cultural diversity (Article 16)
- consulting and co-operating in good faith with Indigenous peoples, through their representative institutions, in order to obtain their free, prior and informed consent before implementing measures that affect them (Article 19) and any project affecting lands and resources (Article 32)
- taking effective and, where appropriate, special measures to ensure continuing improvement of economic and social conditions (Article 21), particularly of women and children (Article 22)
- taking appropriate measures in consultation with Indigenous peoples to give effect to the Declaration (Article 38).

As many of the Articles in the Declaration intersect with the principles of the Treaty (as interpreted by the Waitangi Tribunal and New Zealand Courts), there is considerable scope for the Declaration to be used to support, clarify, and promote understanding of the human rights dimensions of the Treaty. The Māori Land Court, for example, has indicated that several of the Declaration's Articles (Preamble paragraphs 10 and 15, Articles 3, 11, 13, 18, 25, 26, 27, 32 and 40) will have particular significance for its work. The court's jurisdiction under Te Ture Whenua Māori Act 1993 has addressed, or has the potential to address, issues arising from these Articles because they are concerned with the rights of Indigenous people to retain, manage, utilise and control their lands and waters in accordance with their own cultural preferences. The court's jurisdiction also enables the full participation of Māori in the mediation and adjudication of issues concerning the administration of these resources.

New Zealand context
Kaupapa o Aotearoa

CUSTOMARY RIGHTS AND RANGATIRATANGA

International instruments affirm the customary rights of Indigenous peoples as central to the realisation of their human rights. In New Zealand, Māori customary rights are formed by whakapapa (genealogical connections), tikanga (the customary equivalent of law) and mātauranga (traditional knowledge). Exercised collectively, these rights and responsibilities existed prior to colonial contact and have survived – though not necessarily in their original form – into the present. Article 2 of the Treaty of Waitangi protects Māori rangatiratanga, which refers to chiefly authority and self-determination rooted in tikanga, and the protection of lands, forests, fisheries and other taonga or treasures.

> **Maori society was collectively organised with whakapapa (genealogy) forming the backbone or a framework of kin-based descent groups held together by rangatira – leaders for their ability to weave people together.**
>
> (Linda Te Aho, 'Contemporary Issues in Māori Law and Society' *Waikato Law Review* 15, p 140.)

Some legislation refers to and incorporates aspects of 'tikanga Māori', including kaitiakitanga (the exercise of guardianship), mātaitai (food resources from the sea), and tangata whenua (the iwi or hapū that holds mana whenua – that is, the authority, rights and responsibilities derived from the land – over a particular area).[9]

Te Puni Kōkiri, the Ministry of Māori Development, is the Crown's principal advisor on Crown-Māori relationships. Te Puni Kōkiri administers relevant legislation and has developed the 'Māori Potential Approach' as a Māori public policy framework. The ultimate aim of this approach is to better position Māori to build and leverage off their collective resources, knowledge, skills and leadership capability in order to regenerate an economic and cultural base.

A range of non-traditional entities also exercise aspects of contemporary rangatiratanga. These include the New Zealand Māori Council, the only national Māori organisation supported by legislation; the National

9 Hirini Moko Mead (2003), *Tikanga Maori: Living By Māori Values* (Wellington: Huia Publishers), p 5

Māori Congress; the Māori Women's Welfare League; the Federation of Māori Authorities; and the Iwi Leaders' Group.

THE TREATY IN NEW ZEALAND'S CONSTITUTION AND LEGISLATION

Since the 1970s, there has been a persistent call, particularly from Māori, for constitutional change to give greater effect to the Treaty of Waitangi. Submissions to the Constitutional Arrangements Committee, a select committee established in 2004 to inquire into New Zealand's existing constitutional arrangements, echoed this call. While the committee found that any significant constitutional change should be made with great care and be subject to informed public debate, it noted an issue of continuing significance: "the relationship between the constitution and the Treaty of Waitangi, including whether it should and how it might form a superior law".[10]

Several pieces of specific legislation provide for the principles of the Treaty to be given effect; the Treaty itself, however, is not directly enforceable in New Zealand courts. The courts' adopted practice is to interpret legislation according to the principles of the Treaty where appropriate, except where legislation states that this is not to be done. Although it is the principles of the Treaty that are legally enforceable, there is a range of views on them. In particular, there is concern that the focus on the principles moves away from focussing on the Treaty itself. More recently, Parliament has opted to describe Treaty implications for a particular policy area in legislation, rather than solely relying on generic references to the principles of the Treaty.

There are three main ways in which the principles of the Treaty are observed:

- The Waitangi Tribunal can inquire into claims by Māori that the Crown acted in breach of Treaty principles.
- The Crown has accepted a moral obligation to resolve historical grievances in accordance with the principles of the Treaty.
- The Courts can apply Treaty principles where relevant and not explicitly prevented by legislation, and many agencies and departments are required by legislation to consider Treaty principles when carrying out their functions.[11]

The New Zealand Bill of Rights Act 1990 provides legal protection for the civil and political rights of all New Zealanders, including electoral rights, freedom of expression, freedom from discrimination, and freedom of thought, conscience and belief. While it includes provisions relating to the "rights of minorities", it does not specifically protect indigenous rights or refer to the Treaty of Waitangi. There are no protections in the New Zealand Bill of Rights Act for economic and social rights.

The Human Rights Act 1993 establishes the Human Rights Commission, with its primary functions being to advocate and promote respect for human rights and to encourage the maintenance and development of harmonious relations in New Zealand society. The act prohibits discrimination on the grounds of colour, race, and ethnic or national origins, and also (in specified circumstances) racial harassment and inciting or exciting racial disharmony. It provides exceptions to the grounds of discrimination for special measures to achieve equality. The Commission is required by the act to "promote by research, education and discussion a better understanding of the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international law".

The Electoral Act 1993 makes continued provision for Māori representation in Parliament. Four Māori seats were established in 1867. The number was increased in 1993, with the introduction of proportional representation, and is now determined by a formula that divides the number of voters enrolled on the Māori electoral roll by the 'South Island quota'.[12] The number of Māori seats is currently seven.

10 Constitutional Arrangements Committee (2005), Inquiry to Review New Zealand's Existing Constitutional Arrangements, Report of the Constitutional Arrangements Committee, 47th Parliament, Hon Peter Dunne chairperson, p 25. Accessible online at http://www.parliament.nz/NR/rdonlyres/575B1B52-5414-495A-9BAFC9054195AF02/15160/DBSCH_SCR_3229_2302.pdf

11 Office of Treaty Settlements (2004), *Ka Tika ā Muri, Ka Tika ā Mua – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington: Office of Treaty Settlements), p 11

12 For more information see the official elections website. Accessible online at http://www.elections.org.nz/elections/electorates/rep-comms-faqs.html

The Treaty of Waitangi Act 1975 established the Waitangi Tribunal as a permanent commission of inquiry. From 1975 to 1985, the tribunal was able to hear only contemporary claims by Māori against the Crown for breaches of the principles of the Treaty in government legislation, policies and practices. The Treaty of Waitangi Amendment Act 1985 extended the tribunal's jurisdiction to include historical claims dating back to 1840. Since 1985, the Tribunal's principal function has been to investigate historical and contemporary claims against the Crown, and report its findings and recommendations to both claimants and the Crown. In doing so, it has been considered to function as a 'truth and reconciliation' process. A further Treaty of Waitangi Amendment Act in 2006 established a cut-off date of 1 September 2008 for the lodging of historical (pre-1992) claims. Contemporary claims – those relating to breaches of the Treaty after 1 September 1992 – can still be lodged with the tribunal.

The tribunal has exclusive authority, for the purposes of the act, to determine the meaning and effect of the Treaty, and must consider both the English and the Māori texts. The two core Treaty principles that have guided the tribunal's work are those of partnership and active protection. Other principles derived from the Treaty include the principles of reciprocity, mutual benefit, redress, development, and the duty to act reasonably, honourably and in good faith.

Historical and contemporary claims under the Treaty of Waitangi are settled through negotiations between the Crown and iwi and hapu representatives. The Office of Treaty Settlements negotiates historical claims on behalf of the Crown. Once an historical account, an acknowledgement of Treaty breaches, an apology from the Crown, and a package of commercial and cultural redress have been agreed, a deed of settlement is signed by both parties and settlement legislation is passed. Settlements of contemporary claims and of some very specific historical claims have been negotiated by other government departments, including the Ministry of Health (for example, the Napier Hospital settlement) and Te Puni Kōkiri (for example, the vesting of Whakarewarewa and Roto-a-Tamaheke in Ngati Whakaue and Tuhourangi-Ngāti Wahiao).

The Conservation Act 1987 was enacted to promote the conservation of New Zealand's natural and historical resources and establish the Department of Conservation. At section 4 it provides that the act shall be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi. A range of principles and actions derived from section 4 have subsequently been developed to guide the department's work.[13]

Te Ture Whenua Māori Act 1993 lists four principles in its Preamble:

- that the Treaty of Waitangi established the special relationship between the Māori people and the Crown
- that it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed
- that it is desirable to recognise that land is a taonga tuku iho (inherited treasure) of special significance to the Māori people and for that reason:
  - to promote the retention of that land in the hands of the owners for their whānau, and their hapū and to protect waahi tapu (sacred sites)
  - to facilitate the occupation, development and utilisation of that land for the benefit of its owners, their whānau and their hapū.
- that it is desirable to maintain a court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles.

The act also incorporates tikanga Māori concepts, including ahi kā (fires of occupation), tipuna (ancestor) and kai tiaki (guardian). The act continues the Māori Land Court and Māori Appellate Court, which have the primary objective of promoting and assisting in the retention of Māori land. The court must also promote and assist Māori in the effective use, management and development of that land by and on behalf of its owners. The court now has extensive jurisdiction to hear matters relating to the Māori land title system, the protection of historical artefacts or taonga Māori, and the mediation and adjudication of disputes concerning Māori fisheries and aquaculture (under the Māori Fisheries Act 2004 and the Māori Commercial Aquaculture Claims Act 2004, respectively).

13 Department of Conservation, Conservation General Policy – 2. Treaty of Waitangi Responsibilities. Accessed 15 June 2010 from http://www.doc.govt.nz/publications/about-doc/role/policies-and-plans/conservation-general-policy/2-treaty-of-waitangi-responsibilities/

The Historic Places Act 1993 provides for the recognition of "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu (sacred sites), and other taonga". The act establishes the Māori Heritage Council, which comprises a minimum of three appointed or elected Māori members of the Historic Places Trust Board, one other board member, and four people appointed by the Minister of Culture and Heritage. The functions of the council include: protecting and registering wāhi tapu and wāhi tapu areas; assisting the Historic Places Trust to develop and reflect a bicultural view in the exercise of its powers and functions; and providing assistance to whānau, hapū and iwi in the preservation and management of their heritage resources.

The Bay of Plenty Regional Council (Māori Constituency Empowering) Act 2001 was passed after an extensive process of public consultation. It gives Bay of Plenty Māori on the Māori electoral roll the right to vote for regional councillors in Māori constituencies. The number of constituencies is determined by a formula, set out in section 6 of the act, that preserves the democratic principle of 'one person, one vote' across both general and Māori constituencies. There are currently three Māori wards in the Bay of Plenty which return councillors to what is now called Environment Bay of Plenty.

The Local Government Electoral Amendment Act 2002 extended the option of Māori wards or constituencies that had been established in the Bay of Plenty to all regional councils and territorial local authorities. As a result of the amendment, section 19Z of the **Local Electoral Act 2001** provides that a territorial authority may resolve that its district be divided into one or more Māori wards, and any regional council may resolve that its region be divided into one or more Māori constituencies, for electoral purposes. The council must notify the public of their right to demand a poll of all voters on the question. The resolution takes effect for the next two triennial elections and continues thereafter subject to any further resolution or poll demanded by voters.

A number of councils have considered the option since then, but none have taken it up. The Royal Commission on Auckland Governance considered Māori representation when making recommendations on the composition of the new Auckland Council,[14] but the final legislation establishing the council did not include Māori wards.

The Local Government Act 2002 gives recognition to the Crown's responsibilities under the Treaty of Waitangi. This includes the maintenance and improvement of opportunities for Māori to contribute to local government decision-making processes. Specific processes are set out for consulting Māori, and annual reporting is required to illustrate what has been done to strengthen Māori participation.

The Resource Management Act 1991 incorporates a number of tikanga Māori concepts and provides for local authorities to have particular regard for kaitiakitanga and the principles of the Treaty. It also declares the relationship of Māori, and their culture and traditions, with their ancestral lands, water, sites, wāhi tapu and other taonga to be a matter of national importance.

The Ministry for the Environment, the Ministry of Fisheries, the Ministry of Agriculture and Forestry and the Department of Conservation have important roles in relation to Māori resource management issues. For example, the Ministry of Fisheries can establish protective mechanisms (taiapure-local fisheries and mātaitai reserves) in conjunction with iwi to protect significant sites for Māori. Since 1996, eight taiapure-local fisheries and 10 mātaitai reserves have been established.

The Resource Management Act 1991 also established the Environment Court (previously the Planning Tribunal), and two of the judges of the Māori Land Court hold alternate warrants to sit and hear cases on it. The Environment Court is continuing to build its own capacity through training and the experience of hearings commissioners knowledgeable in Māori issues to deal with matters of kaitiakitanga and the relationship, culture and traditions that Māori have with their ancestral lands, water, sites, waahi tapu and other taonga.

The Māori Language Act 1987 recognises Māori as an official language of New Zealand. It established Te Taura

14 Royal Commission on Auckland Governance (2009), *Report of the Royal Commission on Auckland Governance* (Auckland: Royal Commission), volume 1, part 4: Structural Reform, section 22: Maori, pp 477–496. Accessible online at http://www.royalcommission.govt.nz/rccms.nsf/0/553AC2E8BDABC593CC25758500423FA5/$FILE/Vol1Contents.pdf?open

Whiri i te Reo Māori, the Māori Language Commission, to protect and foster the use of te reo Māori. The act was a response to the comprehensive te reo Māori Treaty claim to the Waitangi Tribunal in the 1980s, concerning the Crown's failure to protect the language, as required by Article 2 of the Treaty.

Te Māngai Pāho is a Crown entity established to make funding available to the national network of Māori radio stations and for the production of Māori language television programmes, radio programmes, music CDs and news services.

The Iwi Radio Network was established in the early 1990s in response to the Waitangi Tribunal's recommendations on the radio spectrum Treaty claim. The government reserved the frequencies for the promotion of Māori language and culture. Iwi radio frequency licences are issued to the 21 iwi stations under section 48(b) of the Radiocommunications Act 1989. The licence stipulates that frequencies must be used for the purpose of promoting Māori language and culture and broadcasting to a primarily Māori audience.

The Māori Television Service Act 2003 (Te Aratuku Whakaata Irirangi Māori) established Māori Television as a statutory corporation to protect and promote te reo in broadcasting. Māori Television has two stakeholder interest groups: the Crown and Te Pūtahi Paoho (the Māori Electoral College). [15] In 2008, Māori Television launched a Māori-language-only channel, *Te Reo*.

Te Waka Toi, the Māori arts board of Creative New Zealand, is responsible for developing Māori arts and artists. It invests contestable funding, develops initiatives and delivers tailored programmes for Māori. The Government also funds the Aotearoa Traditional Māori Performing Arts Society through Vote Culture and Heritage.

The Education Act 1989 requires all New Zealand children aged between seven and 16 to be enrolled at a school. The majority of Māori students are educated in English-medium schools. Within this system there is provision for bilingual classes (reo rua), total immersion classes (rumaki reo) and whānau units. Under the act, the Minister of Education can also designate a state school as a kura kaupapa Māori by notice in the *New Zealand Gazette*. All kura kaupapa Māori are required to adhere to the principles of Te Aho Matua (a statement that sets out the approach to teaching and learning applicable to kura kaupapa Māori). One of the key National Education Goals is for "increased participation and success by Māori through the advancement of Māori education initiatives, including education in te reo Māori, consistent with the principles of the Treaty of Waitangi". [16] The Treaty is both one of the foundational principles of the new New Zealand curriculum, and the central guiding principle of Te Marautanga o Aotearoa, its companion document. This document is used by Māori-medium schools to guide teaching and learning, and to support learners, schools and whanāu. The Ministry of Education provides funding for both English and Māori-medium education. The Ministry also provides funding and support for kohanga reo (language nests – early childhood education) and whare wananga (tertiary education institutions).

At the centre of 20 pieces of legislation that govern the health sector, the **New Zealand Public Health and Disability Act 2000** provides for the recognition of the principles of the Treaty of Waitangi in health and disability support. With the aim of improving health outcomes for Māori, the Act also provides mechanisms to enable Māori to contribute to decision-making and the delivery of health and disability services.

Measures provided for in the act include minimum Māori membership on district health boards (DHBs); a requirement for DHBs to establish and maintain processes to enable Māori to participate in and contribute to strategies for Māori health improvement; a requirement

15 The Crown is represented by the Minister of Māori Affairs and the Minister of Finance. Te Pūtahi Paoho (Māori Electoral College) comprises Te Kōhanga Reo National Trust, Te Ataarangi Inc, Te Rūnanga o Ngā Kura Kaupapa Māori, Te Tauihu o Ngā Wānanga, Ngā Kaiwhakapūmau i te Reo Māori, National Māori Council, Māori Women's Welfare League, Māori Congress, Te Whakaruruhau o Ngā Reo Irirangi Māori, Kawea Te Rongo and Ngā Aho Whakaari. See the Māori Television website. Accessible online at: http://www.maoritelevision.com/Default.aspx?tabid=227

16 National Education Goals. The relevant goal is NEG 9. Accessible online at http://www.minedu.govt.nz/NZEducation/EducationPolicies/Schools/PolicyAndStrategy/PlanningReportingRelevantLegislationNEGSAndNAGS/TheNationalEducationGoalsNEGs.aspx

that DHBs continue to foster the development of Māori health capacity for participating in the health-and-disability sector and for providing for their own needs; and an expectation that DHBs provide relevant information to Māori to enable effective participation.

The Climate Change Response Act 2002 and the Climate Change Response (Moderated Emissions Trading) Amendment Act 2009, which finalised the details of the emissions trading scheme, contain a section on the Treaty of Waitangi, section 3(a). This section provides for a number of ways in which the Crown will give effect to its responsibilities under the Treaty in terms of consultation on issues of importance to Māori, and five-yearly review. During negotiations on the emissions trading scheme, the Māori Party was able to gain some concessions for iwi and hapū, including the ability for five iwi to farm trees on 35,000 hectares of low conservation-value land managed by the Department of Conservation, and Māori representation in international negotiations.

THE TREATY IN NEW ZEALAND'S FREE-TRADE AGREEMENTS

In the free-trade agreements that New Zealand has signed with China and the ASEAN nations, clauses related to the Treaty of Waitangi have been included. The New Zealand–China Free Trade Agreement 2008 states at Article 205 that nothing in the agreement will prevent the adoption by New Zealand of measures to fulfil Treaty obligations (provided such measures are not used as a form of unjustified discrimination or disguised restriction on the other party).[17] The same provision regarding the Treaty is included in chapter 15, Article 5 of the ASEAN–Australia–New Zealand Free Trade Agreement 2009.[18]

New Zealand today
Aotearoa i tēnei rā

A Treaty and human rights-based path forward for New Zealand means considering the impact the situation today will have on future generations of New Zealanders.

IMPLICATIONS FOR THE WIDER PACIFIC: CONSTITUTIONAL LINKS AND HUMAN RIGHTS

Māori are not only indigenous to New Zealand but have whakapapa connections across the wider Pacific. Although not signatories to the Treaty of Waitangi, Pacific peoples from Niue, Tokelau and the Cook Islands are indigenous to their own islands, which are part of the wider Realm of New Zealand. The New Zealand government therefore has responsibilities towards them, which could be explored further.

In 2000 the Ministry of Pacific Island Affairs commissioned a report from the Ministry of Justice on the constitutional position of Pacific peoples in New Zealand. The Pacific Peoples Constitution Report 2000 emphasised that "New Zealand has a special relationship with Pacific people" due to: historical relationships (many fostered by New Zealand's early colonial aspirations); high proportions of Pacific peoples in New Zealand (including nearly all of the population of some Pacific nations); geographical proximity; and constitutional links (particularly in the case of the Cook Islands, Niue, Tokelau, and Samoa).

New Zealand is also a Pacific nation with responsibilities to the wider Pacific. These historical connections are becoming increasingly urgent as climate change impacts on low-lying Pacific islands such as Kiribati and Tuvalu. If the land on which these Indigenous peoples live disappears, what will happen to their cultures, languages and identities?

17 See Article 205 of the New Zealand–China Free Trade Agreement. Accessed 15 June 2010 from http://www/chinafta.govt.nz

18 ASEAN–Australian–New Zealand Free Trade Agreement. Accessed 15 June 2010 from http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.pdf

Socio-economic inequalities for Māori and incomplete redress for past breaches of the Treaty mean that today's children do not share equally in the realisation of their human rights. This is especially significant given demographic projections, which indicate that the Māori population has a younger age structure. [19]

This section provides an overview rather than a comprehensive picture of the status of human rights and the Treaty in New Zealand today. The concluding section provides an outline of what has changed since 2004, an assessment of current status, and what the areas for action are now.

INTERNATIONAL REVIEWS OF NEW ZEALAND'S HUMAN RIGHTS PERFORMANCE

In 2009, New Zealand was the subject of a Universal Periodic Review by the United Nations Human Rights Council on its human rights performance. Many of the recommendations New Zealand received focussed on the Treaty relationship and were drawn from the 2007 recommendations of the UN Committee on the Elimination of Racial Discrimination (CERD)'s. These in turn drew on the 2005 report of the United Nation's Special Rapporteur on Indigenous Rights, who visited New Zealand in the wake of the Foreshore and Seabed Act controversy. The Special Rapporteur welcomed New Zealand's moves toward a bicultural approach based on the Treaty, but noted with concern the increasing promotion of an assimilationist position. He found that the controversy reflected the lack of constitutional recognition of the inherent rights of Māori, and he called for responsible debate on constitutional issues. [20]

During its most recent review of New Zealand in 2007, CERD welcomed the reduction of socio-economic disparities between Māori and Pacific peoples and the rest of the population, and the significant increase in the number of Māori and non-Māori who had proficiency in te reo.

It recommended that New Zealand:

- continue the public discussion over the status of the Treaty of Waitangi, with a view to its possible entrenchment as a constitutional norm
- ensure affected communities participate in reviews of targeted policies and programmes, and inform the public about the importance of special measures to ensure equality
- ensure the 2008 cut-off date for the lodging of historical Treaty claims does not unfairly bar legitimate claims
- ensure the Treaty of Waitangi is incorporated into domestic legislation where relevant
- consider granting the Waitangi Tribunal binding powers to adjudicate Treaty matters
- renew Crown–Tangata Whenua dialogue on the Foreshore and Seabed Act 2004
- include references to the Treaty in the new New Zealand curriculum
- address the over-representation of Māori and Pacific peoples in the criminal justice system. [21]

In 2009, the Universal Periodic Review recommendations reiterated a number of the CERD recommendations. These included the need for public discussion on the constitutional status of the Treaty, addressing socio-economic disparities and possible bias in the criminal justice system. New Treaty-related recommendations in 2009 included reviewing New Zealand's stance on the Declaration on the Rights of Indigenous Peoples, and engaging with Māori on the realisation of indigenous rights. [22]

THE CROWN-TANGATA WHENUA RELATIONSHIP

After the 2008 election, the National Party entered into a confidence-and-supply agreement with the Māori Party, in which both parties agreed to act in government according to the Treaty. Māori Party leaders were given prominent

19 Statistics NZ projections. Cited in Te Puni Kōkiri (2007), *For Maori Future Makers* (Wellington: Te Puni Kōkiri), pp 7–8. Accessible online at http://www.tpk.govt.nz/en/in-print/our-publications/publications/for-maori-future-makers/download/tpk-demotrends-2007-en.pdf

20 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: New Zealand, 62nd session of the Commission on Human Rights, E/CN.4/2006/78/Add.3. Accessed 15 September 2010 from http://www2.ohchr.org/english/issues/indigenous/rapporteur/vists/htm

21 Committee on the Elimination of Racial Discrimination (2007). Concluding observations New Zealand. CERD/C/NZL/CO/17

22 United Nations Office of the Commissioner for Human Rights (2009), Universal Periodic Review – New Zealand. Accessed 10 December 2009 from http://www.ohchr.org/EN/HRBodies/UPR/PAGES/NZSession5.aspx

ministerial portfolios outside Cabinet. The Government commissioned a review of the Foreshore and Seabed Act, approved a Māori flag to fly on Waitangi Day, made a commitment to a constitutional review and established the Whānau Ora policy. Conversely, recommendations by the Royal Commission on Auckland Governance for Māori representation in decision-making for the Auckland 'super-city' council were rejected.

At the level of central and local service provision, relationships have been developed with individual central Government agencies, local bodies and service providers. Positive examples of the Crown and Tangata Whenua working together to advance common aspirations include the Crown–Tangata Whenua restoration programme to restore and protect the Te Arawa Lakes, and the co-management agreement which created the Guardians Establishment Committee to restore and protect the Waikato River. The establishment of Māori constituencies on Environment Bay of Plenty provides another example of positive Crown–Tangata Whenua interaction.

There is a long tradition, dating back to the origins of the Kīngitanga, of iwi convening at Pukawa on the shores of Lake Taupo to discuss issues of national importance. More recently, the Government has met with an Iwi Leadership Group to discuss matters such as climate change, water, and the foreshore and seabed. The continued growth and development of Māori authorities has worked to strengthen Māori leadership.

The Declaration on the Rights of Indigenous Peoples calls for the State to consult and co-operate in good faith with Indigenous peoples through their own representative institutions, in order to obtain their free prior and informed consent before implementing measures that affect them (Article 19). There are currently no formal constitutional or legal mechanisms to provide for this, nor is there a consensus among Māori on the desirability of having a pan-Māori forum to exercise this function. Any such forum should be mandated to address issues in the Treaty partnership in a proactive rather than reactive way. Also at stake is whether such a forum would be established for the benefit of Māori or for the benefit of the Crown. The 2010 review of the Māori Community Development Act 1962, which established the New Zealand Māori Council, explores this issue. Currently, the primary means of Crown–Tangata Whenua consultation is between the Crown and iwi and hapū.

THE HEARING AND SETTLEMENT OF TREATY CLAIMS

By 2009, the Waitangi Tribunal had registered more than 2120 claims by Māori against the Crown. A substantial number were new claims received prior to the 1 September 2008 deadline for historical claims. As at September 2009, the Tribunal had reported on 15 of its 37 inquiry districts, covering 71 percent of New Zealand's land area. A further 15 districts were either in hearing or preparing for inquiry. In the remaining districts, major tribal groups have settled or are in negotiation.

By February 2010, nearly $1.087 billion had been committed to final and comprehensive settlements and several part settlements. The total value of settlements has exceeded a nominal one billion dollars, but has not yet reached the equivalent adjusted amount necessary to activate the relativity mechanism in the earlier deeds. The largest single settlement to date – enacted by the Central North Island Forests Land Collective Settlement Act – was passed in 2008, and was notable for its creative approach to achieving a complicated settlement affecting a number of iwi groups. This settlement alone transferred approximately $450 million in land (176,000 hectares) and cash to eight central North Island iwi – Ngāti Tūwharetoa, Ngāti Whakaue, Ngāi Tūhoe, Ngāti Whare, Ngāti Manawa, Ngāti Rangitihi, Raukawa and the affiliate Te Arawa iwi and hapū – in order to settle their historical grievances against the Crown.

The allocation and transfer of assets from the 1992 Fisheries Settlement is almost complete, and only seven of 57 iwi have yet to assume 'mandated iwi organisation' status. Many iwi who have assumed this status are now well advanced in resolving coastline boundary agreements, and are consequently receiving the balance of their commercial fisheries assets.

The Māori Commercial Aquaculture Settlement Act 2004 provides full and final settlement for all Māori claims to commercial aquaculture arising after 21 September 1992. The settlement of aquaculture claims in May 2009 was a significant milestone. The Crown and 10 coastal iwi signed a deed of settlement that included a one-off payment of $97 million. This deed covers the majority of New Zealand's aquaculture development areas.

Some foreshore and seabed agreements and deeds of settlement have been reached. Negotiations were suspended while a review of the Foreshore and Seabed Act 2004 took place. The Government indicated that it would keep faith with negotiations concluded under the 2004 Act. In June 2010 the Government announced its decision to repeal and replace the 2004 act, enabling Māori to have their rights determined in court or through settlement negotiations.

PROTECTION AND DEVELOPMENT OF MĀORI LAND

Te Ture Whenua Māori Act 1993 gives the Māori Land Court substantial powers to promote the retention of land with Māori owners, facilitate its utilisation and protect wāhi tapu.

There are now around 1.5 million hectares – about 6 per cent of the total land area – of Māori land in New Zealand. Most of this remaining Māori land is in Waiariki (Bay of Plenty), Tairāwhiti (East Coast) and Aotea (Manawatu/Wanganui/Taranaki), although activity in the court occurs throughout the country and can be highly contested in areas where there is less land. Māori land generally has multiple owners, with 10 per cent of Māori land having as many as 425 owners. As owners die and their descendants succeed to their interests, the number of owners of Māori land increases and the fragmentation of Māori land ownership continues. Te Ture Whenua Māori Act 1993 attempts to provide some relief from these effects in the form of ahu whenua trusts, whānau trusts and whenua topu trusts.

It is estimated that up to 80 per cent of Māori land is inarable and can support only a limited range of productive uses, or is located in remote areas. Up to 30 per cent of Māori land could be landlocked, lessening its viability because of access issues. [23] Most of the 27, 411 blocks of Māori land are now registered under the Land Transfer Act 1952, following completion of the Māori Freehold Land Project (2005–10).

In 2009 the Kāinga Whenua scheme, designed to help Māori landowners build houses on multiply owned Māori land, was established to ease some of the restrictions on development. This scheme is the most recent of several programmes designed to assist Māori owners in this respect, including schemes from the 1940s to the 1990s of the Department of Māori Affairs, Housing Corporation of New Zealand and Housing New Zealand Limited.

RECOGNITION OF RIGHTS IN THE FORESHORE AND SEABED

In 2003, the Court of Appeal decision in Ngāti Apa v Attorney-General held that legislation must be explicit if it is to extinguish customary rights to land (in this case, the foreshore and seabed). [24] The subsequent controversy about that decision led to the passing of the Foreshore and Seabed Act in 2004, which vested title to the foreshore and seabed in the Crown and effectively extinguished Māori rights. It did provide a settlement process, under which a few iwi reached agreements with the Crown.

A review of the widely criticised act was conducted in early 2009. Following a series of nationwide consultation hui, the panel reported in July that the act should be repealed and a replacement developed. The panel recommended that a new act be based on the Treaty of Waitangi partnership. It should acknowledge that customary rights in any particular area belong to hapū and iwi, and that these are property rights and should not be lightly removed. Further recommendations included restoring access to the courts to determine customary rights and providing reasonable access. The panel proposed two options for the apportionment of customary and public interest: regional or national settlements, or a mix of the two. In 2010, following discussions with iwi leaders, the Government announced its proposal for a new regime and embarked on a programme of discussion. The Government has affirmed its intention to repeal the act and establish a replacement regime that would place the foreshore and seabed in the public domain; create avenues for iwi and hapū to seek customary title; and recognise 'mana tukuiho' in the foreshore and seabed.

23 Office of the Controller and Auditor-General of NZ (2004), Report of the Controller and Auditor-General: *Māori Land Administration: Client Service Performance of the Māori Land Court and Māori Trustee* (Wellington: The Audit Office), March, part 2: Maori land, section 2.12. Accessible online at http://www.oag.govt.nz/2004/maori-land-court/part2.htm

24 In this instance, customary rights mean the rights Māori held, according to their own laws, prior to colonisation and which have survived in some form to the present day.

MĀORI ECONOMIC DEVELOPMENT

The commercial assets owned by Māori are key economic resources for iwi and New Zealand. Over half (52 per cent) of Māori investment is in primary industries, including agriculture, forestry and fisheries. A further 40 per cent is invested in tertiary industries, including cultural and recreational services; wholesale and retail trade; education; health; and community services. Māori commercial assets grew significantly between 2001 and 2005–06, and the value of Māori businesses has also increased. The increased business value is partly due to a greater number of Māori employers and Māori self-employed.[25]

In 2009 the Minister of Māori Affairs organised a Māori employment hui and a Māori economic summit to co-ordinate a response to the economic recession. A Māori Economic Taskforce was subsequently established and will receive government investment of $10 million over 2009–10 and 2010–11 to protect and support Māori through the period of economic recession; think beyond the recession and identify strategic economic development opportunities for Māori; and promote and utilise kaupapa Māori and Māori structures as drivers of prosperity. The taskforce works in seven key areas: tribal asset development, the primary sector, education and training, small to medium enterprises, social and community development, investment and enterprise, and economic growth and infrastructure.

ECONOMIC AND SOCIAL RIGHTS

Since 2001, the annual Social Report, published by the Ministry of Social Development, has charted improvements in socio-economic outcomes for Māori. A number of these improvements have occurred at a greater rate than for the total population. Outcomes for Māori have improved significantly in the areas of life expectancy, participation in secondary and tertiary education, and unemployment and employment rates. Despite improvements in these and other areas, average outcomes for Māori tend to be poorer than for the total population. Areas in which there are significant gaps between Māori and the rest of the population include health (especially smoking rates, obesity and potentially hazardous drinking patterns), safety (assault mortality and victims of crime), employment (median hourly earnings and workplace injury claims) and housing (household overcrowding).

In June 2009, a Whānau-centred Initiatives Taskforce was established to develop a policy framework for a new method of government interaction with Māori service providers, to holistically meet the social service needs of whānau. This is known as 'Whānau Ora' – a whānau-centred approach to Māori wellbeing. After extensive consultation, the taskforce reported in April 2010 and government is considering how to implement its recommendations.

Gaps continue to exist between the Māori and non-Māori labour markets. Despite improvements over the last decade, these gaps have widened due to the economic recession that began in late 2008. Unemployment rates in particular have risen, and are higher for Māori than for non-Māori. Inequalities also persist in pay rates, occupational spread and representation in senior roles.

On average, Māori continue to have poorer health outcomes that any other ethnic group in New Zealand. Despite very slight improvements in 2008, Māori remain over-represented in all aspects of the criminal justice system. Criminal justice and social-welfare legislative reforms undertaken in 2009 are likely to have a disproportionate effect on Māori. These issues are discussed in greater detail in other chapters.

PUBLIC AWARENESS OF THE TREATY AND HUMAN RIGHTS

In 2009, UMR Research found that 70 per cent of Māori and 56 per cent of all New Zealanders agreed that the Treaty was New Zealand's founding document. A total of 56 per cent of Māori and 49 per cent overall agreed the Treaty was for all New Zealanders.

In the same survey, 34 percent of all respondents said they had high-level knowledge of indigenous rights, compared with 45 per cent who said they had a high level of knowledge of human rights. Declared high-level knowledge of the Treaty tends to be slightly higher among Māori respondents. (Due to the small sample size of Māori respondents, the results for Māori are indicative only.)

25 Te Puni Kōkiri (2008), Te Pūtake Rawa o Ngāi Māori: The Māori Asset Base, Fact Sheet 2001–2008. Accessed 30 November 2009 from http://www.tpk.govt.nz/en/in-print/our-publications/fact-sheets/maoriassetbase/download/tpk-maoriassetbase-2008-en.pdf

In addition, only 32 per cent of Māori and 28 per cent of people overall agreed that the relationship between the Crown and Māori was healthy.

DECLARED KNOWLEDGE OF THE TREATY

Year	All respondents	Māori respondents
2009	41%	55%
2008	34%	47%
2007	41%	57%
2006	42%	74%

Conclusion
Whakamutunga

In respect of human rights and the Treaty in New Zealand today, there are legislative mechanisms in place to protect the principles of the Treaty and the rights of Māori as Indigenous people. In practice, the level of recognition and protection varies. There has been significant progress in hearing and settling Treaty claims, revitalising te reo Māori and establishing whānau-centred initiatives, particularly in health and education.

Systemic disadvantage remains to be fully addressed, however, and the process of providing redress for historical grievances is yet to be completed. Significant challenges also remain in Māori land development, in enabling Māori participation in decision-making at the local level, and in improving social and economic outcomes for Māori in health, education, employment, standard of living and imprisonment.

With the Māori population projected to grow to 810,000 or 16.2 per cent of the population by 2026, it is vital that representative structures and public services are optimised. [26] This is to ensure the endurance of the Treaty partnership and better economic, social and cultural outcomes for Māori and non-Māori New Zealanders.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following priorities to advance human rights and the Treaty:

Public awareness
Increasing public understanding of the Treaty and the human rights of Indigenous peoples – including the meaning of rangatiratanga today – and building relationships between Māori and non-Māori New Zealanders at the community level.

Constitutional arrangements
Reviewing laws that make up our constitutional framework, to ensure that the Treaty, indigenous rights and human rights are fully protected.

Treaty settlements
Concluding the settlement of historical breaches of the Treaty promptly and fairly.

Pathways to partnership
Building on existing processes and developing new fora for Tangata Whenua–Crown engagement locally and nationally, and develop and implement new pathways to Tangata Whenua–Crown partnerships.

UN Declaration on the Rights of Indigenous Peoples
Promoting awareness of the Declaration on the Rights of Indigenous Peoples in New Zealand, particularly in fora charged with the responsibility for the management and/or administration of natural resources.

Children and their families
Ensuring that all children and young people enjoy improved economic, social and cultural outcomes which more fully realise the rights set out in the Treaty of Waitangi and international human rights treaties, including the declaration.

26 Statistics New Zealand (2010), National Ethnic Population Projections: 2006 (base) – 2026 update. Accessed 5 May 2010 from http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/nationalethnicpopulationprojections_hotp2006-26.aspx

5. Human Rights and Race Relations

Whakawhanaungatanga a iwi

We will pursue a policy of eliminating racial discrimination in all its forms.

Convention on the Elimination of Racial Discrimination, Preamble (edited)

Introduction
Tīmatatanga

WHAT ARE THE HUMAN RIGHTS ISSUES IN RACE RELATIONS?

Harmonious race relations depend on the equal enjoyment of human rights by all, regardless of ethnic or national origins or skin colour. The New Zealand Statement on Race Relations identifies 10 factors that form a framework for harmonious race relations:

- the Treaty of Waitangi
- freedom from discrimination
- freedom of expression
- safety
- participation in public affairs
- decent work, education, health and housing, and an adequate standard of living
- recognition of the rights of migrants
- education for diversity
- the right to cultural identity (including language)
- responsibilities to others.[1]

WHAT ARE HARMONIOUS RACE RELATIONS?

'Harmonious race relations' refers to the ways in which peoples who are ethnically diverse positively interact with one another. Such positive interaction is based on mutual respect for, and realisation of, each other's rights, non-discrimination, and the recognition of and support for cultural diversity. Developing harmonious race relations also depends on eliminating racism. Racism uses biological differences – whether imagined or real – to assert the superiority of one group over another to justify aggression or privilege. Racism is any individual action, or institutional practice backed by institutional power, which subordinates or negatively affects people because of their ethnicity.

HUMAN RIGHTS COMMISSION INITIATIVES SINCE 2004

Since 2004, the Commission – in partnership with other organisations – has established a framework for addressing race relations issues. This comprises:

- the New Zealand Diversity Action Programme, bringing together organisations with a shared commitment to action on cultural diversity, with networks for media, religious diversity, language policy and refugee issues
- the annual New Zealand Diversity Forum, where existing and new diversity initiatives can be discussed and diversity networks can meet
- a system for acknowledging positive contributions to race relations on a monthly and annual basis (the New Zealand Diversity Awards)
- observance of a national day (Race Relations Day) to promote community celebration of cultural diversity and discussion of race relations, and a calendar of 'diversity dates'
- key partnerships to promote Māori Language Week and Samoan Language Week to the wider community
- publication of national policy statements on language diversity, religious diversity and race relations
- an annual race relations report as a basis for identifying key issues and accounting to the United Nations Committee on the Elimination of Racial Discrimination
- a relationship with this UN committee and a mechanism for feeding into and following up on its recommendations.

1 This summary of rights and responsibilities is drawn from the Human Rights Commission's Statement on Race Relations. Accessible online at http://www.hrc.co.nz/home/hrc/racerelations/tengirathenzdiversityactionprogramme/statementonracerelations.php

◀ The senior kapa haka group of Titirangi Primary school readies for the stage at the West Auckland Primary Schools Multicultural Festival 2010 at Corban Estate Arts Centre, Henderson. About 3500 children from 36 primary schools performed.

The right to religion and belief is dealt with in a separate chapter. Many of the members of the growing religious communities in New Zealand are of non-European and non-Māori origin and there is thus an overlap between religion and ethnicity in some instances. Muslims encountered negative attitudes and stereotypes following the 11 September 2001 attacks in New York because of a degree of association in the public mind between Islam and terrorism, and Sikhs also experienced abuse. There have been issues of reasonable accommodation in education, at work and in the community because of the wearing of religious attire and requirements for religious observance, particularly affecting Muslims and Sikhs.

Many other chapters of the status report refer to race relations issues. These include the chapters on human rights and the Treaty of Waitangi, the rights of migrants, and the rights of refugees and asylum-seekers. Other chapters have race-related dimensions. These include the chapters on the right to freedom of expression; the rights of women, children and young people, and people with disabilities; the right to justice; and the rights to work, health and an adequate standard of living. This chapter of the report does not, therefore, dwell on those topics in detail. Rather, it focusses primarily on racial discrimination, cultural diversity and harmonious relations between diverse peoples.

International context
Ki ngā kaupapa ā taiao

The two key international treaties on the human rights of all people are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICECSR). Both these and subsequent human rights treaties, such as the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Protection of All Migrant Workers and Members of their Families and the Convention on the Rights of People with Disabilities, explicitly affirm the right to freedom from racial discrimination and the rights of all people to practise their own culture, religion and language.

Because of the pervasive and destructive impact of racism and racial discrimination, a specific Convention on the Elimination of Racial Discrimination was adopted by the United Nations in 1965. This convention defines racial discrimination as:

> **Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.**

The convention requires governments to eliminate racially discriminatory policies, prohibit racial discrimination and encourage intercultural communication. It commits governments to declare unlawful the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and acts of racial violence, and to prohibit organisations that incite racial hatred. It declares all people, without distinction as to race, colour, national or ethnic origin, to be equal before the law and in the enjoyment of civil, political, economic, social and cultural rights, and it provides for special measures to be instituted to achieve equality.[2] Governments are required to provide protection and remedies against racial discrimination and to adopt measures to combat prejudice and promote understanding and tolerance.

The Convention on the Rights of the Child (1989) requires that "in those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her religion, or to use his or her own language".

2 Treating groups who have been discriminated against in the past the same as those who have not been can perpetuate existing inequalities. As a result, to ensure genuine equality, at times it will be necessary to treat individuals or groups differently. Special measures should therefore not be seen as discrimination but rather as a way of realising equality for everyone. The Commission has published guidance on special measures. Human Rights Commission (2010) Guidelines on Measures to Ensure Equality (Auckland, HRC), accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/03-Mar-2010_16-12-18_Special_Measures_Feb_10.pdf.

The **Declaration on the Rights of Indigenous Peoples** (2007) sets out universal human rights as they apply to Indigenous peoples. The declaration is discussed more fully in the chapter on human rights and the Treaty of Waitangi.

DURBAN DECLARATION AND PROGRAMME OF ACTION

The United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in 2001, adopted a declaration and a wide-ranging World Programme of Action to Combat Racial Discrimination. The programme has 219 separate recommendations, but its main themes relevant to New Zealand are:

- **effective legal mechanism**s to address instances of racism and racial discrimination
- **targeted programmes to reduce inequalities** experienced by indigenous peoples and ethnic minorities
- **public education in schools and workplaces**, and through public information programmes, about racism and racial discrimination, Indigenous peoples and migrant communities
- **promotion of cultural diversity** as a positive value in society, including the protection of the languages and cultures of Indigenous peoples and ethnic minorities
- **diversity in government and business** to remove institutional barriers, provide equal access to services and enable equal participation by Indigenous peoples and ethnic minorities
- **research, data collection and measurement** to enable progress to be monitored in achieving racial equality.

A Durban Review Conference was held in Geneva in 2009. The outcome document reaffirms the 2001 Durban Declaration and Programme of Action; re-emphasises a number of issues, including those listed above; and identifies further issues that that have assumed greater prominence since 2001.[3] Those with particular relevance to New Zealand include:

- **strengthening implementation of the Convention on the Elimination of Racial Discrimination (ICERD)** through adoption of the complaints procedure under Article 14, improved interaction with the Committee on the Elimination of Racial Discrimination (CERD), mechanisms for developing CERD reports in consultation with human rights institutions and civil society, and effective monitoring and evaluation of the Committee's recommendations
- **ensuring** the protection of human rights in the context of **anti-terrorism** legislation and activities
- **protecting the rights of migrant workers** through a comprehensive and balanced approach to migration, and countering xenophobia
- **collecting reliable data on hate crime**, as well as developing a comprehensive system of data collection and analysis on racial discrimination and racial equality
- **working with sporting codes** to ensure freedom from racism and discrimination in sport.

In the 2006 Census, New Zealanders identified their ethnicity as follows:

European	**2,609,592**	**67.6%**
Māori	**565,329**	**14.6%**
New Zealander	**429,429**	**11.1%**
Asian	**354,552**	**9.2%**
Pacific	**265,974**	**6.9%**
MELAA*	**36,237**	**0.9%**[4]

*Middle Eastern, Latin American and African

Young people are even more diverse. The ethnicity of New Zealand children attending primary and secondary school in 2009 was:

European	**424,242**	**55.8%**
Māori	**166,998**	**22.0%**
Pacific	**73,081**	**9.6%**
Asian	**68,784**	**9.0%**
Other	**18,225**	**2.4%**[5]

3 Accessed 18 September 2010 from http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf

New Zealand context
Kaupapa o Aotearoa

NEW ZEALAND'S ETHNIC DIVERSITY

There has been a marked increase in multiple ethnicities among younger generations. In the 2006 Census, only 10 per cent of all New Zealanders identified with more than one ethnic group. By contrast, 25 per cent of babies born in 2008 had more than one ethnicity. Two-thirds of Māori babies and almost half of Pacific babies belonged to multiple ethnic groups, as did nearly a third of babies of European and Asian descent. [6]

National ethnic population projections to 2026 reflect these changes. In 2010, Statistics New Zealand projected that New Zealand's Asian and Pacific populations will grow faster than other groups:

- the European or Other population is projected to reach 3.47 million by 2026, an increase of 260,000 (0.4 per cent a year) over the estimated resident population at 30 June 2006 of 3.21 million.
- the Māori population is projected to reach 810,000 by 2026, an increase of 190,000 (1.3 per cent a year) over the 2006 estimate of 620,000.
- the Asian population is projected to reach 790,000 by 2026, an increase of 390,000 (3.4 per cent a year) over the 2006 estimate of 400,000.
- the Pacific population is projected to reach 480,000 by 2026, an increase of 180,000 (2.4 per cent a year) over the 2006 estimate of 300,000. [7]

Collection of ethnicity identity data

Statistics New Zealand collects ethnicity data in the five-yearly Census, and the definition of ethnicity for this purpose is a matter of continuing debate and review. The current ethnicity standard, which allows people to identify multiple ethnicities, uses two classifications:

- The 'total response' classification counts the number of people who have reported each ethnic category, no matter how many they reported.
- The 'single and combined response' classification allocates individuals to unique ethnic categories, reflecting the mix of responses they reported if more than one.

After a 2004 review, the 'prioritised' classification – which prioritised responses into five groups (European, Māori, Asian, Pacific and Other) in order to simplify the presentation of data – was removed from the standard. The move away from this classification was partly because it increasingly under-counted Pacific peoples and other minority groups as multiple reporting increased. [8]

In the 2006 Census, partly as a result of a privately run campaign, there was a marked increase in people who reported their ethnicity as 'New Zealander': the number of 'New Zealander' responses to the ethnicity question increased from more than 90,000 in 2001 to more than 400,000 in 2006, making 'New Zealander' the third largest response group in the 2006 Census after 'New Zealand European' and 'Māori'. Although subsequent analysis revealed that around 90 per cent of these respondents were 'New Zealand European', they were coded in 'Other', skewing the results in both categories. In reviewing the ethnicity standard, Statistics New Zealand noted that conflating ethnicity with national identity was a growing trend overseas, but decided against listing 'New Zealander' as an option in the 2011 Census. [9]

4 People were able to identify with more than one ethnic group, so percentages do not add up to 100%. Statistics New Zealand, QuickStats about Culture and Identity: Ethnic Groups in New Zealand, accessed on 24 August 2010 from http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/quickstats-about-a-subject/culture-and-identity/ethnic-groups-in-new-zealand.aspx

5 July School Roll Returns (2009), Student Numbers by Age and Ethnic Group, Education Counts. Accessed 5 May 2010 from http://www.educationcounts.govt.nz/statistics/maori_education/schooling/6028

6 See Tables 2.02 and 2.04, Statistics New Zealand, Demographic Trends 2009. Accessed 24 August 2010 from http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/demographic-trends-2009.aspx

7 Statistics New Zealand, National Ethnic Population Projections: 2006 (base)–2026 update. Accessed 5 May 2010 from http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/nationalethnicpopulationprojections_hotp2006-26.aspx

8 Statistics New Zealand, Final Report of a Review of the Official Ethnicity Statistical Standard 2009. Accessed 11 May 2010 from http://www.stats.govt.nz/publications/populationstatistics/review-of-the-official-ethnicity-statistical-standard-2009.aspx

9 Statistics New Zealand, Review of the Official Ethnicity Standard 2009. Accessed 9 November 2009 from http://www.stats.govt.nz/publications/populationstatistics/review-of-the-official-ethnicity-statistical-standard-2009.aspx

The census questions were reviewed after the 2001 Census, and Statistics New Zealand proceeded with the same questions in 2006. Overall, for the 2011 Census there will be minimal change, no new topics and improved data quality. [10] A key objective is not only to take account of changing definitions of ethnicity, but also to develop more consistency across all data collection by government agencies.

THE TREATY OF WAITANGI

The Treaty of Waitangi is a fundamental reference point for race relations and human rights in New Zealand. The chapter on human rights and the Treaty deals specifically with indigenous rights and the relationship between Māori iwi, hapū and whānau and the Government, but the Treaty is the founding document of the nation and applies equally to all. It recognises the right of everyone to belong in New Zealand and to enjoy equal rights.

Legislation

The **New Zealand Bill of Rights Act 1990** (BoRA) guarantees freedom from discrimination and the rights of minorities. It states that a person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

The **Human Rights Act 1993** (HRA) establishes the Human Rights Commission with primary functions to:

- advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society
- encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society.

The HRA provides for the position of Race Relations Commissioner to lead the Commission's work on race relations.

The HRA prohibits discrimination on the grounds of colour, race, and ethnic or national origins, and also prohibits (in specified circumstances) racial harassment and inciting or exciting racial disharmony. It provides exceptions to the grounds of discrimination for special measures to achieve equality. The Commission is required by the act to promote understanding of the human rights dimensions of the Treaty of Waitangi.

The HRA provides a dispute-resolution mechanism for complaints about racial discrimination, racial harassment and creating racial disharmony. Where disputes cannot be resolved by mediation and related options, complaints can be referred to the Human Rights Review Tribunal. The Office of Human Rights Proceedings may provide legal representation subject to certain criteria.

The **Broadcasting Act** (1989) provides for the Broadcasting Standards Authority to set broadcasting standards and to consider public complaints about breaches of these. The standards include a requirement for accuracy, fairness and balance, and no denigration of ethnic groups.

The **Summary Offences Act** 1981 contains a range of offences, including disorderly behaviour, offensive behaviour, offensive language, intimidation, assault and damage to property that apply to instances of racially motivated hate crime. Although the Summary Offences Act does not list offences that are specifically racially motivated, the **Sentencing Act 2002** makes it an aggravating factor in sentencing if the offender commits an offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic, such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability.

Racial discrimination in employment and accommodation are further prohibited in the **Employment Relations Act 2000** and the **Residential Tenancies Act 1986**. The Employment Relations Service and Tenancy Services offer mediation to settle differences. If these cannot be resolved, they can be referred to the Employment Relations Authority or the Tenancy Tribunal.

Other relevant legislation, including the **Education Act** and **Electoral Act**, are discussed in other sections of this report. See especially the chapters on human rights and the Treaty of Waitangi, the right to education and democratic rights.

10 Statistics New Zealand, 2011 Census Content Report. Accessed 9 November 2009 from http://www.stats.govt.nz/Census/2011-census/2011-census-content-report.aspx

CENTRAL AND LOCAL GOVERNMENT

A number of government departments focus on specific aspects of race relations, Indigenous peoples, minority rights and cultural diversity. They are the Ministry of Māori Development (Te Puni Kōkiri), the Ministry of Pacific Island Affairs, the Office of Ethnic Affairs, the Office of Treaty Settlements and the Ministry for Culture and Heritage.

All public agencies have a responsibility to ensure equitable access to their services and to address inequalities, and there are many agency strategies and policies to give effect to this responsibility. A telephone interpretation service for government agencies, Language Line, was established by the Office of Ethnic Affairs in 2003. The Government has policy frameworks to meet the needs of ethnic communities [11] (Office of Ethnic Affairs, 2002) and to address responsiveness to Māori and Pacific peoples.

Key social and economic policy ministries with a particular responsibility for reducing disparities include the Ministry of Social Development, the Ministry of Health, the Ministry of Education, the Department of Building and Housing, the Department of Labour, the Ministry of Justice and the Ministry of Economic Development. The New Zealand Police also have specific strategies for Māori, Pacific and ethnic communities.

The State Services Commission (SSC) has responsibility for ensuring that government departments meet their obligations under the State Sector Act 1988 regarding equal employment opportunities (EEO). In 2008, under section 6 of the act, the SSC launched Equality and Diversity, the new EEO policy for the public service. Applying to all departments in the public service, the policy is aimed at basing appointments on merit while recognising the employment aspirations of Māori, ethnic and minority groups, women, and people with disabilities.[12]

Local authorities are required, under the **Local Government Act 2002**, to promote the social, economic, environmental and cultural well-being of their communities; to have regard to the diversity of their communities; and to ensure that Māori are able to contribute to the decision-making process. Councils are required to develop long-term community outcomes and have a community plan for their implementation. Local authorities also have significant responsibilities in relation to Māori under the Resource Management Act 1991. Many councils have well-established relationships with local iwi, hapū and whānau, and some also with Pacific and other ethnic groups.

CIVIL SOCIETY

A range of organisations that represent different ethnic communities take an active role in the wider community. Such organisations include both iwi (particularly post-settlement groups such as Te Rūnanga o Ngāi Tahu) and pan-Māori institutions (such as the New Zealand Māori Council), and organisations representing most ethnic communities, such as the New Zealand Chinese Association, the Indian Central Association and the Samoan Advisory Council. While many of these organisations work hard to promote and celebrate diversity, they focus less on underlying race relations principles. One example of an organisation whose role is to foster relationships between communities is the Federation of Multicultural Councils, which acts as a national umbrella organisation for the ethnic communities of New Zealand. The federation's primary purpose is to advocate, lobby, support and share information among the regional councils and New Zealand's ethnic communities. The federation aims to provide an opportunity for people from all segments of New Zealand's diverse society to address the challenges facing our multicultural communities. [13]

The New Zealand Diversity Action Programme (NZDAP) provides a mechanism through which community organisations who seek to enhance their diversity capability and foster harmonious race relations can take action. The programme started from community reaction to the desecration of Jewish gravestones in two Wellington cemeteries in July and August 2004. The sixth anniversary of the NZDAP was marked at the Diversity Forum in Christchurch in August 2010.

11 Office of Ethnic Affairs (2002), 'Ethnic Perspectives in Policy: Helping ethnic people be seen, heard, included and accepted.' Accessed 23 June 2004 from http://www.ethnicaffairs.govt.nz/oeawebsite.nsf/Files/EthnicPerspectivesPolicyPartOne/$fileEthnicPerspectivesPolicyPartOne.PDF

12 State Services Commission, 'Equality and Diversity: New Zealand Public Service Equal Employment Opportunities Policy.' Accessed 6 May 2010 from http://www.ssc.govt.nz/display/document.asp?DocID=6908.

13 See New Zealand Federation of Multicultural Councils website, accessible online at http://www.nzfec.org.nz/page/about-us.aspx

In the past six years, the NZDAP has grown to approximately 250 organisations – with 661 registered projects in 2009 – taking practical initiatives to:

- recognise and celebrate the cultural diversity of our society
- promote the equal enjoyment of everyone's civil, political, economic, social and cultural rights, regardless of race, colour, ethnicity or national origin
- foster harmonious relations between diverse peoples.

Networks have been established for people interested in religious diversity, language policy, media and refugee issues. Through the networks, the Commission has developed a Statement on Religious Diversity (2007), [14] a Statement on Language Policy (2008) [15] and a Statement on Race Relations (2008). [16]

Organisations can register any programme or project that contributes to a diverse, equal and harmonious Aotearoa New Zealand. Registered projects include:

- organisation of and participation in diversity events
- promotion of diversity in the workplace and catering for the diverse needs of clients and customers
- development of policies and programmes for diversity, equality and harmony
- assisting with the settlement of new migrants and refugees
- educational programmes, research and publications
- workshops, conferences and forums on diversity, human rights and harmonious relations
- intercultural and interfaith dialogue and co-operation.

New Zealand today
Aotearoa i tēnei rā

This section examines New Zealand's compliance with international standards, and explores race relations in three key areas: discrimination and harassment; safety; and recognition and support for cultural diversity.

Assessments of New Zealand today in other chapters of this report – including those on human rights and the Treaty of Waitangi; the rights of migrants; the right to asylum; the right to freedom of opinion and expression; and the right to freedom of religion and belief – should be read in conjunction with this section.

COMPLIANCE WITH INTERNATIONAL STANDARDS

New Zealand ratified the Convention on the Elimination of All Forms of Racial Discrimination in 1972. It has not made the declaration provided for in Article 14, which enables individuals to complain directly to the UN Committee for the Elimination of Racial Discrimination (CERD). It has, however, activated the parallel ICCPR procedure, which also provides for individual complaints about racial discrimination. In response to the Universal Periodic Review of New Zealand by the UN Human Rights Council in 2009, the Government indicated that it would consider adopting the Article 14 procedure.

New Zealand generally complies with and exceeds international standards in terms of its legislation and policies on race relations. CERD assessments of New Zealand have generally been positive, while identifying areas for further attention. In its most recent report in 2007, the committee welcomed:

- the importance given to the principle of self-identification when gathering data on the ethnic composition of the population
- the adoption of the 2004 New Zealand Settlement Strategy and the Settlement National Plan of Action
- the New Zealand Diversity Action Programme
- the reduction of socio-economic disparities between Māori and Pacific peoples on the one hand, and the rest of the population on the other hand in particular in the areas of employment and education
- the significant increase in the number of adults, including non-Māori, who can understand, speak, read and write the Māori language

14 Statement on Religious Diversity, accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/27-Aug-2009_09-44-53_Religious_Diversity_09_Web.pdf

15 Statement on Language Policy, accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/21-May-2009_15-42-34_Statementonlanguagepolicy.html

16 Statement on Race Relations, accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/21-May-2009_14-36-48_Statement_on_Race_Relations.html

- the ratification of the 1961 Convention on the Reduction of Statelessness in 2006
- the increase in the budget provided to the New Zealand Human Rights Commission.

The Committee also recommended that the Government:

- take steps to implement the New Zealand Action Plan for Human Rights
- promote continued public discussion on the constitutional status of the Treaty of Waitangi and its place in legislation
- ensure that affected communities participate in any review of targeted policies and programmes, and inform the public about the importance of special measures to ensure equality
- ensure that the cut-off date for lodging historical Treaty claims does not unfairly bar legitimate claims
- consider granting the Waitangi Tribunal legally binding powers of adjudication, and increase funding for the Tribunal
- further engage with the Māori community on the foreshore and seabed
- include references to the Treaty in the new New Zealand curriculum
- increase efforts to address the over-representation of Māori and Pacific people at every stage of the criminal justice system
- ensure that schools are open to all undocumented children
- put an end to the detention of asylum-seekers in correctional facilities, and ensure grounds for refusing asylum-seekers are consistent with international standards,
- collect statistical data on complaints, prosecutions and sentences for racially motivated crimes
- adopt pro-active measures to improve access to procedures for complaints about racial discrimination.

Some of these recommendations have subsequently been addressed, such as further engagement with Māori on the foreshore and seabed, including references to the Treaty in the new school curriculum, and taking steps to enable undocumented children to attend school. The Government has indicated that it is not willing to explore some other recommendations, such as strengthening the powers of the Waitangi Tribunal. Still other recommendations, such as increasing efforts to address the over-representation of Māori and Pacific people in the criminal justice system, relate to entrenched issues that require sustained resourcing and the attention of successive governments.

DISCRIMINATION AND HARASSMENT

Non-discrimination is a basic right for everyone living in New Zealand. Yet evidence from a variety of national and local surveys indicates that people from racial and ethnic minorities continue to experience a significant degree of discrimination and racism in their daily lives, ranging from verbal abuse and denial of opportunity to physical violence.

Experience and perceptions of discrimination

In 2009, Statistics New Zealand released the first information from the New Zealand General Social Survey (GSS). The GSS provides new information about key social and economic outcomes, and includes questions relating to experience of discrimination. According to the GSS 2009, one in 10 people had been discriminated against in 2008–9. The most common were grounds of race, ethnicity, nationality or skin colour. [17] Just over 23 per cent of Asian peoples, 16 per cent of Māori and 14 per cent of Pacific peoples had experienced discrimination in the period, in contrast to just under 8 per cent of Europeans. A Māori Social Survey, which aims to expand insights from the GSS on Māori, is in development and will be put into the field in 2011. [18]

UMR Research regularly surveys New Zealanders' perceptions of discrimination. This gives an indication of what people observe in their own social context. The most recent survey was in December 2009. In unprompted

17 Statistics New Zealand, General Social Survey: 2008: 'Hot Off the Press', pp 1,10. Accessed online on 9 November 2009 at http://www.stats.govt.nz/browse_for_stats/people_and_communities/Households/nzgss_HOTP2008.aspx

18 Statistics New Zealand, He Kohinga Whakaaro: Maori Social Survey Discussion Document accessed online on 9 Novermber 2009 at http://www.stats.govt.nz/reports/papers/maori-social-survey-discussion-paper.aspx

questioning, respondents named the groups of people that they think are generally most discriminated against in New Zealand today. Two-thirds of respondents (64 per cent) nominated an ethnic group. This was an increase from 47 per cent in 2008, and is now the highest since 2001 when the survey was first conducted. A total of 28 per cent identified Asians (up from 18 per cent in 2008), followed by 10 per cent identifying Māori (up from 7 per cent in 2008), 5 per cent identifying Pacific peoples (no change), and 13 percent identifying Europeans (up from 5 per cent in 2008). In prompted questioning, 75 per cent of respondents considered that Asians were subject to a great deal of or some discrimination. Recent immigrants were thought to be subject to a great deal of or some discrimination by 63 per cent of respondents, and refugees by 61 per cent.[19]

In 2010 the Centre for Applied Cross-cultural Research at Victoria University published a meta-analysis of all research relating to the experience of discrimination by Asian New Zealanders. The results, presented at the Diversity Forum in August 2010, included the following:

- Asians are the ethnic group that experienced the most discrimination.
- Of these, East Asians (for example from China, Japan and Korea) were most likely to report discrimination, followed by South-East Asians (for example from Indonesia, Malaysia and the Philippines).
- Asian people experienced most discrimination in a public place such as a street (public harassment): this could take the form of racist epithets or having things thrown at them.
- Asian people experienced significant discrimination both working at and applying for jobs, and had higher rates of unemployment and under-employment than other ethnic groups.
- Despite these experiences, Asian people have reported high levels of life satisfaction in New Zealand, and are accustomed to using coping strategies to deal with experiences of discrimination.
- Meaningful and extended contact between Asian peoples and other New Zealanders should be encouraged as it has been shown that the more contact people have with Asians the 'more warmly' they feel towards them.

The presentation aimed to begin a dialogue on action to be taken in the future to lessen discrimination experienced by Asian peoples.[20]

Complaints about discrimination under the Human Rights Act

Racial discrimination – which includes racial harassment, discrimination based on ethnic or national origin, and inciting racial disharmony – accounted for the largest number of complaints received by the Human Rights Commission in 2008–2009. Of the 1405 formal complaints received, 434 (31 per cent) were race related. A total of 28.2 per cent of these complaints related to employment and 20.7 per cent to the provision of goods and services.

The proportion of complaints received by the Commission relating to race-related grounds has increased in the last five years, as shown in Table 1.

TABLE 1: PROPORTION OF RACE RELATED COMPLAINTS TO THE COMMISSION

Year	Number of formal complaints	Number of race-related complaints	Percentage of race-related complaints
2004-5	1862	465	25%
2005-6	2058	539	26%
2006-7	1665	453	27%
2007-8	1326	389	29%
2008-9	1405	434	31%

19 UMR research undertaken by a telephone survey of 750 individuals aged 18 or over. Key variables in the research include area (Auckland, provincial, Christchurch, Wellington, rural), gender, age, occupation, income, ethnicity, disability/health condition, and experience of discrimination. The 2008 results are accessible online under 'Surveys/Research' at http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/demographic-trends-2009.aspx

20 Summarised from Adrienne N, Girling, James H, Liu and Colleen Ward (2010), 'Confident, Equal and Proud? A discussion paper on the barriers Asians face to equality in New Zealand.' Unpublished paper presented at the annual Diversity Forum, Christchurch, 23 August 2010. Accessible online at http://www.slideshare.net/nzhumanrights/barriers-to-asian-equality-discussion-paper

Racially offensive public statements and behaviour

Section 61 of the HRA prohibits expression that is threatening, abusive, or insulting, and considered likely to excite hostility against or bring into contempt a person or group of persons on the ground of their colour, race or ethnic or national origins. It is the effect of what is said that counts, not whether the person did or did not intend to excite hostility.

Although the Commission receives regular complaints about racially offensive or divisive public statements, many of these fall outside its complaints jurisdiction because they do not meet the legal threshold of section 61 of the HRA, when weighed against the BoRA protection of the right to freedom of speech. If such statements are published or broadcast, however, alternative complaints procedures under the codes administered by the Broadcasting Standards Authority can be used, or complaints can be lodged with the self-regulatory New Zealand Press Council (NZPC) and Advertising Standards Authority (ASA).

The Commission considers that there is a legitimate public issue about the efficacy of section 61, if racial disharmony complaints seldom reach the threshold at which it may intervene. The Commission believes it is time for a review of section 61, to see if it is fulfilling its purpose and to consider whether legislative amendments are required. The reasons for this are more fully explored in the chapter on the right to freedom of opinion and expression.

The media

The media, in exercising their right to freedom of expression, have a responsibility not to denigrate ethnic groups and to report in an accurate, fair and balanced way. Freedom of expression also implies a positive role for the media to promote racial harmony through the airing of plural voices, the promotion of tolerance and the provision of information that aids public understanding. There are pockets of the media, especially on talkback radio, that continue to inflame race relations from time to time.

Since 2004, New Zealand media have become more diverse. There are now, for example, two Māori television channels, an iwi radio network, World TV in Chinese and Korean, Triangle TV, Radio Tarana, Skykiwi.com, Pacific Media Network, access radio programmes and community newspapers in a range of languages. Initiatives aimed at promoting diversity in the media, including the Excellence in Reporting Diversity awards and the Fairfax cadet scheme, have played a role in increasing the number of journalists from diverse backgrounds in mainstream media. The numbers of Māori, Pacific and Asian journalists in the mainstream media, however, still remain disproportionately low.

Details of race-related complaints made to the NZPC, ASA and Broadcasting Standards Authority (BSA) over the past five years are included in the Human Rights Commission's annual Race Relations Report. The NZPC received the lowest number of race-related cases (seven) in the period 2005–09. The BSA received 19 complaints, seven of these in 2009. The ASA received the most complaints (45), but the ratio of race-related complaints to the total number of complaints was very low. For example, in 2009 the ASA released decisions on 647 complaints of which only 10 were race-related. Overall, the level of race-related complaints about the media to standards bodies remains very low.

TABLE 2: NUMBER OF RACE-RELATED COMPLAINTS TO MEDIA COMPLAINTS BODIES 2005-9

Year	NZPC	BSA	ASA
2009	2	7	10
2008	0	2	10
2007	4	5	12
2006	1	2	5
2005	0	3	8

SAFETY

Safety and security of the person is a fundamental human right. The general picture of discrimination above also includes more serious incidents of racially motivated crime. Ensuring the safety of all in New Zealand from racially motivated crime is a central part of achieving harmonious race relations. This section focusses on the collection of data on hate crime; regional strategies to identify, report and deal with racially motivated

crime; and police strategies for engagement with ethnic communities.

Monitoring hate crime

In the absence of systematic data on racially motivated crime, information about when and how this is occurring is available only in an ad hoc way from localised studies and media reports. Examples of incidents of racially motivated crime reported in the media include racial abuse, vandalism (such as defiling property with racist messages) and physical assaults.

The actual number of such complaints, prosecutions and convictions is still not recorded by the New Zealand Police. In the course of the UN Human Rights Council review of New Zealand's human rights performance in May 2009, the issue of recording police complaints was raised again (it had previously been raised by CERD in 2007). The Government accepted the recommendation that this data be collected, but said it was not a priority.

The Review of Crime and Criminal Justice Statistics Report 2009 noted that measuring the motivation or basis for an offence is inherently challenging. It therefore concluded that consistently and reliably identifying offences as crimes of prejudice was problematic. [21] Offences are recorded by police irrespective of the motivation of offenders. The justice sector as a whole is making improvements to its statistical recording of data in line with the review of criminal justice statistics.

In 2009 the Nelson/Tasman community took significant steps toward combating racial harassment and violence in the community. The report *Towards a Reporting System for Racist Incidents in Nelson/ Tasman – Diverse Communities Speak* was launched in Nelson in August 2009. [22] Written by visiting Northern Ireland human rights lawyer Debbie Kohner, the report was based on 30 focus groups, involving 184 people of 48 ethnicities. The report found that 81 per cent of participants had experienced racism and 86 per cent had witnessed it. The frequency varied from once (or not at all) to daily abuse. The report recommended the establishment of a local reporting system, which was supported by the police, the Human Rights Commission and local councils. The Nelson Multicultural Council is following up on the recommendation, with support from other organisations, and the Speak Out Nelson Tasman racist reporting system is in the final stages of development. [23]

International student safety

The rights of international students were identified, at the annual Australia and New Zealand Race Relations Round Table in November 2009, as a significant human rights concern for national, state and territory human rights commissions in Australia and New Zealand. Commissioners viewed instances of racial harassment, abuse and violence directed at international students as symptoms of human rights issues that need to be addressed. These include international students' rights to non-discrimination; equality of treatment; security of the person; access to justice, housing and information; freedom of religion and culture; and labour rights. The Ministry of Education administers a Code of Practice for the Pastoral Care of International Students for schools, state tertiary institutions and private training establishments with New Zealand Qualifications Authority accreditation.

The Commissioners resolved to:

- highlight the treatment of international students as a major current human rights and race-relations issue and stress the importance of addressing it from a human rights perspective
- note that the harassment and abuse of international students cannot be adequately addressed if the existence of racism as a significant factor is denied
- call for more research into the experience of discrimination and harassment of international students in specific communities and contexts, including regular surveys of students by education providers to provide a better evidence base for policy decisions

21 Statistics New Zealand, Review of Crime and Criminal Justice Statistics 2009. Accessed accessed 24 August 2010 from http://www.stats.govt.nz/browse_for_stats/people_and_communities/crime_and_justice/review-of-crime-and-criminal-justice-statistics.aspx.

22 Debbie Kohner (2009). Towards a Reporting System for Racist Incidents in Nelson/Tasman: Diverse Communities Speak (Nelson / Tasman: Nelson / Tasman District Councils). Accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/05-Aug-2009_15-45-39_Diverse_Communities_Speak_-_final.pdf

23 Nelson Multicultural Council, 'Racist Reporting System'. Accessed 4 August 2010 from http://www.nelsonmulticultural.co.nz/ONGOING+PROJECTS/Racism+Reporting+System.html

- call on the police to record complaints and incidences of racially motivated crime, and for education providers, local government and other stakeholders to provide accessible reporting systems for racial harassment and discrimination, including web-based systems
- encourage the provision of reliable and accessible web-based information to prospective international students, including about their human rights and the support available
- monitor progress in addressing the human rights of international students and support student organisations in their advocacy and support for an improved experience for international students in Australia and New Zealand
- increase public awareness of the rights of international students; their contribution to the Australian and New Zealand economies and societies; and the importance of speaking out when they witness instances of harassment, discrimination and abuse.

In New Zealand, a coalition of Christchurch organisations, including tertiary institutions, the police, the Human Rights Commission and Ngāi Tahu, established the 'Report It!' website in August 2008.[24] The site provides international students with information on racial harassment and a simple way to report it. In the first year, 2204 individuals visited the site. In 2009, the coalition received 36 reports, of which 26 requested follow-up action. Some reports involved serious physical assaults.

Police ethnic strategy

The New Zealand Police have developed both national and regional strategies for engagement with ethnic communities. In 2004 the police developed a foundation strategy for 'Working Together with Ethnic Communities Towards 2010'. The foundation strategy focussed on reducing the fears of ethnic communities about being targets of crime, and increasing their confidence in the police. In order to achieve this, two outcomes were identified: building police capability and capacity to engage with ethnic communities and implementing culturally appropriate strategies with communities to increase their safety, and prevent and reduce crime, road trauma and victimisation.[25] The foundation strategy is under review. In building on its first ethnic strategy, the police are actively considering priorities in relation to ethnic communities that will achieve their desired outcomes for all New Zealanders of 'confident, safe and secure communities' and 'less actual crime and road trauma, [and] fewer victims'.[26]

In addition to the strategy, police have undertaken a range of initiatives to improve their responsiveness to ethnic communities and increase the number of ethnic police officers. Some of these include:

- tailoring police recruitment and marketing strategies in response to changing New Zealand demographics to specifically target Māori, Pacific and Asian people and recruit a more culturally diverse and responsive workforce
- encouraging ethnic communities' participation in community safety initiatives and developing formal partnerships to encourage their input into policing and to enable better understanding of crime and safety issues[27]
- establishing Asian safety patrols in Auckland to provide greater police visibility and engagement with communities, to reduce crime, victimisation and road traumas
- establishing Asian-ethnic advisory boards in major districts to enable communities to engage directly with senior police
- sponsoring ethnic football tournaments and the Race Unity speech awards with the aim of fostering positive race relations among youth and communities

24 'Report It!'. Accessible online at http://report-it.org.nz/

25 New Zealand Police, Working Together with Ethnic Communities – Police Ethnic Strategy Towards 2010, pp 4–5. Accessed 6 May 2010 from https://admin.police.govt.nz/resources/2005/ethnic-strategy/index.html

26 New Zealand Police, Strategic Plan to 2010. Accessed 21 September from http://www.police.govt.nz/resources/2006/strategic-plan-to-2010/index.html

27` Examples include MOUs with NZ Federation of Multicultural Councils and the Federation of Islamic Councils of New Zealand

- partnering with agencies and community organisations in Christchurch and Nelson to develop critical incident-response systems.

RECOGNITION AND SUPPORT FOR CULTURAL DIVERSITY

Non-discrimination and safety from racially motivated crime form part of what is required for harmonious race relations. The other equally important part is recognition and support for cultural diversity. This involves not only recognising and accepting racial and ethnic diversity, but actively supporting it. This section therefore focusses on public attitudes (recognition), participation, education for diversity and diversity action (support). The section concludes with a brief overview of socio-economic inequalities by ethnic group, which indicate that greater government and community action is needed to more fully realise the rights that support cultural diversity.

Public attitudes to race relations

In December 2009, UMR Research Ltd issued a 'Mood of the Nation' report based on the results of its omnibus surveys throughout 2009. It revealed that race relations was no longer in the 'top five issues worrying New Zealanders' in 2009. It had last topped the list in 2004. Race relations was second on the list of areas which New Zealanders felt would be 'much better' in 10 years' time. Overall, 38 per cent said they expected race relations to get better, while 29 per cent said they expected them to get worse. [28]

Political participation

The MMP electoral system has boosted the representation of Māori, Pacific and other ethnic groups in Parliament. The 2008 general election resulted in the most ethnically diverse Parliament in New Zealand history, although it still did not fully reflect the population of New Zealand. Although the number of Māori MPs reduced by one, the number of Pacific MPs increased from three to five and the number of Asian MPs doubled from three to six. In 2009, some MPs resigned from Parliament, and their replacements have slightly altered these results: the number of Māori increased to 21 and the number of European/other decreased by one.

In local government, the number of successful Māori, Pacific and Asian candidates in the 2007 council elections was disproportionately low, with Māori comprising 4.8 per cent and all others who did not identify as European comprising only 6.3 per cent. Environment Bay of Plenty remains the only local authority with dedicated Māori constituencies. A survey of territorial and regional authorities conducted by the Commission in 2010 revealed that many local authorities are not taking up the options in the Local Electoral Act 2001 to explore the introduction of Māori wards or constituencies. [29] Māori were better represented on district health boards after the 2007 elections and ministerial appointments, with 19.2 per cent of members, but the percentage of Pacific and Asian members was negligible. There were also elections for school boards of trustees in 2007. Māori comprised 15.4 per cent of trustees after the election, Pacific peoples 3.5 per cent and Asian peoples 0.9 per cent. Board elections were again held in May 2010, but representation statistics are not yet available.

In 2009 the reorganisation of eight Auckland councils into the single Auckland Council raised serious concerns about representation and participation, particularly given the size and diversity of Auckland's population. In 2008 a Royal Commission recommended that one Auckland council be established. In addition to the mayor, it recommended that the council comprise 23 councillors, two of whom should be elected by voters on the Māori electoral roll, and one of whom should be appointed by mana whenua through a specified mechanism. It also recommended the establishment of Pacific and ethnic advisory panels. The Government decided, however, that Pacific and ethnic advisory panels would only be established for the first term of the new Auckland Council. After the first term, the council could determine its own arrangements for Pacific and ethnic

28 UMR Research Ltd, Mood of the Nation Dec 2009, pp 9, 36. Accessed 11 May 2009 from http://www.umr.co.nz/Reports.php#

29 Human Rights Commission 2010. Māori Representation in Local Government. Powerpoint presentation given at the annual Diversity Forum, 23 August. Accessed 25 August 2010 from http://www.slideshare.net/nzhumanrights/maori-representation-in-local-govt-survey-results-19-august-2010. A draft discussion paper on the issue was also presented to the forum and is being finalised. This paper is accessible online at http://www.hrc.co.nz/home/hrc/racerelations/newzealanddiversityforum/2010diversityforum/maorirepresentationinlocalgovernment.php

participation. For Māori, the Government decided to establish an independent statutory board, which would consist of up to nine members, with up to seven of these coming from mana whenua groups. The new council can, however, establish Māori seats under existing legislation if it chooses.

Policy initiatives

In addition to services such as Language Line and the telephone interpreting service, and programmes such as Building Bridges, the Office of Ethnic Affairs is implementing a range of new initiatives to address the challenges of diversity. These include:

- collaboration across government agencies to develop robust statistical data, reporting and monitoring mechanisms on ethnic communities
- collaboration across government agencies to inform policy advice on immigration, settlement, health, economics and civic participation
- developing a national database for interpreters
- facilitating business forums to build constructive relationships between business communities, government organisations and business councils
- working with government agencies and private organisations to develop, train and maintain a culturally diverse workforce.

Education for diversity

A revised New Zealand curriculum was introduced in 2008. It includes the following core principles:

- The Treaty – acknowledging the principles of the Treaty of Waitangi, and the bicultural foundations of Aotearoa New Zealand. All students must have the opportunity to acquire knowledge of te reo Māori me ōna tikanga.
- Cultural diversity – reflecting New Zealand's cultural diversity and valuing the histories and traditions of all its people.
- Inclusion – being non-sexist, non-racist, and non-discriminatory; ensuring that students' identities, languages, abilities and talents are recognised and affirmed and that their learning needs are addressed.

Throughout the curriculum, students are also to be encouraged to value diversity, as found in our different cultures, languages and heritages; equity, through fairness and social justice; community and participation for the common good; and respect for themselves, others and human rights.

Following the introduction of the new curriculum, there is a need for teacher training and support as well as educational resources to deliver these components.

Linguistic diversity

The first Action Plan for Human Rights in New Zealand (2005–10) identified a long-term outcome for language: "by the bicentenary of the signing of the Treaty of Waitangi in 2040, New Zealand is well established as a bilingual nation, and communities are supported in the use of other languages". A series of actions were identified in order to achieve this goal. Since 2005, a range of initiatives have been implemented in order in relation to these actions. These include:

- New Zealand Sign Language (NZSL) became New Zealand's third official language and the first NZSL week took place.
- A 'Statement on language policy' was developed as part of the New Zealand Diversity Action Programme.
- Learning languages became a core learning area in the new New Zealand curriculum.
- The Māori Language Act and Te Taura Whiri i te Reo Māori turned 20.
- A survey of the health of te reo Māori showed improvements.
- The Māori Language Strategy was reviewed.
- The *Te Reo* television channel was launched.
- The Pacific Languages Strategy was initiated.
- Samoan Language Week was launched and increasingly celebrated.
- New community language resources for Cook Island Māori, Niuean and Tokelauan were developed.
- A national approach to translation and interpreting services was investigated.

Resourcing remains a challenge, particularly in the provision of teachers with high degrees of fluency in te reo. The timely provision of information – particularly relating to health and government – in a range of community languages is similarly challenging. English-only polices in the workplace have repeatedly been the cause of complaints to the Human Rights Commission.

Social and economic inequalities

Harmonious race relations are difficult to achieve when peoples from different ethnic groups are fundamentally unequal. There continue to be significant social and economic inequalities between different ethnic groups, despite a wide range of government policies and community actions that seek to address them. There has been progress in recent years in reducing disparities in areas such as employment, life expectancy, income and educational achievement, but there is still a long way to go and gains may be fragile in the face of changing economic conditions.

Such entrenched disparity between ethnic groups can be considered a form of structural discrimination. Unlike personal discrimination, structural discrimination is "observed from its effects. It is a bias in our social and administrative institutions that automatically benefits the dominant race or culture, while penalising minority and subordinate groups". [30] In practice, this means that apparently neutral policies can disproportionately affect ethnic minorities. Special measures are one means of addressing such effects.

The Ministry of Development's *Social Report 2009* assessed the social and economic wellbeing of New Zealanders across a range of indicators. [31] It found higher rates of unemployment for young people, Māori, Pacific peoples and other ethnic groups, and lower rates of median hourly earnings for the same groups. The report also found that 14 per cent of the population live in low-income households. Housing affordability was particularly difficult for Pacific peoples, other ethnic groups and those on low incomes, and household overcrowding was disproportionately experienced by Māori and Pacific peoples. Health indicators such as health and life expectancy have improved, although Māori continue to have lower outcomes than other groups. Cigarette smoking rates have declined since 2003 but, along with obesity rates, remain higher for Māori and Pacific peoples. Potentially hazardous drinking [32] is also higher among Māori and Pacific peoples. Rates of participation in licensed early childcare services have improved, although they remain lower for Māori and Pacific peoples. Participation in tertiary education has improved, and there were higher rates for Māori under 18 years and over 25 years. Rates of educational attainment in the adult population have also improved, but are proportionally lower for Māori and Pacific peoples. [33]

The 2009 General Social Survey found that Māori, Asian and Pacific peoples were more likely than Europeans to report that they did not have enough money to meet their everyday needs. Māori and Pacific peoples (62 per cent each) were more likely to report major problems with their house or neighbourhood than Europeans (49 per cent). Asian peoples felt least safe walking alone in their neighbourhoods at night (45.6 per cent). [34]

Barriers to employment and promotion continue to be one of the major issues for migrants and refugees, as do equal employment opportunities for Māori and Pacific peoples across the full range of occupations. These issues are discussed more fully in the chapter on the right to work.

Conclusion
Whakamutunga

New Zealand generally complies with and exceeds international standards in terms of its legislation and policies on race relations. Public opinion polling has shown that

30 Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare 1988, Puao-te-ata-tu (Wellington: Department of Social Welfare). Accessed 16 September 2010 from http://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/archive/1988-puaoteatatu.pdf

31 Ministry of Social Development (2010). The Social Report (Wellington: MSD). Accessible online at http://www.socialreport.msd.govt.nz

32 "Potentially hazardous drinking" is defined in the *Social Report 2009* as "the proportion of the population aged 15 years and over who drink alcohol, who scored eight or more on the Alcohol Use Disorders Identification Test (AUDIT)", as measured in the New Zealand Health Surveys conducted by the Ministry of Health in 1996–97, 2002–03 and 2006–07. The AUDIT is a 10-item questionnaire covering alcohol consumption, alcohol-related problems and abnormal drinking behaviour'. In 2006–07, 22.9 per cent of all adult drinkers had a potentially hazardous drinking pattern.

33 See *Social Report 2009* for further details

34 Statistics New Zealand, General Social Survey 2008: Hot off the Press, pp 10–11

New Zealanders are more positive about race relations than they were in 2004, and public institutions, particularly Parliament, are now more ethnically diverse.

There have been many positive developments in race relations since the last *Review of Human Rights in New Zealand Today* in 2004, indicating increasing recognition and support for cultural diversity. Many of these developments will have long-term benefits in enhancing race relations. A central example of this is the New Zealand curriculum introduced in 2008, which contains the core principles of the Treaty of Waitangi, cultural diversity and inclusion. Curriculum requirements to learn a language will further expedite the development of language policy and resourcing.

A range of initiatives have been implemented to further the goal of establishing New Zealand as a bilingual nation by 2040, and supporting other languages in the community. In addition to new curriculum requirements to learn a second language, these include the development of new strategies, resources and media, the establishment and increasing profile of awareness-raising language weeks, and making New Zealand Sign Language an official language of New Zealand.

New Zealand media have become more diverse, with a range of media (radio, television, newspapers and websites) available in a variety of languages and formats. Initiatives aimed at promoting diversity in the media have played a role in increasing the number of journalists from diverse backgrounds in mainstream media.

The Office of Ethnic Affairs has established Language Line, the telephone interpreting service, and programmes such as Building Bridges. By collaborating across government departments, it is in the process of implementing a range of new initiatives to address the challenges of diversity through developing robust monitoring mechanisms, improving policy advice, establishing business forums and developing, training and maintaining a culturally diverse workforce.

The New Zealand Police have developed both national and regional strategies for engagement with ethnic communities. Their foundation strategy for working with ethnic communities is currently being reviewed. In addition to the strategy, the police have undertaken a range of initiatives to improve their responsiveness to ethnic communities and increase the number of ethnic police officers.

The New Zealand Diversity Action Programme has grown from a small number of community organisations seeking to enhance their diversity capability and foster harmonious race relations to approximately 250 organisations with more than 660 projects. Networks have been established for people interested in religious diversity, language policy, media and refugee issues, and policy statements on race relations, language and religious diversity have been developed through them.

Challenges remain, however. These include promoting public understanding of diversity, combating discrimination and harassment, meeting the needs of diverse communities and fostering harmonious relationships. Anti-discrimination provisions would be enhanced by adopting the Article 14 complaints procedure in Convention on the Elimination of Racial Discrimination (see the 'New Zealand Today' section of this chapter).

Enduring priorities dealt with in other chapters of this report are to:

- address outstanding issues in relation to the Treaty of Waitangi
- reduce social and economic inequalities between different ethnic groups
- better support the settlement and integration of migrants and refugees
- review section 61 of the HRA to ensure it fulfils its legislative purpose
- promote understanding between people of different beliefs.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance human rights and race relations:

Asian New Zealanders and international students

Countering the relatively high level of prejudice, discrimination and harassment experienced by Asian New Zealanders and international students.

Structural discrimination

Investigating the extent to which structural discrimination underlies entrenched racial inequalities in the enjoyment

of civil, political, social, economic and cultural rights and developing programmes to address it.

Diversity action
Encouraging organisations and communities to develop their own diversity-action projects and programmes, especially inter-cultural activities.

Languages
Developing and implementing a national languages policy and dedicated strategies for Māori, Pacific and community languages, and interpreting and translation services.

Diversity education
Ensuring that teachers are appropriately trained, supported and resourced to teach diversity in the new curriculum.

6. Democratic Rights

Tikanga Manapori

"Everyone has the right to choose to take part in the government of their country."

Everyone has the right to choose to take part in the government of their country.

Universal Declaration of Human Rights, Article 21 (plain text)

Introduction
Tīmatatanga

Democratic rights include the right to take part in electing the Government and the right to access and participate in the public service. There is also a corresponding duty of responsible citizenship, which involves a willingness to play a part in public affairs and to respect the rights and freedoms of others.

There have been some significant changes since the Commission's review of human rights in 2004. Domestically, these include acknowledgement of the need for a review of New Zealand's constitutional arrangements, better understanding of the role that civil society can play in informing the development of policy, and amendments to the Local Government Act 2002 to increase the transparency and accountability of local government. The Electoral Finance Act 2007 was introduced (and repealed), legislation to make Auckland into a 'super city' was passed, and the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 and Canterbury Earthquake Recovery Response Act 2010 were enacted amid criticism that they undermined democratic participation and the rule of law.

Internationally, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) – which includes the right to self-determination for Indigenous peoples – was adopted by the UN General Assembly in 2007.[1] The Convention on the Rights of Persons with Disabilities, which sets out a state's responsibility to ensure persons with disabilities can effectively and fully participate in political and public life on an equal basis with others (Article 29(a)), was also opened for ratification in 2007. Overall, there is greater recognition that democracy and the rule of law are not only interdependent but necessary to create an environment in which human rights can be realised.[2]

International context
Kaupapa ā taiao

INTERNATIONAL HUMAN RIGHTS STANDARDS

Under Article 25 of the International Covenant on Civil and Political Rights (ICCPR), all citizens have the right and opportunity to take part in the conduct of public affairs in their country, directly or through freely chosen representatives, and the right "to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".[3] They also have access, on equal terms, to public service.

Both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) state that all peoples[4] have the right to self-determination, including the right to freely determine their political status. The right to self-determination is also found in the UNDRIP.

Democratic rights include a range of other rights, such as to justice, freedom of expression, peaceful assembly and freedom of association. They also include freedoms and social and economic rights, such as to health, social security and education. The importance of ensuring that these rights are available on a non-discriminatory basis is emphasised in the ICCPR and the ICESCR, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD) and, most recently, the Convention on the Rights of Persons with Disabilities (CRPD). CEDAW and CERD also require states to ensure equal representation and participation of women and all ethnic and racial groups in political processes and institutions.[5]

1 New Zealand indicated its support for the declaration in 2010.

2 Economic and Social Council, Civil and Political Rights (2005), Interdependence between Democracy and Human Rights, Report of the Second Expert Seminar on Democracy and the Rule of Law, Geneva, E/CN.4/2005/58

3 Unlike the other rights in the ICCPR, Article 25 applies only to citizens, not to all people.

4 Traditionally a term referring to nation states

5 CEDAW, Article 7; CERD, Article 5(c)

◀ Gavin Marshall, of Little Akaloa on the Banks Peninsula, carries a ballot box into the Little Akaloa Public Hall in preparation for the 2005 general election. (New Zealand Herald photograph by Simon Baker)

INTERDEPENDENCE OF DEMOCRACY AND HUMAN RIGHTS

Democracy and the rule of law are interdependent and both are necessary to create an environment in which human rights can be realised. The Economic and Social Council has reported in relation to Article 25 that "the fundamental principles of equality, participation and accountability derive from, underpin and protect human rights, democracy and the rule of law".[6]

General comment 25 develops the concept of the right of everyone to vote and play a role in public affairs. It describes the conduct of public affairs as:

> **… a broad concept which relates to the exercise of political power … It covers all aspects of public administration, and the formulation and implementation of policy at international, national and regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs should be established by the constitution and local laws.**[7]

The rights to influence public decision-making and decision-makers (popular control), and to be treated with equal respect and as of equal worth (political equality) in decision-making are fundamental to a democracy.

The conditions necessary for realising popular control and political equality are:

- a guaranteed framework of citizens' rights (including civil, political, economic, social and cultural rights)
- a system of representative and accountable political institutions
- an active civil society (people working together who can channel popular opinion and engage with the Government).[8]

New Zealand context
Kaupapa o Aotearoa

THE CONSTITUTIONAL FRAMEWORK

New Zealand does not have a single, stand-alone constitution. Rather, a number of laws, including the Constitution Act 1986, the Electoral Act 1993 and the New Zealand Bill of Rights Act 1990 (BoRA), together with the Treaty of Waitangi, judicial decisions and constitutional conventions, make up the constitutional framework.[9]

The business of government is distributed among the executive (cabinet ministers and the public service), the legislature and the judiciary. This separation of powers ensures that there are checks and balances within the system and accountability and impartiality are maintained. The public service consists of 35 government departments and ministries, is politically neutral (that is, appointments are not made on a partisan political basis) and serves the elected Government.[10]

Treaty of Waitangi[11]

Article 1 of the Treaty of Waitangi provides for the Crown's right to govern in New Zealand. In terms of contemporary democratic rights, Article 1 is arguably the basis for current government structures in New Zealand, including the predominantly Westminster style of governance.

Article 2 of the Treaty guarantees Māori "full, exclusive and undisturbed possession" (English version) or "te tino rangatiratanga" (Māori version) of their lands, estates, forests, fisheries and 'taonga' (treasured possessions). This

6 Economic and Social Council, Civil and Political Rights (2005), para 41

7 United Nations Human Rights Committee (1996), general comment 25: The right to participate in public affairs, voting rights and the right of access to public service (UN Doc.CCPR/C/21/Rev.1 add 7).

8 Beetham D (1999), *Democracy and Human Rights* (Stafford, Australia: Wiley-Blackwell)

9 Many constitutional conventions (such as the collective responsibility of cabinet ministers) have no formal legislative base, but are reflected in documents such as the Cabinet Manual. Similarly, parliamentary practices are contained in Parliamentary Standing Orders.

10 Under the State Sector Act 1981, the State Services Commissioner has three roles relating to the performance of the public service: appointing chief executives, reviewing the performance of chief executives and investigating the performance of the public sector.

11 For a more detailed explanation of the Treaty and its relationship to New Zealand law, see the chapter on 'Human Rights and the Treaty of Waitangi'.

can be measured by the extent to which Māori are able to govern relevant aspects of Māori life and participate in Māori structures and organisations, including whānau, marae, hapū and iwi.

Article 3 affirms the equal citizenship rights of all New Zealanders, including Māori. This may be measured by the extent to which New Zealanders are proportionately represented in the institutions of the State and can participate in political processes, such as voting. Article 3 also promises the Queen's "royal protection" to Māori. A measure of this protection would be the well-being of Māori.

New Zealand Bill of Rights Act 1990 (BoRA)

The BoRA affirms New Zealand's commitment to the ICCPR.[12] Section 12 states:

> **Every New Zealand citizen who is of or over the age of 18 years:**
>
> **(a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot**
>
> **(b) is qualified for membership of the House of Representatives.**

Equal suffrage has been interpreted as meaning every vote carries equal weight and has equal influence. It requires that elections be 'genuine' and accurately reflect the will of the people and be free from intimidation or fraud.[13]

Although section 12 is limited to national elections and does not refer to the right to take part in public affairs, the BoRA provides for a range of other rights and freedoms that are central to democracy and which relate to the ability to participate in public affairs, such as freedom of thought, conscience and religion (section 13), freedom of expression (14), association (17) and peaceful assembly (16), and freedom from discrimination (19) on the grounds provided for in section 21 of the Human Rights Act 1993 (HRA).

CONSTITUTION ACT AND ELECTORAL ACT

The Constitution Act 1986 vests power in Parliament and entrenches the three-year parliamentary term. The Electoral Act 1993 sets out the structures and processes for holding national general elections (including the creation of electoral districts and the method of voting), defines who can vote, and describes the qualifications for members of the House. Certain provisions in the Electoral Act are also entrenched.

Certain groups are disqualified from voting under section 80 of the Electoral Act. They include New Zealand citizens who are not (and have not been for the three years prior) in New Zealand at the time of the election; some detainees under the Mental Health (Compulsory Treatment and Assessment) Act 1992; certain categories of prisoners; and people on the Corrupt Practices List. At the time of writing this chapter, legislation – the Electoral (Disqualification of Convicted Prisoners) Amendment Bill – that would amend the Electoral Act to disqualify all convicted prisoners from voting had passed its second reading in Parliament.

In 2007, the Electoral Finance Act introduced more rigorous requirements for election campaigning by third parties or parallel campaigners. It also included a stricter regime for disclosure of political donations and increased the criminal penalties and time limits for prosecution for electoral finance offences. The act was repealed in 2009 in the face of wide-ranging criticism about the restrictions on freedom of expression, and concerns about the parallel campaigning regime generally. The former provisions of the 1993 act relating to campaign expenditure and advertising were reinstated, and the provisions of the 2007 act relating to donations and criminal sanctions were inserted into the Electoral Act 1993.

Following an extensive consultation process, legislation was introduced in 2010 to further amend the Electoral Act 1993. The Electoral (Finance Reform and Advance Voting) Amendment Bill is designed to ensure greater certainty and transparency in the conduct of the electoral process and increase public confidence in the outcome of elections.

12 In New Zealand, the right to vote extends to all permanent residents.

13 Butler P and Butler A (2005), *The New Zealand Bill of Rights: A Commentary* (Wellington: LexisNexis), para 12.8. See also discussion below on "free and fair elections".

National general electoral system

The first general election using the mixed member proportional system (MMP) was held in 1996. Under MMP every person has two votes – one for a party and one for an electorate candidate. The party vote determines the overall distribution of parliamentary seats in the House of Representatives. To be entitled to a seat in Parliament, a registered party must gain more than 5 per cent of all the party votes or win at least one electorate seat. A referendum will be held in conjunction with the 2011 general election to indicate whether voters want to retain the current MMP voting system.

The Māori electoral option

After each census, the process of redrawing electorate boundaries begins with a four-month Māori electoral option. During this period, Māori can choose to be on either the Māori electoral roll or the general roll. The results form the basis for calculating the Māori electoral population and the general electoral population, and determine the number of Māori seats for the following two general elections.

Currently, the 122 seats in Parliament consist of 63 from general electorates, seven from Māori electorates and 52 from party lists. The 2008 election created an overhang of two seats.

Citizens-initiated referenda

The Citizens Initiated Referendum Act 1993 (CIR Act) provides a process for individuals and corporate bodies to initiate national referenda on any subject if 10 per cent of registered voters sign a petition in support. The results of such referenda are indicative only and not binding on the Government.

Election oversight and review

As part of the electoral reform package, the Electoral Act 1993 was amended to establish a new Electoral Commission as an independent Crown entity. The new Commission will merge the functions of the Chief Electoral Officer and the Electoral Commission from 1 October 2010. [14] The Chief Registrar of Electors' responsibility for the electoral role will transfer to the new Electoral Commission in October 2010.

The new commission will have all the functions of the original agencies relating to electoral administration – information on electoral issues and reviews of the electoral system – as well as providing an advisory opinion on whether a draft advertisement is an election advertisement for the purposes of the Electoral Act.

LOCAL GOVERNMENT ELECTORAL SYSTEM

There are three types of local government in New Zealand: regional, territorial (cities and districts) and unitary (combining the functions of a regional and territorial council).

Local government does not have a formally recognised constitutional status, although Parliament's Standing Orders give local authorities the right to promote legislation affecting their own districts independently of central government. Local authorities enjoy considerable independence from the Government, but must act within the legal framework established by Parliament.

Local government elections occur every three years under the Local Electoral Act 2002, which establishes principles to ensure fair and effective representation for individuals and communities in local government. It also allows regional councils to provide Māori seats and a triennial representation review for choice of the electoral system. To date, only one council (Environment Bay of Plenty) has allocated specific seats for Māori. The electoral systems available for loca-body elections are 'first past the post' (FPP) and 'single transferable vote' (STV).

Local Government Act 2002

The Local Government Act 2002 (LGA) requires local authorities to promote the social, economic, environmental and cultural well-being of their communities, in a way that is sustainable now and in the future. It promotes the accountability of local authorities to their communities [15] and respect for the Crown's responsibilities under the Treaty of Waitangi, and provides opportunities for Māori to contribute to local government decision-making. [16] Part 6 requires local authorities to involve citizens in decisions that affect their lives, by setting out principles for consultation with communities,

14 This was an action point in the previous Action Plan.

15 LGA 2002, section 3(c)

16 LGA 2002, section 4

including obligations to ensure the contribution of Māori to decision-making [17] and to consult with all interested and affected persons. [18] The LGA also sets out a process for identifying and reporting on community outcomes.

In 2010, the Local Government Act 2002 Amendment Bill was introduced. The bill aims to change the way local authorities set their direction and how this can be influenced and assessed by their communities. The bill will achieve this by reinforcing the need for local authorities to focus on the contribution which specified 'core services' make to its communities. It requires local authorities to satisfy themselves that the expected returns from commercial activities are likely to outweigh the inherent risks. It also reduces "unnecessary" consultation by limiting the opportunity for different communities to consult and act in partnership with local councils. This could undermine the consultation requirements in the principal act and the ability of different communities to influence the activities of local government. Although designed to improve transparency, the bill is also seen as easing the way for increased private-sector involvement in local government operations. [19]

The 'super city' legislation

In October 2009, Cabinet agreed to a package of reforms to improve the transparency, accountability and financial management of local government. As part of this, a suite of bills was introduced to change the local government structure in Auckland. The legislative change was preceded by a Royal Commission on Auckland Governance, which had reported to the Government in March 2009 following extensive public consultation. The Commission found that regional governance was weak and fragmented and there was poor community engagement. It recommended a single council as the first tier of governance, supported by six local councils that would focus on local engagement and the delivery of quality local services. The commission also recommended that there be a number of safeguarded seats on the council for Māori, in recognition of the Treaty of Waitangi and the requirements of the Local Government Act.

The Local Government (Tāmaki Makaurau Reorganisation) Act 2009 and the Local Government (Auckland Council) Act 2009 create a single unified governance structure. They have the primary objective of ensuring democratic and effective local government to maximise "…the current and future wellbeing of Auckland and its communities". [20] In other ways, the legislation departs significantly from the format envisaged by the royal commission:

- It creates a new mechanism for the devolution of non-regulatory activities through Council Controlled Organisations. This has been the subject of significant criticism because of the lack of transparency in the appointment process.
- There is no specific provision for Māori representation in the decision-making process. Māori representation is provided through an independent statutory board which is to "promote issues of significance for mana whenua and Māori of Tāmaki Makaurau" and is designed to ensure that the council acts in accordance with existing Treaty of Waitangi provisions. The board has no real power and is purely advisory.
- Provision is made for a Pacific Peoples Advisory Panel and an Ethnic Peoples Advisory Panel with similarly limited roles.
- The legislation does not reflect the Royal Commission's view of local boards. Rather than six local councils, there are a large number of small local boards with poorly defined roles, which are intended to respond to local needs and requirements.

OTHER REPRESENTATIVE BODIES

Other bodies that require election or representative participation include school boards of trustees, district health boards, statutory boards and committees (of which there are over 400), registered societies and associations, and electoral colleges. Iwi and runanga trust boards are also examples of representative bodies to which members may be elected. Although no accurate figures exist, many thousands of New Zealanders are involved in such bodies.

17 LGA 2002, section 8.

18 LGA 2002, section 82

19 Russell McVeagh (2010), Local Government Update, 3 May. Accessible online at http://www.russellmcveagh.com/_docs/LocalGovernmentUpdate_298.pdf

20 Local Government (Auckland Council) Bill, explanatory note at 9

New Zealand today
Aotearoa i tēnei rā

A human rights approach to good governance – which includes the realisation of democratic rights – empowers citizens and voters, requires governments to act consistently and in a non-discriminatory way, affirms that governments have a legal obligation to observe human rights commitments, and recognises that rights are linked. For example, economic and social rights cannot be achieved when rights to information or free speech are obstructed.[21]

HUMAN RIGHTS EDUCATION

Although New Zealand's recognition of democratic rights meets international standards, there is no formal process for educating people about their human rights and the importance of participation. The core principles of the national education curriculum recognise the importance of the Treaty of Waitangi, cultural diversity and inclusion (as being non-sexist, non-racist and non-discriminatory), and in its values statement encourages students to "respect themselves, others and human rights". The New Zealand Qualification Authority offers a number of standard units linked to human rights through a variety of tertiary institutions. A number of university courses also include human rights components.

The Human Rights Commission provides information on and education about human rights. The Commission provides a comprehensive website and has a dedicated advisor team that provides education on human rights, delivers workshops on topics such as the human rights dimensions of the Treaty of Waitangi, works with communities to build their capability to address human rights issues locally, and facilitates the New Zealand Diversity Action Programme. The Commission also works with a range of government agencies to integrate a human rights approach into policy and practice. Over the past five years, this has included the New Zealand Police, the Ministry of Foreign Affairs and Trade, and the Department of Corrections.

There is no co-ordinated programme specifically for local authorities. Rather, each local authority is responsible for ensuring that its employees understand and apply relevant human rights standards.

Civil society also plays a role in promoting human rights. Human Rights in Education (Mana Tika Tangata) is an initiative by Amnesty International, the Children's Commissioner, the Development Resource Centre, the Peace Foundation and the Human Rights Commission to assist schools and early-childhood centres in understanding and promoting human rights. Other NGOs offer specific programmes for schools, including the Culture of Peace Outreach Programme and the Cool Schools Peer Mediation Programme offered by UNESCO.

LEVEL OF DEMOCRACY

The democracy of a society can be identified in a number of ways, including whether there is a legislative framework guaranteeing citizens' rights, and the levels of participation, authorisation, representativeness, accountability, transparency and responsiveness.

Guaranteed rights

Over the past 20 years there has been debate about whether New Zealand should have a written constitution to guarantee the rights of its citizens and what place the Treaty of Waitangi should have in such arrangements.[22]

The BoRA itself is not entrenched legislation. It follows that in theory it could be repealed by Parliament.[23] There is also no formal power for the courts to strike down legislation that breaches New Zealand's constitutional arrangements, although declarations of inconsistency are possible in some (limited) areas.[24]

21 International Council on Human Rights (2005), *Local Government and Human Rights: Doing Good Service* (Geneva: ICHR), p 4. Accessible online at http://www.ichrp.org/files/reports/11/124_report.pdf

22 See, for example, Roughan N (2005), Te Tiriti and the Constitution: Rethinking Citizenship, Justice, Equality and Democracy, *New Zealand Journal of Public and International Law* 3(2), November, pp 285–303.

23 This is highly unlikely, given the NZ BoRA's almost quasi-constitutional status. See discussion in Rishworth P, Huscroft G, Mahoney R and Optican S (2003), *The New Zealand Bill of Rights Act 1990* (Auckland: OUP), pp 3ff

24 Under the HRA (s.92J), a declaration of inconsistency can be obtained in relation to the right to freedom from discrimination. It is also considered that, as section 6 of the NZ BoRA requires a court to prefer statutory meanings that are consistent with the Bill of Rights over those that are not, for all practical purposes the outcome is a declaration of inconsistency. See, for example, R v Hansen [2007] 3 NZLR 1.

Despite the fact that there is no single document that protects all the recognised democratic rights, New Zealand's protection of human rights rates highly in terms of international standards. New Zealanders enjoy freedom of movement, expression, association and assembly, with minimal restrictions. They are free to practise their own religion, speak their own language and observe their own culture. The public sector, including the executive and the judiciary, are subject to the BoRA, and the criminal justice and penal system are independent and impartial.

While successive New Zealand governments have taken the view that economic, social and cultural rights are not justiciable [25] – and therefore not legislatively guaranteed in the same way as civil and political rights – these rights are addressed through policy and practice.

Participation and empowerment

Participation is integral to stable and responsive governance. The United Nations, for example, recently issued a guidance note suggesting that the way a government provides for people to have a say in the policy process and the development of legislation has a direct impact on the way they view the legitimacy of the democratic system. [26]

Consultation is fundamental to participation. Genuine consultation involves listening to what others have to say and considering the responses, even if not necessarily agreeing on the outcome. The party with the onus to consult must keep an open mind and be ready to change and even start afresh if necessary. [27] The person consulted must be provided with enough information and sufficient time to allow them to respond in a useful way.

It can be particularly concerning, therefore, when the opportunity to provide input to the development of legislation is unduly restricted – for example, the limited timeframe for the public to make submissions on the Local Government (Auckland Council) Bill 2009; or legislation such as the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, which was introduced under urgency and forced through all three readings in a single sitting; [28] or the precedent set when a law such as the Canterbury Earthquake Response and Recovery Act 2010 is enacted under urgency, abrogating established constitutional protections.

In the absence of a written constitution, a robust and independent civil society is fundamental to democratic participation and the rule of law. New Zealand has an active and well regarded civil society that covers a wide spectrum of interests and issues. However, to realistically influence decision-making, there needs to be greater engagement between civil society and government agencies.

Over the years, some government ministries and departments have made efforts to involve community organisations in their policy and planning, but the results have often been unsatisfactory. Community organisations tend to feel that the sector's views and expertise are ignored, that lipservice is paid to the partnership between Māori and the Crown, and that consultation and decision-making processes are ineffective.

In 2009, Cabinet approved a package designed to build stronger community relationships and send a clear message to communities that the Government takes their concerns seriously. [29] The initiative will involve the development of a set of principles and a quick reference guide on how to implement the principles for effective engagement with citizens and communities. It is modelled on overseas examples, such as the OECD Guiding Principles for Open and Inclusive Policy Making. [30] The principles will balance the value of inclusive and collaborative

25 The position on justiciability is slowly changing as international changes increasingly impact as a result of the UN's adoption of an optional protocol to the ICESCR.

26 Guidance note of the Secretary-General on Democracy (2009), para 7.

27 Wellington International Airport v Air New Zealand Limited [1993] 1 NZLR 671, 675

28 Joseph P (2010), Environment Canterbury legislation, *New Zealand Law Journal*, June, p 193

29 Office of the Minister for the Community and Voluntary Sector (2009), Cabinet Social Policy Committee: Government Commitment to Building Strong Community Relationships

30 Accessible online at http://www.oecd.org/dataoecd/20/3/42658029.pdf

practices with the need for efficiency where issues have already been well canvassed. Guidance in the Cabinet Guide for the public service about consulting community organisations will also be developed, along with a tool for assessing how existing work to improve and measure government performance can include agencies' community relationships.

There will be seminars on good practice in community engagement in a range of locations, the development of a Code of Funding Practice to assist implementation of good funding practice, and information for community organisations on the Ombudsmen's role in dispute resolution. [31]

Authorisation

Elections in New Zealand are considered to be free and fair – 'free' because there is no restriction on access to the process, and 'fair' because they are impartially run in accordance with international standards. [32] The criteria for deciding whether elections are free and fair will vary from country to country. They take into account issues such as rules about campaigning, balancing the rights of those not contesting the election to put their arguments to the people with the right to free speech without restriction. It was perhaps a reflection of the commitment to democracy in New Zealand that led to the level of public concern when these values appeared to be under threat with the introduction of the electoral finance legislation.

Voter turnout rates are an indicator of the extent to which citizens participate in the political process, the confidence the population has in it and the importance they attach to political institutions. While it is mandatory for all New Zealand citizens and permanent residents to be on the electoral roll once they are 18 years old, it is not compulsory to vote.

Even though New Zealand ranked 10th out of 30 OECD countries surveyed in 2008 on voter turnout, which was higher than the OECD median of 74 per cent, there has been a decline in civic engagement in its most 'politically salient' forms (such as voter turnout [33]) over the last 20 years. In 2008, voter turnout in New Zealand in the general election was 76 per cent, a slight decline from 77 per cent in 2005, but significantly less than the 89 per cent recorded in 1984. [34]

Although there is no detailed information available on who votes, results from New Zealand election surveys over a number of years show that non-voters are more likely to be people on lower incomes, younger people, and members of Māori, Pacific or ethnic groups. This is of concern, because where there is a decline in voter turnout among low-income groups, governments can react by spending less on welfare, with the result that over the long term, social problems associated with poverty and income inequality are more likely. [35]

There has also been a drop in those voting in local-body elections, down from 46 per cent in 2004 to 44 per cent

TABLE 1: PERCENTAGE OF REGISTERED POPULATION WHO VOTED IN PARLIAMENTARY ELECTIONS IN NEW ZEALAND AND SELECTED OECD COUNTRIES, 2005–2008

Country	Date of recent election	Voter turnout at election
New Zealand	2008	79.5
Australia*	2007	95
Canada	2008	59
United States	2008	62
Sweden	2006	81.9
United Kingdom	2005	62

** Voting is compulsory in Australia*

31 Office of the Minister for the Community and Voluntary Sector (2009), para 4

32 Elections New Zealand, Free and Fair Elections. Accessible online at http://www.elections.org.nz/elections/concepts/free-fair-elections/

33 Vowles J (2004), Civic engagement in New Zealand: Decline or Demise? Inaugural professorial address delivered at the Conference Centre, University of Auckland, October 13, 2004. Accessible online at http://www.nzes.org/docs/papers/Inaugural_2004.pdf

34 Ministry of Social Development (2009), Social Report 2009 (Wellington: MSD). Accessible online at http://www.socialreport.msd.govt.nz/

35 Brady D (2003), The Politics of Poverty: Left Political Institutions, the Welfare State and Poverty, Social Forces 82 (2), pp 557–588, cited in MSD (2009)

in 2007 – the lowest turnout since the restructuring of local government in 1989. The drop was relatively constant across all regions,[36] but there were considerable variations between rural and urban areas. For example, smaller communities and those in the South Island tended to have a higher turnout for all types of election.

Representation and non-discrimination

Participation is heavily influenced by who speaks for communities and who is represented on decision-making bodies. Only when those directly affected by policy and legislation have a genuine voice in deciding its formation can a governance structure be said to truly reflect the society it represents.

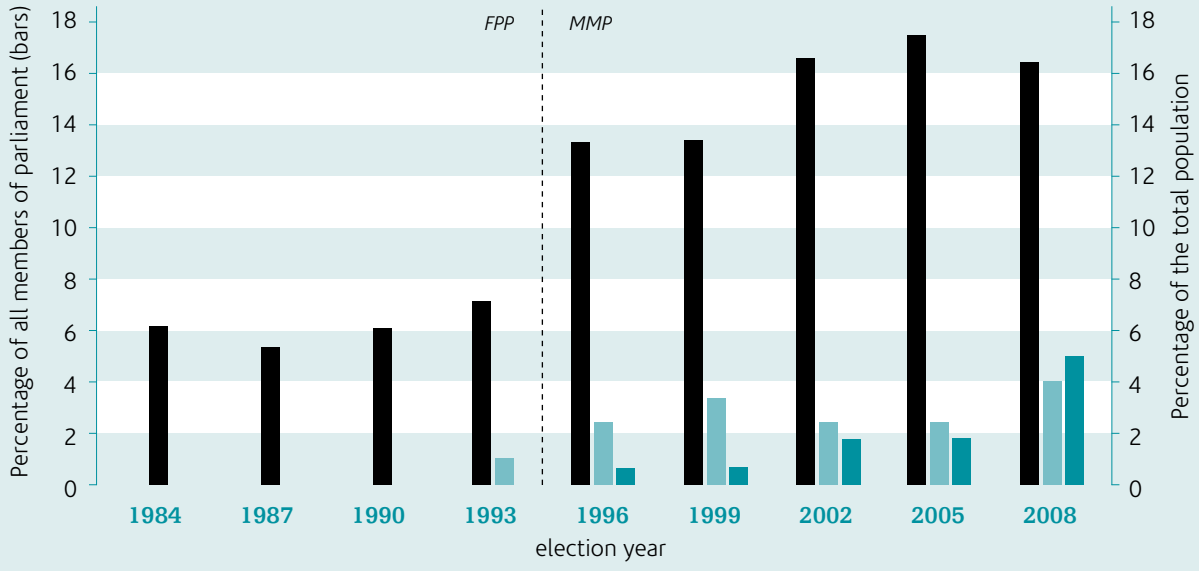
Representation at the national level

Māori seats have contributed to a more representative Parliament. The MMP system has also resulted in a Parliament that better reflects the social and political composition of the electorate, with more Māori, Pacific and Asian MPs, a greater number of women, and openly gay MPs.

The diversity of ethnic groups represented in Parliament rose sharply with the introduction of MMP in 1996 and has increased steadily in subsequent general elections. In 2008, 31 per cent of MPs identified as Māori, Pacific or Asian, and the proportion of MPs identifying as Pacific or Asian were the highest recorded.[37] A similar proportion of Māori were elected to Parliament in 2008 as the percentage of Māori in the population overall (16 per cent of MPs identified as Māori, compared with 15 per cent of the total population in 2006). The proportion of Pacific peoples in Parliament (4 per cent) was smaller than their share of the population (7 per cent), while the Asian ethnic group had the lowest representation (5 per cent of all MPs, compared with 10 per cent of the population).[38]

Under the FPP electoral system, women's representation in Parliament increased from 13 per cent in 1984 to 21 per cent in 1993, but as with Māori, it rose significantly in the first MMP election in 1996. Following the 2008 general election, 41 (33.6 per cent) of the 122 seats were held by women, compared with 32 per cent after

TABLE 2: MEMBERS OF PARLIAMENT IDENTIFYING AS MĀORI, PACIFIC OR ASIAN 1984–2008, AND MĀORI, PACIFIC OR ASIAN SHARE OF THE TOTAL POPULATION



Source: Wilson and Anderson (2008), Statistics New Zealand, *Estimated National Ethnic Population 1996, 2001, 2006*; MSD (2009), *The Social Report 2009*.

36 Brady (2003), cited in MSD (2009)

37 Brady (2003), cited in MSD (2009), p 74

38 ibid

the 2005 election. Since then, three women MPs have resigned.

In 2008, women made up a higher proportion of list MPs (42 per cent) than of electorate MPs (27 per cent). The majority of women elected to Parliament in 2008 were list MPs. Although the current 38 women MPs are the largest number in New Zealand's parliamentary history, this is unlikely to continue to increase unless women are high on party lists or in winnable constituency seats. [39]

Public service representation

In the year to 30 June 2009, the number of full-time employees in the public service increased to 44,672. Employees in the public sector are still overwhelmingly European (71.4 per cent), but there has been an increase in the number of people identifying as Asian. If the Asian ethnic group continues to increase at its present rate, it will overtake Pacific peoples as the third largest ethnic group in the public service within the next two years. The number of Māori and Pacific peoples employed in the public sector has remained relatively constant, although a small decline is evident. Their numbers are not reflected at senior management level, however. Clearly there is still some way to go for the senior management group of the public service to fully reflect the diversity of the workforce. [40]

A high proportion of women (59 per cent) are employed in the public sector compared with the labour force generally. Again, this is not reflected at senior level, where only 37.8 per cent of senior managers are women. The number of women in leadership positions is disproportionately low compared with their numbers in the workforce generally, and has even dropped slightly since 2008.

In 2007, the CEDAW committee raised concerns about the absence of women in leadership positions, recommending that New Zealand "enact and implement comprehensive laws guaranteeing the substantive equality of women with men in both the public and private sectors…" [41]

Local government representation

In the 1990s and early 2000s, women were more highly represented in local government than national government, but this trend has been reversed since the 2005 election. [42] In 2007, there were marginal increases in the number of women elected to local government. Women's representation was highest on district health boards (46 per cent), followed by city councils (37 per cent) and community boards (33 per cent). Women's representation was lowest on district councils (28 per cent) and regional councils (27 per cent). Census data shows that the number of women in management positions in local government has more than doubled in the past 10 years, but a closer look at the organisational structures within local authorities shows that women hold only 5 per cent of CEO positions and 24 per cent of second-tier management jobs. [43]

In 2007, the proportion of representatives on local boards identifying as Māori was 4.8 per cent. Apart from the Environment Bay of Plenty, the Māori seat option has not been used.

Representation on District Health Boards is much better for Māori – 19.2 per cent of those represented identified as Māori – mainly as a result of the minister exercising a power of appointment to address any perceived imbalance. Representation of Pacific and Asian people remains very low. [44]

Overall, women, Māori, Pacific peoples and other minority groups tend to be under-represented, in proportion to their numbers in the population, in leadership roles on bodies such as school and district health boards and

39 Human Rights Commission (2008), *New Zealand Census of Women's Participation 2008* (Auckland: HRC), p 66. Accessible online at http://www.neon.org.nz/documents/HR%20Women_screen.pdf

40 State Services Commission (2009), *Human Resource Capability Survey of Public Service Departments as at 30 June 2009* (Wellington: SSC).

41 Committee on the Elimination of Discrimination Against Women 39th Session 23 July–10 August 2007 CEDAW/C/NZ/CO/6. Accessible online at http://www.un.org/womenwatch/daw/cedaw/cdrom_cedaw/EN/files/cedaw25years/content/english/CONCLUDING_COMMENTS_ENGLISH/New%20Zealand/New%20Zealand%20-%20C-6.pdf

42 State Services Commission (2009), p 73

43 Human Rights Commission (2008), pp 59–61

44 Human Rights Commission (2007), Tui Tui Tuituia: Race Relations in New Zealand (Auckland: HRC), p 74

councils. Concern about such inequalities has led to initiatives to improve participation of young people, [45] disabled people [46] and older people [47] in a range of focussed projects. Nominations and appointments services are also operated by a number of agencies, such as Te Puni Kōkiri, the Ministry of Pacific Island Affairs, the Office of Ethnic Affairs, the Ministry of Women's Affairs, the Office for Disability Issues and the Crown Company Monitoring Unit as a way of increasing diversity.

Accountability

Parliament plays the central role in holding the Executive and the Government of the day to account. It does this in various ways, including ensuring expenditure is allocated for specified purposes, reviewing how the money is spent, providing debating opportunities when the Government must defend its position, and upholding the traditional right to petition the House on issues such as seeking change to public policy or the law. [48] These structures compare favourably with other parliamentary systems. Governments are also obliged to account for how they use the input received through feedback, consultation or other forms of public participation. It follows that measures to ensure that policy-making is open, transparent and amenable to external scrutiny and review are crucial to accountability.

The select-committee process (which has existed in its current form for 25 years) strengthens the accountability of the executive to Parliament by systematic, comprehensive scrutiny of government activity. [49] It also provides opportunities for the public to become involved in the work of the House through the submission process. This interchange between MPs and the public is the most distinctive feature of New Zealand's parliamentary system. [50] However, the submission process can prove difficult for groups likely to be affected by proposed legislative change who do not normally engage with or understand the process (for example, as occurred with some groups in relation to the 'super city' legislation).

The select committee process itself can be subverted by unreasonably restricting the time for making submissions or limiting the number of submissions that will be heard (as occurred with the Electoral Finance Bill). This has led the Commission to advocate for at least 12 weeks as the minimum period for consultation on proposed legislation. [51] The Executive's ability to dictate which committee it sends a particular piece of legislation to can also influence the outcome. For example, the Foreshore and Seabed legislation was sent to the Fisheries Select Committee (rather than the Māori Affairs Select Committee) because the Government anticipated resistance from the latter. The frequent use of supplementary order papers (SOPs) to introduce amendments that are not subject to public submission or examination for consistency with the BoRA can affect the quality of participation. [52] Poor legislation can result when the established legislative process is effectively bypassed by the use of urgency.

Twenty years ago, commentators warned about hasty legislation and the frequency with which urgency was invoked. [53] The use of urgency has now evolved to such a point in New Zealand that it has been described as

45 Ministry of Youth Affairs (2002), Youth Development Strategy Aotearoa (Wellington: Ministry of Youth Affairs)

46 Minister for Disability Issues (2001), New Zealand Disability Strategy (Wellington: Ministry of Health)

47 Ministry of Social Development (2001), New Zealand Positive Ageing Strategy (Wellington: MSD)

48 Office of the Clerk of the House of Representatives (2010), Government Accountability to the House. Accessible online at http://www.parliament.nz/NR/rdonlyres/439D688B-629B-4A2A-9197-C15C888F80A3/148361/governmentaccountability2010_3.pdf

49 Standing Orders Committee, Report of the Review of Standing Orders 1995, AJHR 1.18A, p 31

50 New Zealand Parliament, 25th Anniversary of the Select Committee System, media release, 23 July 2010. Accessed 4 November 2010 from http://www.parliament.nz/en-NZ/Features/5/2/9/00NZPHomeNews230720101-25th-anniversary-of-the-select-committee-system.htm

51 The Commission's position is outlined on its website at www.hrc.co.nz/hrc_new/hrc/cms/files/documents/16-Jul-2009_10-43-25_SubmissionAkldCouncilBill.doc

52 Waldron J (2008), Parliamentary Recklessness: Why We Need to Legislate More Carefully, Inaugural John Graham Lecture, Maxim Institute, Auckland.

53 Joseph P (2010), p 196

"disgraceful by world standards".[54] While urgency may be acceptable in relation to changing revenue laws in the wake of a budget,[55] it is less justifiable where it is used for purely political purposes. For example, the Electoral Finance Bill was deliberately rushed through its second reading and committee stages, in the face of public concern and opposition by other parties. The Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 was introduced under urgency and forced through all three readings in one sitting.

Transparency

Transparency and accountability are closely linked.[56] Transparency can be defined as access by the public to timely and reliable information on decisions and performance in the public sector.

In New Zealand, transparency is made possible through the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987, which ensure that citizens can access information about government and local government activities and are primary tools for public scrutiny of the Executive and local bodies.

In relation to the development of legislation, the BoRA applies to legislation in a number of ways. All government policy proposals and bills introduced into Parliament are assessed for their consistency with the BoRA. The process of vetting proposed legislation for consistency also contributes to transparency. Where legislation appears to be inconsistent with any of the rights and freedoms in the BoRA, a report must be tabled in Parliament by the Attorney-General. Although Parliament can enact the legislation even if it is incompatible, the process does ensure that the public and the legislature are aware that it breaches the BoRA.

The reporting requirement has been described as "deficient" in certain respects. It applies only on the introduction of legislation (and, as noted earlier, not to SOPs). A report will be tabled only if the Attorney-General considers the bill is inconsistent (not if it is consistent) with the BoRA. The fact that the legal information provided to the Attorney-General on which the advice is based can be withheld under the Official Information Act has been criticised as having implications for the transparency of the process.[57] Although advice received by the Attorney-General relating to BoRA consistency has been posted on the Ministry of Justice's website since 2003, the process could be improved by tabling Bill of Rights reports on every bill introduced.

To further help ensure the regulatory process is open and transparent, regulatory impact statements are prepared to support the consideration of regulatory proposals. They are published when the relevant bill is introduced to Parliament or the regulation is gazetted, or at the time of ministerial release.

The media also plays a significant role in ensuring transparency by championing the right to free speech, which is a necessary prerequisite for the effective functioning of a democratic government.[58] In New Zealand, state-owned television and radio channels are run at arm's length from the Government through state-owned enterprises.

Responsiveness

Government responsiveness is held in high regard in New Zealand. Members of parliament, including cabinet ministers, make themselves available to the public and their constituents, and local authorities have a wide range of mechanisms through which they can consult the general public.

Tensions can arise, however, when the Government has to balance conflicting views. The Government is responsible for making principled decisions and respecting and protecting internationally agreed-on human rights, even when public opinion on a particular issue is inconsistent with those standards.

54 Waldron J (2008), p 21

55 ibid p 21

56 Armstrong E (2005), Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues UN Economic and Social Affairs. Accessible online at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan020955.pdf

57 Butler and Butler (2005), p 212

58 Butler and Butler (2005), p 308

This is well illustrated when people participate in democratic processes such as citizen-initiated referenda and the Government does not act on the results. In 2009, there was a national referendum on section 59 of the Crimes Act, which relates to the use of force in disciplining children. The referendum, which asked "Should a smack as part of good parental correction be a criminal offence in New Zealand?", highlighted a number of difficulties. Not only was the question ambiguous, but the process for querying the wording was not generally well understood, effectively pre-empting the opportunity of challenging it. For many, however, it was more concerning that although 87 per cent of those who voted opted for "no", the Government elected not to change the law (which it considered was working well).

The section 59 debate illustrates the dilemma sometimes faced by governments being responsive to general public opinion and implementing human rights standards. Governments must maintain this balance in order to both stay in power and retain their moral authority to act. [59]

Conclusion
Whakamutunga

New Zealand is a parliamentary democracy with universal suffrage and free and fair elections. Its structures and processes are seen as largely democratic and there is general consensus on the ideal of a common citizenship without discrimination. Government accountability is recognised as important and public participation in decision-making is well understood and appreciated. The declining rate of voter turnout in both parliamentary elections and local body elections seems to reflect a loss of confidence in the benefits of participation.

Mechanisms to ensure participation and accountability are not always effective, and have at times been undermined by unduly limiting opportunities for making submissions to select committees or passing legislation under urgency. There is also a strong sense of dissatisfaction by many Māori about accountability by the Crown in relation to the Treaty of Waitangi.

While many institutions reflect increasing diversity, women, Māori, Pacific peoples, young people, disabled people and people of ethnic, cultural, religious and linguistic minorities are under-represented in elected office.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to progress democratic rights in New Zealand.

Constitutional framework

Reviewing the laws that make up our constitutional framework to ensure the Treaty, indigenous rights and human rights are fully protected.

Legislative process

Enhancing the transparency and accountability of the legislative process by tabling reports on the consistency of legislation with the BoRA on introduction and the third reading.

Representation

Increasing the representation of Māori, Pacific and other ethnic groups in local government.

Disenfranchisement of prisoners

Ensuring there is no further disenfranchisement of prisoners.

59 In order for a government even to consider acting on the results of a referendum, petitioners need to achieve a credible turnout. Turnout is one objection that opponents raise against making such referendums binding. Others are public policy importance and comprehensibility (which the section 59 referendum arguably failed).

7. Right to Justice

Tika ki te Haepapa

All are equal before the law.

Universal Declaration of Human Rights, Article 7 (plain text)

Introduction
Tīmatatanga

New Zealand has traditionally enjoyed a high regard for the right to justice, which is fundamentally linked in the popular imagination to the notion of a 'fair go' and to the belief that society should be based on the rule of law.

The rule of law is an essential foundation for a fully functioning democratic system and for full and effective protection of human rights. The rule of law is also fundamental to economic security, as it ensures that both the public and private sectors have a stable and reliable legal system for resolving commercial and other disputes. Furthermore, it establishes clear rules by which business can be conducted.

The core principle of the rule of law is that "all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and administered by the courts".[1] Lord Bingham of Cornhill, formerly senior Law Lord, has identified eight sub-rules to the rule of law. While all overlap to some degree with the right to justice, this chapter assesses the status of the right in New Zealand against five particularly relevant sub-rules.[2] These are:

1. The law must be accessible, intelligible, clear and predictable.
2. Fundamental human rights must be protected by the law.
3. Civil disputes, which the parties themselves are unable to solve, should be resolved through established procedures without prohibitive cost and in a timely fashion.
4. Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers.
5. Adjudicative procedures provided by the State should be fair. The overarching objective of the rule of law and the right to justice is that fair outcomes are realised by everyone encountering the judicial process.

Overall, New Zealand demonstrates an active commitment to the rule of law and the right to justice through continual review, evaluation and ongoing legal development. The convention is that judges are to be appointed without political bias. Where potential bias exists in the judiciary, it is identified and there are systems for ensuring that judgments are not tarnished by bias. Although the diversity of the judiciary has increased somewhat over recent years, the make-up of the judiciary as a whole is still not fully reflective of society.

International treaty bodies have criticised New Zealand for significant discrepancies in the realisation of the right to justice among different groups of New Zealanders, including disabled people; Māori and Pacific peoples; migrant communities and international students; and children and young people.

International context
Kaupapa ā taiao

The right to justice is fundamental to international human rights law. The right to justice is recognised under the Universal Declaration on Human Rights (UDHR) through the following Articles:

- Article 6: Everyone has the right to recognition everywhere as a person before the law.
- Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law.
- Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
- Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

1 Lord Bingham (2007), The Rule of Law, *Cambridge Law Journal*, Volume 66, Issue 1 pp 67–69

2 This assessment is not made from the perspective of those who are detained or are seeking asylum, which is covered in the chapters on rights of people who are detained and the rights of refugees.

Lawyers David Peirse (far left) and Frances Joychild (far right) with clients (from second left) Jessie Raine, Jean Burnett and Stuart Burnett outside the High Court in Auckland. Jessie, Jean and Stuart are three of the plaintiffs in what has become known as the parents as caregiver case. The health ministry pays for carers to look after severely disabled people but not if that carer is a family member. (New Zealand Herald Photograph by Natalie Slade)

- Article 21: (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country.

The right to justice is referred to in the International Covenant on Civil and Political Rights (ICCPR)[3] and customary international law. In addition, the notion that decision-makers, including judges, should abide by the principles of natural justice is a common law principle.

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) explicitly protects the rights of disabled people in relation to legal process in Article 12, on equal recognition before the law; Article 13, on access to justice; and Article 14, on the liberty and security of the person.

New Zealand context
Kaupapa o Aotearoa

THE LAW MUST BE ACCESSIBLE, INTELLIGIBLE, CLEAR AND PREDICTABLE

There are six main sources of law in New Zealand:

- laws made by Parliament – statutes or acts of Parliament
- laws made by the executive under the delegated authority of Parliament – regulations and rules
- laws made by local authorities
- some United Kingdom statutes made by the British Parliament, following the Statute of Westminster Adoption Act 1947
- laws made by the courts – common law
- customary international law.[4]

The law-drafting process in New Zealand strives to ensure that legislation is drafted only when it is needed, consultative procedures are followed, and resultant laws are clearly drafted. Key players in this process include the Legislation Advisory Committee, the Parliamentary Counsel Office, the Ombudsman, the Attorney-General (with respect to consistency with the New Zealand Bill of Rights Act 1990 (BoRA)), and parliamentary select committees.[5]

After a bill is introduced to Parliament and has been given its first reading, it is referred to a select committee. Select committees are small groups of MPs who can examine bills in detail and hear public submissions on proposed laws.

Nearly all bills, once referred to a select committee, are advertised in the metropolitan and major provincial newspapers for submissions from interested organisations or individuals. Bills and guidance on how to make a submission to select committees can be found on Parliament's website.[6] People may appear before select committees in person to support their written submissions. It is standard practice to make all submissions and officials' advice to select committees publicly available on Parliament's website as soon as the select committee has reported back to the House.

Additionally, openness and transparency of law-making is secured pursuant to several legislative enactments. The Official Information Act 1982 (OIA), for example, allows members of the public to seek official documents from government departments and some other public bodies.

FUNDAMENTAL HUMAN RIGHTS MUST BE PROTECTED BY THE LAW

New Zealand has constitutional safeguards designed to ensure adequate protection of human rights. The chaper on democratic rights outlines the elements of the constitution and the role of the executive, Parliament and the judiciary in providing checks and balances on each other.

One way in which human rights standards are incorporated into domestic law is through the BoRA. One of its purposes is to "affirm New Zealand's commitment to the

3 The ICCPR underscores the right to impartial and independent justice, cornerstones of the right to justice. For example, see Articles 3 and 14.

4 Customary international law is automatically a source of New Zealand law without the need for legislative action, and can thus be applied directly by the courts in the absence of any contrary statutory provision.

5 For more detail on the legislative drafting process, see the Legislative Advisory Committee Guidelines, accessible online at http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/combined-guidelines-2007v2.pdf

6 http://www.parliament.govt.nz

ICCPR". However, this affirmation can not be relied upon to fill perceived gaps in the BoRA, such as the absence of economic, social and cultural rights. This reflects the domestic norm that international law is part of domestic law only to the extent that Parliament has incorporated it into the domestic system. Rather, international law is used as a helpful source of guidance in ascertaining the meaning of domestic law.

Section 27 of the BoRA guarantees three aspects of what the section heading refers to as the "right to justice": the right to observance of the principles of natural justice; the right to apply for judicial review; and the right to take and defend civil proceedings involving the Crown in the same way as civil proceedings between individuals. The concept of the "principles of natural justice" in section 27(1) can be (and is) developed as a matter of common law. The "principles of natural justice" include, as a minimum, the rights to notice (as to hearing and as to the content of the case against one, where relevant), to contradict, to representation, to an impartial determination, to an oral hearing, and to consultation in advance. [7]

The following institutional practices are designed to guarantee protection of fundamental human rights:

- The Regulations Review Committee ensures that regulations are made lawfully, and can draw to the attention of Parliament any regulations that "trespass unduly on personal rights and liberties". [8]
- The Cabinet Office Manual requires human rights assessments of proposals for new laws and policies. Government departments must act in a way that meets human rights standards.
- The Ministry of Justice (along with the Solicitor-General and the Crown Law Office) has a particular role in checking draft legislation of other government departments for compliance with the BoRA. In particular, under Standing Order 264 and section 7 of the BoRA, the Attorney-General is required to report on any bill containing any provision that appears to be inconsistent with any of the rights and freedoms contained in the act.

Of these measures, the reporting mechanism under section 7 in the BoRA has the most important deterrent effect on policy-makers promoting measures contrary to the rights and freedoms contained in the BoRA. [9] It constitutes a safeguard designed to alert members of parliament to legislation which may give rise to an inconsistency, and accordingly to enable them to debate the proposals on that basis. [10] While Parliament can pass legislation inconsistent with a section 7 report, it is usually reluctant to do so.

The section 7 process is much more transparent now that all advice provided by the Ministry of Justice and the Crown Law Office to the Attorney-General on the consistency of bills with the BORA is placed on the Ministry of Justice's website, and all section 7 reports are available on Parliament's website. [11]

However, as observed by human rights experts, this reporting mechanism is deficient in a number of respects. First, the obligation to report arises only in respect of the introductory copy of a bill. Accordingly, there is no statutory obligation on the Attorney-General to report the BoRA inconsistencies that appear in amendments proposed after the initial introduction of the bill (although this does occasionally occur in the context of select-committee proceedings and in the tabling of supplementary order papers).

Secondly, section 7 of the BoRA focusses on a reporting obligation, but does not provide a mechanism that channels the productive use of the information gleaned through the making of such a report. The Attorney-General does not have a 'second look' at legislative proposals in the light of such information.

Thirdly, because the views of successive Attorneys-General have been that the obligation to report arises

7 Butler P and Butler A (2005), *New Zealand Bill of Rights Act: A Commentary* (Wellington: LexisNexis)

8 House of Representatives Standing Order 378

9 Palmer G (2006), The Bill of Rights Fifteen Years On, Keynote Speech at Ministry of Justice Symposium, 10 February, accessible online at http://www.lawcom.govt.nz/media/speeches/2006/bill-rights-fifteen-years

10 Mangawaro Enterprises Ltd v Attorney General [1994] 2 NZLR 451

11 Accessible online at http://www.justice.govt.nz/policy-and-consultation/legislation/bill-of-rights and http://www.parliament.nz/en-NZ/PB/Presented/Papers/Default.htm

only where he or she is of the view that a provision is inconsistent with the BoRA (not may be) and the concept of the BoRA inconsistency is triggered only where the limit placed on a right or freedom is not reasonable, parliamentarians are not advised through the section7 mechanism of those instances where the consistency of a proposed measure with the BoRA is a matter of fine judgment.

A key element in the overseeing of law-making is the active participation of civil society: people making submissions, challenging proposals, and complaining when bills are too complex or difficult to understand (see the chapter on democratic rights).

Tribunals and courts must consider human rights when interpreting laws. [13] The courts do not have power to strike down acts of parliament that are inconsistent with human rights standards. However, the Court of Appeal has hinted at a willingness to make formal declarations where legislation is found to be inconsistent with the BoRA. Such declarations would be in addition to a similar remedy available through the Human Rights Tribunal, in respect of section 19 of the BoRA (freedom from discrimination). The courts can go further with regulations and rule them invalid in some circumstances. [14]

CIVIL DISPUTES, WHICH THE PARTIES THEMSELVES ARE UNABLE TO SOLVE, SHOULD BE RESOLVED THROUGH ESTABLISHED PROCEDURES WITHOUT PROHIBITIVE COST AND IN A TIMELY FASHION

It is a corollary of the principle that everyone is bound by and entitled to the benefit of the law that people should be able, in the last resort, to go to court to have their rights and liabilities determined. Although this sub-rule refers specifically to civil claims, it applies equally to the criminal justice system.

Section 24(f) of the BoRA guarantees anyone the right, when charged with a criminal offence, "to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance". New Zealand's current legal aid system is administered by the Legal Services Agency under the Legal Services Act 2000, which grants legal aid to those who are unable to pay for legal services. Legal aid is also available in many civil proceedings, although the criteria to be met are stricter and include a requirement on the applicant to show reasonable grounds for taking or defending the proceedings, and whether the repayment amount will exceed the cost of proceedings. [15]

Community law centres (CLCs) have lawyers who give free legal advice and in some cases can provide representation at court. [16]

Auckland Disability Law, set up in 2008, has specialised knowledge of the issues and law that particularly affect disabled people, as well as being able to address the barriers, including support needs and communication assistance, to enable disabled people to exercise their legal rights and access justice.

The Duty Solicitor Scheme provides representation free of charge for a person's first appearance.

Alternative disputes-resolution processes, such as mediation, are available in a number of specialist jurisdictions, such as employment and human rights.

MINISTERS AND PUBLIC OFFICERS AT ALL LEVELS MUST EXERCISE THE POWERS CONFERRED ON THEM REASONABLY, IN GOOD FAITH, FOR THE PURPOSE FOR WHICH THE POWERS WERE CONFERRED AND WITHOUT EXCEEDING THE LIMITS OF SUCH POWERS

Openness and transparency enhances public confidence in the impartial administration of justice and ensures that public officers do not exceed the limits of their powers.

The OIA and the Local Government Official Information and Meetings Act 1987 (LGOIMA) are useful tools to open up the internal processes of government departments and other public bodies, in order to assess whether they are

13 Hosking & Hosking v Runting & Ors, [2004] NZCA 34; [2003] 3 NZLR 385 [2004] NZCA 34; [2003] 3 NZLR 385

14 Drew v Attorney-General [2001] 2 NZLR 428

15 Legal Services Act 2000, section 9

16 The CLCs are largely funded by interest from the trust (client) accounts of practising lawyers. With the economic downturn, it has been necessary for the Government to make substantial contributions to their running costs.

acting in accordance with the law. Section 47 of LGOIMA also confirms that, subject to the limited exceptions, every meeting of a local authority shall be open to the public (including the media).

Judicial review forms part of the New Zealand legal tradition. Judicial review is the body of law relating to the review of the justiciable acts, decisions, determinations, orders and omissions of individuals and bodies performing public functions. Judicial review of the decision-making activities of these bodies is generally perceived as an important constitutional procedure to prevent those exercising public functions from abusing their powers.

ADJUDICATIVE PROCEDURES PROVIDED BY THE STATE SHOULD BE FAIR

Equality and fairness are not just about having laws and processes that appear to treat everyone equally or in the same way (sometimes called 'formal equality'). Equality and fairness are also about what happens in practice in everyday life (sometimes called 'substantive equality'). [17]

Neither the BoRA nor the Human Rights Act 1993 (HRA) address the right to equality. However, the BoRA indirectly affirms it by reference to New Zealand's commitment to the ICCPR. The White Paper (which preceded the BoRA) considered that the term was "elusive and its significance difficult to discern". [18] Rather, it said that the 'general notion' of equality before the law was implicit in reference in the proposed bill to "New Zealand being founded on the rule of law". [19] The White Paper considered that a notion would bind the legislature.

An independent and impartial judiciary is a cornerstone of a legal system, ensuring that questions of legal right and liability are resolved by application of the law. Judicial independence from political interference by the executive is protected by the Judicature Act 1908 and the Constitution Act 1986. Most judges are appointed by the Governor-General on the advice of the Attorney-General. In giving this advice, the Attorney-General takes advice from the Solicitor-General and the Chief Justice of the court to which the judge is to be appointed. Measures such as permanent tenure, [20] judicial immunity and the setting of salaries by an independent body all protect judicial independence. Judges are also prohibited from undertaking other employment, unless the employment is compatible with judicial office. [21] Bias (including a perception of bias) is a reason for overturning judicial decisions. Where any potential conflicts of interest arise, the convention is that judges will voluntarily step down or 'recuse' themselves.

The Office of the Judicial Conduct Commissioner was established in August 2005 to deal with complaints about the conduct of judges. The Judicial Conduct Commissioner's role is to receive and assess complaints about judges' conduct that would warrant removal from office.

New Zealand has a well-developed legal system, with a range of courts and tribunals. The final appeal court is the Supreme Court, below which are the Court of Appeal, the High Court and the District Courts.

There are a number of specialist courts, including the Family Court, the Youth Court, the Environment Court, the Employment Court and the Māori Land Court. There are over a hundred specialist tribunals, authorities, boards, committees or related bodies to deal with specific types of disputes (largely between individuals) on matters such as human rights, [22] employment disputes, censorship, welfare and benefits, taxation, and licensing.

The Waitangi Tribunal is a permanent commission of inquiry, established by the Treaty of Waitangi Act 1975, to inquire into claims by Māori relating to the Treaty of Waitangi. It reports its non-binding findings and recommendations to the Government. New Zealand also has specialist officers in the private sector, such as the Banking Ombudsman.

17 The differences between formal and substantive equality are widely recognised in sociological and legal writing. For examples, see: General Recommendation No. 25, on CEDAW, Article 4, para 1, on temporary special measures, paras 4–9

18 White Paper (1985), *A Bill of Rights for New Zealand* (Wellington: Government Printer).

19 This principle is further reflected in the Supreme Court Act 2003

20 Judges must retire at the age of 68. A bill is currently before Parliament raising the retirement age to 70.

21 Section 4(2a) Judicature Act 1908

22 The Human Rights Review Tribunal hears cases involving claims of discrimination under the Human Rights Act 1993, as well as cases involving privacy issues under the Privacy Act 1993, and some cases involving health and disability issues.

New Zealand today
Aotearoa i tēnei rā

THE LAW MUST BE ACCESSIBLE, INTELLIGIBLE, CLEAR AND PREDICTABLE

Increasingly, agencies and departments are consulting with the Legislation Advisory Committee in advance of framing their legislative proposals, and there is considerable benefit in that practice.[23]

It has been stated that the Parliamentary Counsel Office strives to "improve access to legislation so that legislation is drafted as clearly and simply as possible", and to ensure that "New Zealand legislation is readily accessible".[24] The New Zealand Legislation website provides access to acts, statutory regulations, bills and supplementary order papers. In 2010 the Legislation Bill was introduced to Parliament. The purpose of this bill is to modernise and improve the law relating to the publication, availability, reprinting, revision and official versions of legislation, and to bring this law together in a single piece of legislation.

A variety of information and assistance is available from government and other bodies (such as community law centres) about legal requirements across a range of areas. Increasingly, this is available in a range of different languages.

Periodic review of New Zealand's laws and regulations ensures that improvements can be made to enacted legislation. This is the responsibility not only of government departments and agencies administering legislation, but also of specialist bodies. For example, the Rules Committee continuously reviews procedural rules in the Supreme Court, the Court of Appeal, the High Court and District Courts, in the light of national and overseas developments. The Rules Committee has made significant contributions, simplifying and streamlining procedures in the District and High Court, drafting the Judicature (High Court Rules) Amendment Act 2008 and the District Court Rules 2009. In relation to the new District Court Rules, the Rules Committee described the need for the change as follows:

> **The traditional interlocutory process is cumbersome, time-consuming, and comes at a disproportionate cost to most litigation in the District Court… Fundamental to the new rules is the principle that litigants in the District Court should be able to give notice of their claims and defences simply and economically. They should be empowered readily, easily and efficiently to receive and obtain from each other relevant evidential and documentary information at the earliest practicable points.**[27]

Urgency

As Sir Geoffrey Palmer has observed:

> **Law-making should be a solemn and deliberate business. It ought to permit time for reflection and sober second thought. It ought to be organised so that people have a chance of knowing what is happening and making representations about it if they wish.**[28]

He identified the dangers that flow from the rapid passing of legislation, including lack of time for the public to

23 Palmer G (2006), Law reform and the Law Commission after 20 years – we need to try a little harder, Speech to para 89. Accessible online at http://www.lawcom.govt.nz/UploadFiles/SpeechPaper/d0c9b674-5a55-405d-9b3c-2cfd467a0d5d//Law%20Reform%20and%20the%20Law%20Commission%20in%20NZ%20after%2020%20years.pdf

24 Parliamentary Counsel Office, PCO's Mission and Vision Statements, accessible online at http://www.pco.parliament.govt.nz/mission-and-vision/

25 http://www.legislation.govt.nz

26 The Rules Committee is a statutory body established by section 51b of the Judicature Act 1908.

27 Rules Committee Information Paper, paras 5 and 7 http://www.courtsofnz.govt.nz/about/system/rules_committee/district-courts-revision/Rules-Committee-DCR-overview.pdf. The rules provide a streamlined process with a logically staged exchange of relevant information which is conducive to exploration of settlement. If early settlement is not achieved, a more elaborate 'information capsule' exchange procedure provides adequate foundation for examination of the merits and the parties' needs and interests at an early settlement conference. If settlement is not reached, the dispute can be promptly channelled into a form of adjudication proportionate to the case. It is anticipated the information exchanged by that point will largely remove the current discovery complications and their attendant expense.

28 Palmer G (1987), *Unbridled Power* (Auckland: OUP) at 160

participate in the parliamentary process in order to make their views known. This has the potential to diminish public confidence in Parliament, both as a watchdog on the executive branch of government and as a forum for public opinion to be heard.

Participation is a foundation stone of democracy in a modern society. While voting is fundamental to participation, so too is the ability to contribute in a meaningful way to the development of legislation. From time to time governments expedite legislative proposals through all the parliamentary processes, under a perceived need for 'urgency'. This limits the possibility for public participation in several respects, for example by severely truncating select committee deadlines,[29] or in some cases by accepting submissions only from those expressly requested to provide them.[30] This practice suborns good democratic processes to the potential detriment of sound decision-making. This has led the Commission to advocate for at least 12 weeks as the minimum period for consultation on proposed legislation.[31]

Disabled people report an overload of legislative changes in the past two years, including significant amounts of legislation passed under urgency. Among the concerns raised by disabled people are the short periods of time in which submissions must be made; the complexity of the submission processes; discussion documents being lengthy, difficult to read and rarely available in alternative formats; and, more generally, the lack of consideration of the impact of law changes on disabled people.

The use of government majorities on select committees to muzzle opposition critics (for example, by not allowing a minority report) has also been the subject of criticism.

FUNDAMENTAL HUMAN RIGHTS MUST BE PROTECTED BY THE LAW

While, generally speaking, New Zealand is committed to the rule of law and the right to justice, legislation does not encapsulate all the civil and political rights recognised in the ICCPR, nor are economic, cultural and social rights protected. As such, persons seeking to claim violations of economic, cultural, and social rights are precluded from doing so before the courts.

The Human Rights Committee stated in its concluding remarks, in relation to New Zealand's fifth periodic review under the ICCPR:

> **The committee reiterates its concern that the Bill of Rights Act 1990 (BoRA) does not reflect all Covenant rights. It also remains concerned that the Bill of Rights does not take precedence over ordinary law, despite the 2002 recommendation of the committee in this regard. Furthermore, it remains concerned that laws adversely affecting the protection of human rights have been enacted in the state party, notwithstanding that they have been acknowledged by the Attorney-General as being inconsistent with the BoRA.**[32]

Limited effect of constitutional safeguards

While the Attorney-General's section 7 report is probably the strongest tool against enacting laws inconsistent with BoRA, under the doctrine of parliamentary sovereignty (and until there is an entrenched Bill of Rights), Parliament is unconstrained in the legislation it can pass. Since 1990, section 7 reports have been tabled in Parliament in relation to 56 bills. Of these, 19 (mostly private members' bills) were not enacted, and 10 were amended to address the inconsistency. However, 19 bills were enacted substantially unchanged, and eight remain before the House. The following examples demonstrate the limited effect of the reporting function:

(a) An amendment to the Crimes Act 1961 sought to introduce two exceptions to the double jeopardy rule, whereby a defendant in a criminal case could not be tried

29 In practice this prevents NGOs from being able to consult members to inform their submissions.

30 For example, the limited timeframe for the public to make submissions on the Local Government (Auckland Council) Bill 2009; or legislation such as the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 which was introduced under urgency and forced through all three readings in a single sitting; or the precedent set when a law such as the Canterbury Earthquake Response and Recovery Act 2010 is enacted under urgency, abrogating established constitutional protections.

31 The Commission's position is outlined on www.hrc.co.nz/nz/home/hrc/newsandissues/publicconsultation.

32 CCPR/C/NZL/CO/5

twice for the same offence. [33] Under the original bill, a defendant could be tried twice in two circumstances: 'tainted acquittal', where a person found not guilty of a crime is subsequently convicted of an administration of justice offence that significantly contributed to the person's acquittal; [34] and where there is new and compelling evidence in relation to an offence that is punishable by imprisonment of 14 years or more.

In his section 7 report, the Attorney-General found the 'tainted acquittal' exception to be a justifiable breach of section 26(2) of the BoRA. [35] However, he considered that the 'new and compelling evidence' exception was not justified. He was concerned about the disproportionately wide range of offences caught by the 14-year penalty threshold. He considered that a specific and limited schedule of offences must be regarded as a minimum requirement of any scheme that makes an exception to the double jeopardy rule for fresh and compelling evidence cases. He noted that the new and compelling evidence exception enacted under the United Kingdom's Criminal Justice Act 2003 captured significantly fewer offences than was proposed under the bill. [36] National, NZ First, the New Zealand Law Society and the Law Commission also considered that the exception was a major inroad into the double jeopardy principle, which is a cornerstone of criminal justice, and that there was no principled foundation for allowing retrial on the basis of new and compelling evidence.

Even though the Attorney-General had provided concrete examples of how to amend the legislation to make it compliant with the BoRA, while still achieving the policy objective, the select committee did not share his concerns. [37] The final amendments to the Crimes Act were largely unchanged from the original proposal. [38]

(b) A 2009 bill, popularly known as the 'three strikes bill', proposed the imposition of a life sentence for a third listed offence, with a non-parole period of 25 years. The Attorney-General concluded, in his section 7 report, that this provision "may raise an inconsistency with the right against disproportionately severe treatment affirmed by section 9 of the BoRA", noting that "where section 9 is engaged, there is no scope for justification in terms of section 5". [39]

The Attorney-General was one of many individuals and groups to raise concerns about the human rights implications of this bill. [40] Following the Attorney-General's section 7 report, the Government and the select committee made additional changes to the bill. However, the revised bill required judges to impose the maximum sentence on a third-strike conviction, regardless of the

33 The rule against double jeopardy is a fundamental principle of law, which declares that a person should not be tried for the same crime more than once. The basic premise is that the State, with all its resources and powers, should not be allowed to make repeated attempts to convict a person for an alleged offence. Without the rule, the possibility of convicting an innocent defendant is higher. The principle stems from the Magna Carta and is codified under section 26(2) of the Bill of Rights Act and the special pleas of previous acquittal and previous conviction in the Crimes Act.

34 The 'tainted acquittal' exception was intended to apply to persons who escape probable conviction for a serious crime by committing an administration-of-justice offence leading to their acquittal

35 Because a tainted acquittal is not legally a legitimate verdict but a nullity, a rule relating to a retrial of such an acquittal is not an exception to the double-jeopardy rule.

36 The Attorney-General was concerned the circumstances of many charges would be unlikely to warrant 14 years' imprisonment if the accused were found guilty. Not all of the current offences that would qualify for the exception are of the type that justify departure from the double-jeopardy rule. The bill's method of determining qualifying offences will result in the automatic capture of any future offences enacted with this maximum penalty. Moreover, lifting current maximum penalties above the threshold will offer an expedient way to extend the reach of the exception without having to give proper consideration to the consequences of undermining the double jeopardy rule.

37 It considered that "the new and compelling evidence proposal represents, in our view, a principled balancing of the two competing interests of finality and justice in the criminal system".

38 Enacted under the Crimes Amendment Act 2008

39 Attorney-General (2009), Interim report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform Bill, para 4

40 Then New Zealand Law Society noted that the sentencing regime proposed in the bill had aroused "concern and disquiet" among legal practitioners experienced in the criminal justice system. Dr Richard Ekins and Professor Warren Brookbanks of Auckland University Law Faculty spoke on 'three strikes' at a public lecture co-hosted by Maxim Institute and the Institute of Policy Studies in Wellington on 31 March 2010 and Auckland on 7 April 2010.

gravity of that particular wrong, and did not address the BoRA issues. The bill was subsequently passed by Parliament.

Although cabinet guidelines[41] require that government departments are aware of the NZ Disability Strategy, and consider whether a disability perspective is required in papers submitted to Cabinet, this arguably is not a robust assessment and does not generally require input from disabled people.

Bias in the criminal justice system

Every second person serving a prison sentence in New Zealand is Māori. About 50 per cent of the people in jail come from 14 per cent of the population. Among imprisoned women, about 60 per cent are Māori. Recent policy and legislative proposals – such as the 'three strikes' legislation, which will disproportionately affect Māori – risk exacerbating the over-representation of Māori in prisons. The criminal justice system continues to fail to ensure substantive equality before the law.[42]

The Human Rights Committee stated in its concluding remarks, in relation to New Zealand's fifth periodic review under the ICCPR, that:

> **The State party 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 state party should also increase its efforts to prevent discrimination against Māori in the administration of justice. Law enforcement officials and the judiciary should receive adequate human rights training, in particular on the principle of equality and non-discrimination.**[43]

In 2009, the Government agreed that "addressing drivers of crime" be established as a whole of government priority, and that this approach to reduce offending and victimisation would include:

- addressing the underlying issues that drive and facilitate offending and victimisation, particularly for Māori
- responding effectively to the drivers of crime along the pathways of offending, including early prevention, treatment for specific needs related to offending, and justice sector responses that reduce reoffending
- resolving civil disputes, which the parties themselves are unable to solve, through established procedures without prohibitive cost and in a timely fashion.

It has been suggested that people with intellectual disabilities are also over-represented in the criminal justice system, and that there is a lack of support for such individuals throughout the criminal justice process.

Equal access to court

Although New Zealand law generally provides for equal access to courts and other dispute resolution mechanisms, significant barriers remain for a large proportion of New Zealanders.

Access to justice is to some degree dependent on financial circumstances, with those who are unable to pay the substantial costs of litigation prevented from obtaining an effective remedy or, at best, obtaining a remedy available in lower levels of tribunal or mediation which is less than what would otherwise be available through court processes.

Disabled people often report challenges of being expected to represent themselves due to lack of reasonable accommodation, including barriers to access, communication and information. Access problems include physical and wheelchair access; lack of accessible facilities and parking at courts; inaccessible documents and information; and, despite the New Zealand Sign Language Act 2006, lack of access to sign language interpreters for deaf people attending courts.

In 2010, a new Special Circumstances Court was established in Auckland on a pilot basis. It is a specialised, solution-focussed court designed to "aid in the reduction of chronic public space offending in Auckland's inner city by those who are homeless … and have ongoing mental illness and/or addictions, or who are mentally impaired through either injury or disability". It will be important

41 Cabinet Office: Guide to cabinet and cabinet committee processes. Retrieved 15 Oct 2010 from: http://cabguide.cabinetoffice.govt.nz/procedires/papers/sections-in-papers#disability-perspective

42 See the chapter on the rights of people who are detained

43 CCPR/C/NZL/CO/5

to monitor this pilot programme's impact on access to justice.

Legal Aid

Certain groups continue to have difficulty in accessing legal aid, including disabled people, women, refugees, victims of collapsed financial institutions and victims of historic claims of abuse. In its 2007 comments on New Zealand's sixth periodic report under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the CEDAW Committee noted its concern about the barriers women faced in accessing legal aid.[44]

In 2009, Dame Margaret Bazley completed her review of the legal aid system.[45] Her report found "system-wide failings". As a result, the Government has initiated a number of changes to the system, which include:

- competency testing for legal aid providers (performance monitoring will be in place by July 2012)
- expanding the Public Defence Service to Hamilton, Wellington and Christchurch
- introducing changes to improve the duty lawyer scheme
- streamlining processes for assessing applications for low-cost criminal cases in the summary jurisdiction
- developing national standards for community law centres
- bringing the functions of the Legal Services Agency into the Ministry of Justice – an independent statutory officer will be responsible for granting legal aid.

Changes that do not require legislative amendment are being implemented over the next year; those that do require amendment will follow the legislative process. These changes are designed to "deliver access to justice for those who are most in need in a way that is appropriate to both their needs and those of the justice system".[46]

While most of the recommendations in the report are highly critical of the existing system, the extension of the Public Defence Service to Hamilton, Wellington and Christchurch reflects positively on the public defenders programme piloted in Auckland. The evaluation report for the Public Defence Service showed that, where the volumes of work are sufficient (such as in the major centres), the Public Defence Service could provide services more efficiently than private lawyers, with no perceivable decline in quality.[47] In the context of the Ministry of Justice's current review of community law centres, the report also made positive observations that "community law centres are too important to be allowed to fail or to have their services restricted significantly".[48]

Security for costs

Concerns have been raised about the use of discretionary costs orders in civil courts. Such orders essentially require a party to pay into court an amount equal to what the judge decides the opposing party would likely spend in defending the case. The sum is forfeited where the instigating party loses. The financial burden imposed by these costs orders can effectively preclude a large proportion of New Zealanders from being able to seek redress through the civil courts.

The legal profession

A committed legal profession is also critical to ensuring access to justice. Sir Owen Dixon said on the occasion of taking his oath as Chief Justice of Australia:

> **[T]here is no more important contribution to the doing of justice than the elucidation of the facts and the ascertainment of what a case is really about, which is done before it comes to counsel's hands. Counsel, who brings his learning, ability, character and firmness of mind to the conduct of causes and maintains the very high tradition of honour and independence of English advocacy, in my opinion makes a greater contribution to justice than the judge himself.**[49]

44 CEDAW/C/NZL/CO/6 (2007)

45 Legal Aid Review (2009), *Transforming the Legal Aid System – Final Report and Recommendations* (Wellington: Ministry of Justice)

46 Legal Aid Review (2009), p 11

47 Legal Aid Review (2009), para 407

48 Legal Aid Review (2009), p 7

49 Owen Dixon, 'Upon Taking the Oath of Office as Chief Justice' in Jesting Pilate, 1965, p 247

Speaking to the Bar Association's AGM in September 2009, Attorney-General Christopher Finlayson said the quality of the bar needed to improve. He made a number of suggestions for reform, including improvements to pre-admission professional legal education and mandatory continuing legal education, at least for those in the early years of legal practice.

> **Unfortunately, what I am picking up [from speaking with judges about any concerns they may have] is counsel incompetence. Some people contend that the overall standard of the bar, and particularly the criminal bar, is not high enough in New Zealand and that is why we have so many delays… Too many lawyers practising at the bar are incompetent or worse and there is no proper means of assessing their competence.** [50]

Following this speech, the New Zealand Law Society announced restrictions on barristers practising without supervision in their first three years following admission to the bar.[51] This will go some way toward ensuring that barristers sole are given adequate supervision as they begin to practise.

Excessive delays in court proceedings

Section 25(b) of the BoRA provides that everyone charged with an offence has "the right to be tried without undue delay". The current average wait for a jury trial in the High Court from committal to trial date is 305 days, and for the District Courts 283 days. In 2008, Parliament passed the Criminal Procedure Bill, which contains a number of procedural reforms aimed in part at addressing issues of efficiency in the justice system.

However, a raft of recent criminal justice proposals have tested the strength of New Zealand's constitutional protections and may impact negatively on the right to justice. These include, for example, restricting availability of jury trials.[52]

There was also a move to introduce a form of trial by video, in which defendants held in custody could be denied their right to be physically present at their trials. The Human Rights Commission expressed its opposition to a select committee hearing, arguing that this infringed the BoRA right to be present at trial, but it was only during the parliamentary debates at the third reading that this particular proposal was effectively dropped. While these proposed changes are designed to further simplify procedures and deliver 'justice' to victims,[53] they also have significant implications in relation to the realisation of the right to justice.

Historic claims of abuse while under the care of the State

There are a significant number of claims before the courts relating to abuse and mistreatment suffered while under the care of the State. The courts have heard five cases to date, all of which have failed, primarily because of technical legal defences such as a time-bar.[54]

It has been suggested a number of times that the courts are not an appropriate forum for dealing with claims of historic abuse, and that the Government should consider other ways of resolving them. Dame Margaret Bazley stated in her report on the legal aid system:[55]

> **The historic abuse claims in particular have the potential to place enormous pressure on the LSA's [Legal Services Agency's] granting process and on legal aid expenditure, both because of the large number of claims and the high cost involved. Urgent consideration**

50 Christopher Finlayson, Counsel's Duty to Cooperate – Achieving Efficiency and Fairness in Litigation, 2009

51 New Zealand Law Society (2010), Starting Practice as Barrister. Accessible online at http://www.lawsociety.org.nz/home/for_lawyers/regulatory/starting_practice_as_a_barrister. Under regulations expected to be promulgated by the middle of 2010, applicants must have had at least three years' relevant legal experience in New Zealand within the last eight years before they can start practice as a barrister.

52 Section 24 of the BoRA currently provides the right to trial before a jury where a person is charged with an offence which carries a penalty of three months or more.

53 See also Ministry of Justice (2009), 'A Focus on Victims of Crime: A Review of Victims' Rights' (consultation document), (Wellington: Ministry of Justice). Accessible online at http://www.justice.govt.nz/publications/global-publications/a/ a-focus-on-victims-of-crime-a-review-of-victims-rights

54 The Commission is currently undertaking a review of New Zealand's response to historic claims of abuse while under the care of the State.

55 See also *J v CHFA* CIV-2005-485-2678, 16 November 2007

should be given to alternative ways of resolving these claims. [56]

The litigation process results in claimants being re-traumatised by telling their story a number of times and is ineffective in providing any resolution to these claims.

In its concluding observations in 2009 the United Nations Committee against Torture (UNCAT) stated:

[New Zealand] should take appropriate measures to ensure that allegations of cruel, inhuman or degrading treatment in the 'historic' cases are investigated promptly and impartially, perpetrators duly prosecuted, and the victims accorded redress, including adequate compensation and rehabilitation. [57]

MINISTERS AND PUBLIC OFFICERS AT ALL LEVELS MUST EXERCISE THE POWERS CONFERRED ON THEM REASONABLY, IN GOOD FAITH, FOR THE PURPOSE FOR WHICH THE POWERS WERE CONFERRED AND WITHOUT EXCEEDING THE LIMITS OF SUCH POWERS

The fact that New Zealand has consistently ranked as one of the least corrupt countries in the world on Transparency International's Corruption Perceptions Index suggests that the system is operating satisfactorily.

Courts

Most court hearings are open to the public and the media, with some limitations in proceedings involving child, youth and family matters. In 2006, the Law Commission released a report on access to court records. [58] It found that access to court records is not as open as access to court hearings.

Government

In 2009, the Law Commission commenced a review of the OIA and the LGOIMA. [59] This review is intended to assess these two acts to ensure that they continue to operate efficiently and remain influential. Both acts have been successful in promoting a culture of openness in relation to central and local government activities, and their underlying principles are not in question. The strength of these acts is the underlying principle of general availability of information, subject to listed exceptions.

However, the Law Commission has identified a number of issues that are so prevalent as to thwart the underlying objective of transparency. In his media release on the review, Sir Geoffrey Palmer stated that "the political landscape is different than in the 1980s and advances in information technology have transformed the management of all information". [60] Recently a lawyer commenting on the acts observed that when the legislation was first enacted, government departments gave away large amounts of information, whereas today, doing so is seen as naive. [61]

The Law Commission has analysed the responses from a survey and conducted further research. An issues paper was released for public consultation in 2010. [62]

Section 48 of the LGOIMA states that a local authority may, by resolution, exclude the public (including the media) from the proceedings of any meeting on certain grounds. For example, a local authority may exclude the public from the whole or any part of the proceedings where: there is good reason for withholding the information; [63] disclosure would be unlawful; [64] or the

56 Legal Aid Review (2009), p 103

57 CAT/C/NZL/CO/5, 14 MAY 2009, para 11

58 New Zealand Law Commission (2006), *Access to Court Records* (Wellington: NZLC), p 93. Accessible online at http://www.lawcom.govt.nz/project/access-court-records?quicktabs_23=report#node-643

59 Parts I to VI of LGOIMA are, in most respects, identical to the OIA

60 http://www.lawcom.govt.nz/sites/default/files/press-releases/2009/12/Publication_159_448_PR%20-%20Official%20Information%20Act%2009122009.pdf

61 Catriona McLennan, speaking on National Radio, 3 March 2010

62 New Zealand Law Commission (2010), *The Public's Right to Know – A Review of the Official Information Act 1982 and parts 1–6 of the Local Government Official Information and Meetings Act 1987*

63 LGOIMA, section 48(1)(a)

64 LGOIMA, section 48(1)(b)

purpose of the proceedings is to consider a recommendation made by an Ombudsman.[65]

It is important that these exceptions are invoked only in exceptional circumstances, where exclusion is a necessity. A wider application risks undermining the purpose of LGOIMA and bringing the legitimacy of local authorities as democratic bodies into question.

ADJUDICATIVE PROCEDURES PROVIDED BY THE STATE SHOULD BE FAIR

Judiciary

An independent and impartial judiciary is a cornerstone of a legal system. This convention has recently come under scrutiny following the 'Saxmere interests' cases. Wilson J did not recuse himself when a case came before him in the Court of Appeal where he had a long-term business relationship with counsel for the (successful) Wool Board. The Saxmere interests were successful in having Wilson J's decision remitted for hearing, when the Supreme Court found (reversing their earlier judgment) that there was an apprehension of bias in the mind of a fair-minded lay observer.[66] Following this decision, and the instigation of a formal judicial-conduct inquiry, Wilson J resigned from his position as Supreme Court judge.

This case raises questions as to whether the conventions surrounding judges recusing themselves are too informal. However, it should be noted that prior to this case, there were no reported decisions on apparent bias relating to the relationship between judges and counsel, reflecting that the conventions are largely followed.[67] No judicial system is immune from allegations of apparent bias. For example, in Re Pinochet,[68] the House of Lords recalled one of its earlier decisions.

The Judicial Conduct Commissioner received 139 complaints in 2008–09. These were based on various grounds, including rudeness, unfairness, inappropriate remarks, failure to listen, bias and predetermination. The Commissioner dismissed 113 complaints during the year upon one or more of the grounds set out in section 16(1) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. The most common ground for the dismissal of complaints occurred, in essence, where the complaint called into question the correctness of a decision made by a judge. Section 8(2) of the act provides that it is not a function of the Commissioner to challenge or call into question the legality or correctness of any judgment or other decision made by a judge in relation to any legal proceedings. The proper avenue for that is by way of appeal or application for judicial review. Other grounds for dismissal were varied, including complaints being frivolous, vexatious or not in good faith. Four complaints were referred to the Heads of Bench.

As an unelected body, the legitimacy of the judiciary rests largely on its credibility and the acceptance by the public of its rulings as fair. A 2004 UK government consultation paper, entitled 'Increasing Diversity in the Judiciary' noted:

> **[I]f the make-up of the judiciary as a whole is not reflective of the diversity of the nation, people may question whether judges are able fully to appreciate the circumstances in which people of different backgrounds find themselves.**[69]

The importance of women judges in this regard was described by Justice Judith Potter (then President of the New Zealand Law Society) at the swearing in of Dame SIlvia Cartwright as the first woman judge of the High Court in 1993:

> **I am increasingly concerned about the widening credibility gap between the law and the citizens it serves – for one reason or another, or for a whole host of reasons, the law is not seen to be relevant to the lives of many people living in our society.**
>
> **It would be idle to pretend that the presence of women in representative numbers on our**

65 LGOIMA, section 48(1)(c)

66 Saxmere v the Wool Board Disestablishment Company Ltd [2009] NZSC 122

67 This convention was followed in early 2008 when Sian Elias recused herself from a Supreme Court case involving jockey Lisa Cropp. The judge part-owns the galloper Resolution that Cropp rides and decided that if she sat on the case her judgment could appear biassed.

68 [1999] All ER (d) 18

69 Department for Constitutional Affairs, 'Increasing Diversity in the Judiciary', 2004, p 14

> **judiciary could alone bridge the credibility gap. But the necessity for women to be actively represented is a fundamental starting point. Without adequate representation, the integrity of this system and the wisdom and compassion our judges bring to it are seriously at risk.** [70]

Since its inception, the New Zealand judiciary has been drawn from a remarkably homogenous group. This homogeneity was well described by J E Hodder in 'Judicial Appointments in New Zealand' over 30 years ago and has stood the test of time. He observed:

> **[T]he person appointed to be a judge in New Zealand in the years since the Second World War is a middle-aged Caucasian male; he is well-educated; and he is a successful and prominent member of the legal profession and, as such, is almost certainly wealthy, a member of the upper-middle class, and lives in an urban environment.** [71]

Although the diversity of the judiciary has increased somewhat over recent years, the make-up of the judiciary as a whole is still not fully reflective of society. The number of women in the judiciary, for example, is currently around 25 per cent. CEDAW has requested that the New Zealand Government outline a programme of concrete action, goals and time frames to increase the number of female judges.

There also continues to be few people of Māori, Pacific, Asian or other minority ethnic origins appointed as judges, and even fewer judges with a disability. A submission received from Amicus Lawyers during public consultation on this chapter suggests that:

- There are no judges of minority ethnic origin in the Supreme Court or Court of Appeal.
- There is only one Maori judge in the High Court and no other-origin judges in this jurisdiction.
- Less than 10 per cent of District Court judges are of minority ethnic origin.

The right to be informed of what is said against oneself

There is no easy balance to be struck between the need to protect classified security information (in case divulging this information damages its provision and/or source) and the need to protect the right to a fair trial. [72]

In 2005, the Government reviewed the Terrorism Suppression Act 2002 (TSA). In its submission to the select committee, the Human Rights Commission was one of many submitters concerned with provisions in the TSA allowing for classified security information to be presented to the court in the absence of the "designated entity", its lawyers, and the public. The Commission raised concerns about access as a basic prerequisite to a fair trial, if an accused is not provided with all (classified security) information held about them that is to be relied on in the proceedings.

The select committee agreed that processes involving special advocates and security-cleared counsel would add additional elements of protection, but considered that the inclusion of such procedures in the act should not be considered in isolation. It noted that the Immigration Bill, which was then before the Transport and Industrial Relations Committee, had a number of clauses relating to the use of classified information in decisions to be made under the proposed new Immigration Act, and included provision for the use of special advocates. The committee recommended that if the Immigration Act as finally enacted made special provision for the use of classified information in decisions under that act, consideration should be given to the application of those procedures to decisions made under the Terrorism Suppression Act. [73]

70 [1993] NZLJ 337

71 Hodder J E (1974)

72 Human Rights Commission, submission on the review of the Terrorism Suppression Act 2002, to the Foreign Affairs, Defence and Trade Select Committee, 19 June 2005. http://www.hrc.co.nz/home/hrc/newsandissues/reviewoftheterrorismsuppressionact2002.php.

73 Foreign Affairs, Defence and Trade Committee (2007), Report on the Terrorism Suppression Amendment Bill (105-2) (27 September 2007), pp 5–6. Accessible online at http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/b/d/7/48DBSCH_SCR3888_1-Terrorism-Suppression-Amendment-Bill-105-2.htm

The Immigration Act has now been passed, adopting this "special advocate" procedure.[74] It is therefore timely for the TSA be reviewed to consider how it might adopt an analogous procedure. Discussion of this legislation will raise issues regarding the appropriate balance between giving effect to our international obligations, and maintaining respect for human rights and civil liberties in New Zealand.

Vulnerable victims and witnesses

Ensuring that all accused persons have a fair trial and obtaining the most accurate and complete testimony from witnesses are both critical to the quality of justice delivered by the courts. Testifying can be a considerable ordeal for adults, let alone children.

Children: Following the legislative and procedural changes of the 1980s and subsequently, there are now special measures available aimed at making it less stressful for children to testify, thereby enhancing the quality of their evidence. The members of New Zealand's specialised forensic interviewing service, comprising police and statutory social workers, are jointly trained in best practice for communicating with children. Interviews are expected to cover both evidential issues and care and protection issues.

In the meantime, children continue to be subjected to suggestive questioning in the courtroom by defence lawyers, using complex language and employing dubious tactics, such as abrupt changes in topics and intense questioning on irrelevant details. These practices go against the best interests of the child, but worse still, they risk undermining the integrity of the evidence being given. The Minister of Justice has stated that the handling of child witnesses is currently under review.

Disabled people: Following the Law Commission's work on children and other vulnerable witnesses, legislative amendments were made. For example, the Evidence Act 2006 provides for interpreters by way of "communication assistance" for anyone with a communication disability. However, such procedures have yet to be fully implemented.

Conclusion
Whakamutunga

For the large part, New Zealand has clear laws which incorporate human rights standards (including the right to justice) supported by adequate systems, to ensure that human rights are taken into account.

Overall, New Zealand demonstrates an active commitment to the rule of law and the right to justice through continual review, evaluation and ongoing legal development. The convention is that judges are appointed without political bias. Where potential bias exists in the judiciary, it is identified, and there are systems for ensuring that judgments are not tarnished by bias.

However, New Zealand has, through the Universal Periodic Review process, come under international criticism for significant variations in the realisation of the right to justice among various groups of New Zealanders, including disabled people, Māori, Pacific peoples, and children and young people.

Since 2004 there has been a rise in popular anxiety about crime. The Government has responded by implementing legislation and policy to simplify the justice system, ensure greater access to justice and protect the rights of victims and their families. However, significant issues remain:

- The legal aid system has been found to need major reform. Until these reforms are successfully carried out, this has serious ramifications for those in need of legal aid, which is indispensable for achieving access to justice.
- While there are some conventions and laws for ensuring that human rights standards are incorporated

74 Section 263 of the Immigration Act 2009 defines the role of the special advocate as: (1) The role of a special advocate is to represent a person who is the subject of (a) a decision made involving classified information; or (b) proceedings involving classified information. (2) In particular, a special advocate may (a) lodge or commence proceedings on behalf of the person; (b) make oral submissions and cross-examine witnesses at any closed hearing; (c) make written submissions to the Tribunal or the court, as the case may be. (3) At all times a special advocate must (a) ensure that the confidentiality of the classified information remains protected; and (b) act in accordance with his or her duties as an officer of the High Court. The designated agency may recognise a lawyer as a special advocate if (a) the lawyer holds an appropriate security clearance given by the chief executive of the Ministry of Justice; and (b) the designated agency is satisfied that the lawyer has appropriate knowledge and experience to be recognised as a special advocate. (S264)

into law, proposed criminal law-reform initiatives are testing the strength of those conventions.

- Aspects of proposed criminal law-reform have the potential to violate fundamental human rights and New Zealand's international obligations.
- Legislation does not encapsulate all the rights recognised by the ICCPR.
- Economic, social and cultural rights are not contained in the BoRA and the Government continues to question their justiciability.
- Māori are disproportionately represented in the criminal justice system.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance the right to justice:

Historic cases of abuse

Developing a comprehensive mechanism outside the court system to address historic cases of abuse while under the care of the State.

Evidence from vulnerable people

Developing more appropriate methods for the taking and recording of evidence from vulnerable victims and witnesses in criminal proceedings.

Use of urgency

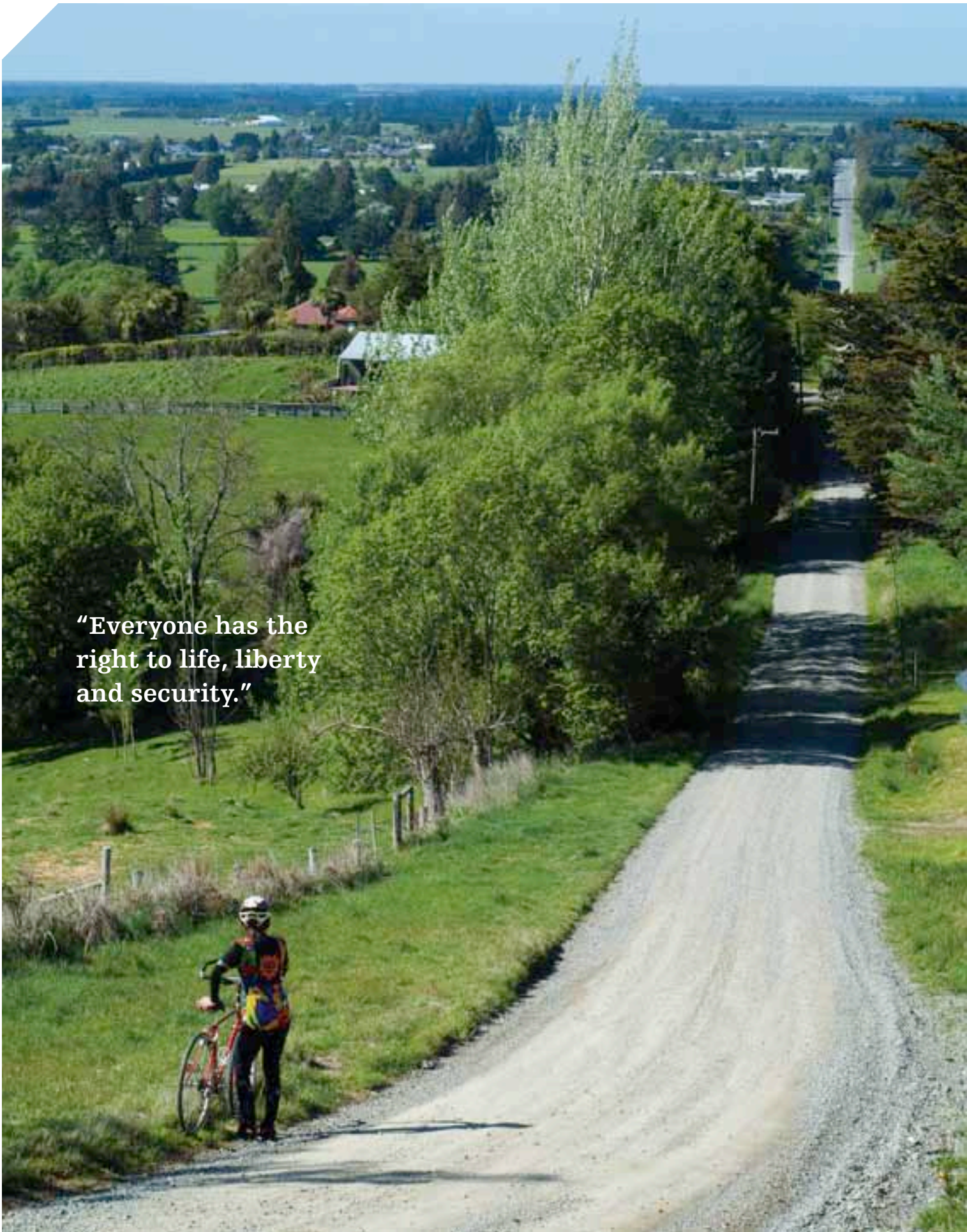
Reviewing the excessive use of urgency in the passage of legislation.

Judiciary

Increasing diversity in the judiciary.

8. Life, Liberty and Security of Person

Te Ora, Mana Herekore me te Haumaru



Everyone has the right to life, liberty and security.

Universal Declaration of Human Rights, article 3 (plain text)

Introduction
Tīmatatanga

The right to life, liberty and security of person is made up of three distinct but strongly interconnected elements. This chapter focusses on the right to security of the person, but an understanding of all three elements is necessary.

The right to life is the supreme right of human beings.[1] It is basic to all human rights, and without it all other rights are without meaning. The term 'life' has been interpreted widely by courts internationally to include the right to livelihood, health, education, environment and dignity.[2] The State has a duty to protect human life against unwarranted actions by public authorities as well as by private persons.[3]

The right to liberty protects the physical liberty of the person through a cluster of interrelated rights, including:

- the right not to be deprived of liberty except on such grounds and in accordance with such procedures as are established by law
- the right not to be arbitrarily arrested, detained or exiled
- the right to be secure from unreasonable search and seizure, including of the person
- the right to be free from torture and cruel, inhumane and degrading treatment.

The right to liberty may be invoked in respect of all deprivations of liberty, whether arising in relation to the application of criminal law or by reason of mental illness, vagrancy, drug addiction or immigration control. The chapter on the rights of people who are detained examines deprivation of liberty in more detail.

The right to security is closely associated with the right to liberty. The right to security includes national and individual security. National security is how the State protects the physical integrity of its citizens from external threats, such as invasion, terrorism, and biosecurity risks to human health. Individual security is how the State protects the physical integrity of its citizens from abuse by official authorities and other citizens.

The right to security of the person protects physical integrity, which has traditionally taken the narrow focus of protection from direct physical trauma. However, emerging standards are beginning to include providing for: the necessities of life (such as sustenance or healthcare); the right to social security; and the protection of health and safety, particularly in employment .These issues are addressed in other chapters and so are not included here.

Security of the person also raises issues about state or private surveillance of citizens. The Privacy Commissioner specifically deals with impingements on a citizen's privacy. These issues will not be discussed in more detail here.

The right to refuse medical treatment is also part of the right to security. Some jurisdictions, when considering the right to refuse medical treatment, have placed a particular importance on the concept of informed consent. It might be inferred from this that protection of integrity of the person extends beyond the physical to other elements.

While the right to 'freedom from fear', set out in the Universal Declaration of Human Rights (UDHR),[4] is

1 United Nations Human Rights Committee (1982), general comment 6: The right to life, para 1 (16th Session: HRI/GEN/1/Rev.7). Accessed 22 November 2010 from http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf

2 However, in Lawson v Housing New Zealand (1997) 4 LRC 369, the High Court of New Zealand observed that "it requires an unduly strained interpretation to conclude that the right not to be deprived of life encompasses a right not to be charged market rent for accommodation without regard to affordability and impact on a tenant's living standards".

3 There have been differing interpretations internationally of whether the right to life applies to the unborn child. The International Covenant on Civil and Political Rights (ICCPR) declares that "every human being" has the inherent right to life while in respect of other rights the expressions used are "everyone", "every person", "every child" or "every citizen". This use of different terminology has raised the question of whether "every human being" has a more expansive meaning than usually attributed to "every person" and in particular, whether it also includes an unborn child. There have also been differing views internationally on whether the right to life includes the right to die.

4 The text of the international human rights instruments is accessible online at the website of the Office of the High Commissioner for Human Rights: http://www.unhchr.ch/ Most of New Zealand's human rights obligations are summarised in Ministry of Foreign Affairs and Trade (2003), *Handbook on International Human Rights* (2nd ed, Wellington: MFAT)

A mountain biker takes a moment to savour the view near Oxford, Canterbury.

often raised in relation to security of the person, it is not guaranteed as a right in any internationally recognised document. It is an aspiration that can be achieved only through the realisation of other rights.

Since the Commission's review of human rights in 2004, New Zealand has taken a number of positive measures to better protect, promote and fulfil the right to life, liberty and security of person. These include:

- increased emphasis on the prevention of domestic violence, including a comprehensive campaign for Action on Family Violence
- reviews of victims' rights and access to support services
- introduction of the Policing Act 2008, which takes account of national and international human rights standards
- ratification of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (OPCAT) [5]
- a review of the Police Complaints Authority and the introduction of the Independent Police Conduct Authority
- some amendments to New Zealand's counter-terrorism laws.

Nevertheless, the rate of reported crime, in particular violent crime, has increased since the last review, and there continues to be bias (either perceived or actual) in the criminal justice system. In examining the right to life, liberty and security of person, the Commission identifies specific groups in society who are most vulnerable to threats to their security.

This chapter focusses in particular on the New Zealand Police's functions in upholding the right to life, liberty and security of person and recent developments in their operations. Among the agencies responsible for the protection of the security of people in New Zealand, the New Zealand Police have the greatest daily role. Police do this by working to reduce the incidence of crime, detecting and apprehending offenders, maintaining law and order and enhancing public safety. However, due to the nature of their role and their corresponding position of power, there remains a risk of infringements on human rights by them.

International context
Kaupapa ā taiao

Article 1 of the United Nations Charter lists as the first purpose of the United Nations:

> **...to maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.**

The United Nations General Assembly and the United Nations Security Council have international security responsibilities under the UN Charter.

The International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), the UN Convention on the Rights of the Child (UNCROC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD) contain provisions relevant to the right to life, liberty and security of person. New Zealand has ratified all six treaties and they are reflected in a variety of domestic legislation. [6]

Rights in the international human rights treaties apply to everyone. The ICCPR requires ratifying states to protect the civil and political rights of people in their jurisdiction, without discrimination. [7] It includes the right to liberty

5 The OPCAT establishes a dual system of preventative monitoring, undertaken by national and international monitoring mechanisms. The chapter on the rights of people who are detained considers OPCAT in more detail.

6 For example, the New Zealand Bill of Rights Act 1990 (BoRA) affirms New Zealand's commitment to the ICCPR, and the Crimes of Torture Act 1989 was enacted as a precursor to New Zealand's ratification of CAT.

7 New Zealand ratified the ICCPR and the ICESCR in 1976.

and security of person and the right not to be subjected to torture or cruel and unusual punishment, or to medical or scientific experimentation without consent. Article 20 requires the prohibition of propaganda for war and the incitement of hostility or violence on the basis of national, racial or religious hatred.

The CAT prohibits torture under any circumstances and requires states to take effective measures to prevent it. The OPCAT provides for regular visits by independent bodies to places of detention in order to ensure compliance with the CAT.

The right of children to security of the person is specifically provided for in the UNCROC.[8] Women's right to security of the person is referenced in CEDAW.[9]

The CERD requires states to legislate against acts of violence against any group on the basis of race,[10] and emphasises that the right to freedom from race discrimination is part of the enjoyment of the right to security of the person.[11] The CRPD requires states to protect the right to life, liberty and security of persons with disabilities on an equal basis with others.[12]

New Zealand context
Kaupapa o Aotearoa

States must ensure the human rights of their nationals and others by taking positive measures to protect them.

The New Zealand Bill of Rights Act 1990 (BoRA) specifically includes a section entitled "life and the security of the person", which lists these rights:

- not to be deprived of life (section 8)
- not to be subjected to torture or cruel treatment (section 9)
- not to be subjected to medical or scientific experimentation (section 10)
- to refuse to undergo medical treatment (section 11).[13]

Despite the phrase "security of the person" appearing in the subheading of the BoRA, it does not reappear in the text of any of the rights set out in sections 8 to 11. Consequently, the BoRA departs from the text of the ICCPR, which requires states to guarantee "security of the person" in addition to the right to life and to freedom from torture, degrading treatment and experimentation. It has been suggested that the rights to security of the person guaranteed in sections 8 to 11 of the BoRA are more limited than a section which explicitly guaranteed the right to security of the person would be. Other relevant rights contained in the BoRA include rights in regard to the liberty of the person (section 22) and against unreasonable search and seizure (section 21).

Section 7 of the BoRA provides an additional protection for the individual against the State by requiring the Attorney-General to bring to the attention of the House of Representatives any provision within any proposed bill that is inconsistent with the rights contained in the BoRA. This process allows a means, albeit limited, of monitoring and preventing state infringement of citizens' rights. The chapter on the right to justice examines the operation of section 7 of the BoRA in more detail.

8 Article 11 of UNCROC seeks to combat the illicit transfer abroad and non-return of children, and Article 19 requires effective and appropriate measures to protect children from all forms of physical or mental violence.

9 Article 11(f) of CEDAW promises protection of health and safety in working conditions and safeguards the function of reproduction. The CEDAW Committee has commented that "Articles 2, 5, 11, 12 and 16 of the convention require the state parties to act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life". CEDAW Committee (1989), general recommendation 12: Violence against women. (8th Session). Accessed 22 November 2010 from http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm
The committee has also ruled that violence against women is a form of discrimination, reflecting and perpetuating women's subordination, and requires states to eliminate violence in every sphere. CEDAW Committee (1992), general recommendation 19: Violence against women (11th Session: A/47/38). Accessed 22 November 2010 from http://www.unhchr.ch/tbs/doc.nsf/0/300395546e0dec52c12563ee0063dc9d?Opendocument

10 CERD, Article 4(b)

11 CERD, Article 5(b)

12 CRPD, Articles 10 and 14

13 In Cairns v James [1992] NZFLR 353, the Family Court found that section 11 of the BoRA allowed the plaintiff to refuse to provide blood for a paternity test.

NATIONAL SECURITY

The Defence Act 1990 empowers the Governor-General as Commander-in-Chief to raise and maintain the New Zealand Defence Force (NZDF), consisting of the Royal New Zealand Navy, the New Zealand Army and the Royal New Zealand Air Force. The Minister of Defence exercises control of the NZDF through the Chief of Defence Forces.

In addition to the defence forces, other agencies that contribute to national security are:

- the New Zealand Security Intelligence Service, the Government Communications Security Bureau and the National Assessments Bureau, [14] which provide foreign intelligence and assessments
- the New Zealand Police, which is responsible for counter-terrorism within New Zealand and has a role in supporting multilateral regional-security initiatives
- the New Zealand Immigration Service, which has duties, under the Immigration Act 2009, relating to national security concerns and suspected terrorists
- the Customs Service, which helps prevent terrorism and threats to bio-security
- the Ministry of Defence, which is responsible for providing defence-policy advice to the Government
- the Ministry of Agriculture and Forestry, which also deals with threats to bio-security
- the Ministry of Foreign Affairs and Trade, through diplomacy
- the Ministry of Health, which provides services to prevent health threats at New Zealand's borders and overseas.

States have a responsibility to protect persons within their territory against the threat of terrorist acts, and to bring perpetrators of such acts to justice. New Zealand has a comprehensive counter-terrorism legislative framework. The key pieces of legislation that provide protection from terrorism are the Aviation Crimes Act 1972; the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980; the Maritime Crimes Act 1999; the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001; the Terrorism Suppression Act 2002; the Counter Terrorism Act 2003; and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

In 2007, the Government amended the Terrorism Suppression Act to strengthen New Zealand's commitment to its international counter-terrorism obligations by:

- facilitating New Zealand's ratification of the Nuclear Terrorism Convention, by creating new offences concerning the use of radioactive material and radioactive devices, and amending existing offences concerning the physical protection of nuclear material
- amending the designation of 'terrorist' and associated entities
- introducing a new offence of committing a "terrorist act".

CONSTRAINTS ON STATE ACTIONS

Protection against specific state infringements is provided by:

- the Abolition of the Death Penalty Act in 1989, [15] abolishing the death penalty for treason, the last remaining offence to which it had applied
- the Criminal Investigations (Bodily Samples) Act 1995, which outlines the circumstances and procedure for obtaining blood samples – under part 3 of this act, police can keep a DNA profile databank for samples taken from suspects who are subsequently convicted
- the Crimes of Torture Act 1989, which reflects the CAT by prohibiting torture by public officials
- the Contraception, Sterilisation and Abortion Act 1977, which prohibits anyone (including state officials) from consenting to sterilisation of another person when that person is too young to do so

14 The National Assessment Bureau, renamed from the External Assessments Bureau, is responsible for a national assessments programme that includes domestic and external intelligence sources.

15 In 1941, the Crimes Amendment Act changed the penalty for murder from death to life imprisonment with hard labour. The only crimes for which the death penalty still applied were treason and piracy. The National Government restored the death penalty for murder in 1950. From 1951 to 1957, there were 18 convictions for murder and eight executions. The Crimes Act 1961 abolished the death penalty for every crime except treason, which became no longer punishable by death with the passing of the Abolition of the Death Penalty Act in 1989.

- the Mental Health (Compulsory Assessment and Treatment) Act 1992, which provides for the compulsory assessment and treatment of patients suffering from a mental disorder, sets clear limits on the powers in the act and provides for patient rights (discussed in more detail in the chapter on the rights of people who are detained)
- the Privacy Act 1993, which sets out provisions protecting the citizen from impingements of privacy by people in the private and public sector – the Privacy Commission established under this act specifically monitors compliance with the privacy principles set out in the act.

When the State or its agencies impinge on people's physical integrity, a number of bodies are empowered to intervene. The Independent Police Conduct Authority (IPCA) investigates complaints against the police. The Office of the Ombudsmen investigates complaints by prisoners. The Inspector-General of Intelligence and Security reviews decisions on intelligence, including the issuing of security certificates. The Health and Disability Commissioner can receive and investigate complaints by consumers of health and disability services. The Human Rights Commission can consider human rights violations.

Police complaint and review processes

In response to concerns about the independence and efficiency of the Police Complaints Authority, the Independent Police Complaints Authority Amendment Act 2007 replaced it with the IPCA, which is made up of five members and is an independent Crown entity under the Crown Entities Act 2004.

In the year ending 30 June 2009, 1997 people made 3090 complaints to the IPCA. Of these, 2331 (75 per cent) were accepted for investigation. Of the 2331 complaints investigated, 1074 were resolved.

During 2008–09, the IPCA's investigators were involved in 219 investigations. The investigations covered a range of serious complaints and incidents, including:

- police actions appearing to have contributed to death and serious bodily harm – for example, deaths in police cells, and deaths and injuries arising from police pursuits
- complaints alleging corruption or flaws in relation to police investigations
- complaints of excessive force or other misconduct by police officers.

The IPCA released 11 reports during 2008–09.[16]

Under section 13 of the Independent Police Conduct Authority Act 1988, police must notify the IPCA of incidents of death and serious bodily harm associated with police actions (for example, deaths in police cells and deaths or injuries following police pursuits). During 2008–09, the IPCA received nine reports of death, one of suicide and 40 of serious bodily harm.

The Human Rights Commission receives some complaints from people alleging physical mistreatment by police. Unless the complaint is about alleged discrimination under part 1(a) of the Human Rights Act (HRA), the Commission will usually refer the complainant to the IPCA.

If the State infringes the BoRA, other legislation or common law rights, individuals may seek restitution through the courts.

PROTECTIONS FOR THE INDIVIDUAL

The key pieces of legislation that provide individuals with redress and protection from harm are the Crimes Act 1961,[17] the Domestic Violence Act 1995, the Harassment Act 1997, the Children, Young Persons and their Families Act 1989, the Arms Act 1983, the Civil Defence Emergency Management Act 2002, and the Fire Service Act 1975.

The Victims' Rights Act 2002 outlines the principles that guide the treatment of victims of crime. This act ensures that throughout the criminal justice system, victims of crime are:

- treated with courtesy and compassion, and with respect for their dignity and privacy
- kept informed of important information, and decisions relating to case proceedings
- able to participate in criminal justice processes if they wish to.

16 These reports are accessible online at http://www.ipca.govt.nz

17 In relation to the unborn child, section 182 of the Crimes Act 1961 makes it a crime to kill an unborn child that has not become a human being. This offence recognises that there is a life to be protected, but also that the unborn child is not a human being.

Personal security is primarily maintained by the New Zealand Police. The Policing Act 2008 repealed and replaced the Police Act 1958 to update the law in relation to organisation of the police and the powers of members of the police. The Policing Act takes account of national and international human rights standards as set out in the HRA, the BoRA, and various international conventions and covenants. The principles [18] on which the act is based are a cornerstone for successful policing, and ensure that the human rights of everyone in New Zealand are respected and protected by police.

In 2007, a commission of inquiry carried out a full and independent investigation into the way in which the police had dealt with allegations of sexual assault by members and associates of the police. The report found:

- There was evidence of disgraceful conduct by police officers and associates over the period from 1979, involving exploitation of vulnerable people. There was evidence of police officers condoning incidents involving inappropriate sexual activity and a culture of scepticism in dealing with complaints of sexual assault. However, there was no concerted attempt across the organisation to cover up unacceptable behaviour.
- Police management lacked the policies, procedures and practices necessary for dealing with misconduct.
- Police did not have any code of conduct or guidelines to provide sworn police officers with clear guidance about what constitutes appropriate behaviour.
- The public could not have confidence, at that time, in the calibre of police investigations into allegations of sexual assault by police officers and police associates. The Commission noted that policies and procedures for such investigations had improved in the past 25 years but considered that further improvements were needed.

The inquiry's report has had a significant impact on how police operate, and has resulted in an increased emphasis being placed on human rights responsibilities. For example, the police are providing training courses about the code of conduct, leadership, ethical policing, and investigating of adult sexual assaults. [19]

Family violence

In 2003, the UN Committee on Economic, Social and Cultural Rights (CESCR) recommended that New Zealand intensify measures to combat domestic violence and provide disaggregated statistical data on domestic violence. More recently, the Committee on the Elimination of Discrimination against Women (CEDAW) expressed concern about the continued prevalence of violence against women, particularly Māori, Pacific and minority women, and the low rates of prosecution and convictions for crimes of violence against women. [20]

In 2009, legislation [21] was passed to amend the Domestic Violence Act 1995, the Sentencing Act 2002 and the Bail Act 2000, to improve and strengthen the domestic violence legislative regime. Key changes were to:

- give the police the ability to issue 'on-the-spot' police safety orders
- allow the criminal courts to issue a protection order for the victim when sentencing an offender for domestic violence offending
- remove the statutory criteria that the police must take into account when considering whether to arrest, without warrant, a person who they have good cause to suspect has committed a breach of a protection order
- reform the structures and penalties for contravening a protection order.

The Taskforce for Action on Violence within Families, which advises the Government on family violence issues, has initiated the 'It's not OK' campaign in response to growing concerns about the level of family violence in New Zealand. The campaign is being led by the Ministry

18 These principles are set out in section 8 of the BoRA.

19 In 2009, the Office of the Auditor-General found that the police had responded in a committed manner to the Commission's findings and that their work programme for responding had been comprehensive.

20 See CEDAW (2007), Concluding Comments of the Committee on the Elimination of Discrimination Against Women: New Zealand, 10 August, CEDAW/C/NZL/CO/6. Accessible online at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/459/77/PDF/N0745977.pdf?OpenElement

21 The Domestic Violence (Enhancing Safety) Bill 2008

of Social Development and the Families Commission, in association with communities. It is supported by the Accident Compensation Corporation and the New Zealand Police.

The Office for Senior Citizens is continuing to develop and monitor programmes for the prevention of elder abuse and neglect.

Victims' rights

The Ministry of Justice is undertaking a review of victims' rights and access to support services. The Enhancing Victims' Rights Review aims to improve government agencies' responses to victims of crime and to enhance victims' rights and role in criminal justice processes. The review will cover legislative, policy and operational options to achieve this.

Other agencies

The Ministry of Social Development is responsible for intervening to protect and help children who are being abused or neglected or who have behavioural problems.

Local authorities also have a strong role in protecting the safety of their constituents, through a range of programmes. One example is the Safer Community Councils programme, which aims to reduce crime by supporting 'at-risk' families, reducing family violence, targeting youth at risk of offending, developing programmes that address the misuse and abuse of alcohol and other drugs, addressing white-collar crime, and addressing the concerns of victims and potential victims.

Māori wardens work in close association with some Māori communities and police. They promote respect among Māori people for the standards of the community and take appropriate steps, where possible, to prevent any threatened breach of law and order. [22]

Community law centres and other civil society groups, including Victim Support, churches, Women's Refuge, Rape Crisis and Age Concern, work to promote and protect security of person.

New Zealand today
Aotearoa i tēnei rā

NATIONAL SECURITY

Counter-terrorism

In general, New Zealand has fully implemented its international anti-terrorism obligations. However, concern continues to be raised about the effect of New Zealand's anti-terrorism regime on the enjoyment of human rights.

In 2005, the Government reviewed the Terrorism Suppression Act 2002 (TSA). The resulting Terrorism Suppression Amendment Bill provided for a summary of classified security information to be given to the entity concerned, except to the extent that a summary of any particular part of the information would itself involve disclosure that would be likely to prejudice the interests referred to in section 32(3). [23] This exception means that the type of information provided to the 'person concerned' must be limited, because the information, by its definition as classified, invokes the interests in section 32.

In its submission to the select committee, the Commission was one of many submitters concerned with provisions which allowed classified security information to be presented to the court in the absence of the 'designated entity', its lawyers and the public. The Commission raised concerns about access to a fair trial, if an accused is not provided with all (classified security) information held about them.

The committee did not recommend any change to the process proposed in the bill. It agreed that processes involving special advocates and security-cleared counsel would add additional elements of protection. However, it considered that the inclusion of such procedures in the act should not be considered in isolation, noting that the Immigration Bill, which was then before the Transport and Industrial Relations Committee, had a number of clauses relating to the use of classified information in decisions to be made under the proposed new Immigration Act,

22 Regulation 11(4), Māori (Community Development) Regulations 1963

23 Terrorism Suppression Act, section 32(3): Disclosure of information falls within subsection (1)(c)(ii) if the disclosure would be likely (a) to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or (b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of another country or any agency of such a government, or by any international organisation; or (c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or (d) to endanger the safety of any person.

and included provision for the use of special advocates. The committee recommended that if the Immigration Act, as finally enacted, made special provision for the use of classified information in decisions under that act, consideration should be given to the application of those procedures to decisions made under the Terrorism Suppression Act. [24]

The UN Human Rights Committee also raised concerns, commenting:

> **While noting the obligations imposed under United Nations Security Council Resolution 1373 (2001), the committee expresses concern at the compatibility of some of the provisions of the Terrorism Suppression Amendment Act 2007 with the covenant. It is particularly concerned at the designation procedures of groups or individuals as terrorist entities and at the lack of a provision in the act to challenge these designations, which are incompatible with Article 14 of the covenant. The committee is also concerned about the introduction of a new section allowing courts to receive or hear classified security information against groups or individuals designated as terrorist entities in their absence.** [25]

The Immigration Act 2009 provides for the special advocate procedure. [26] Despite the limitations of this procedure, the Commission considers that the TSA should be reviewed to consider how it could adopt an analogous procedure. Discussion of this legislation will raise issues regarding how best to give effect to New Zealand's international anti-terrorism obligations in ways that respect human rights here in New Zealand.

The UN Human Rights Committee also raised concerns about the arguably discriminatory application of the TSA, and in particular noted the allegedly excessive use of force against Māori communities during 'Operation 8'. [27]

INDIVIDUAL SECURITY

The New Zealand Crime and Safety Survey 2006 [28] showed that 39 per cent of New Zealanders had been victims of one or more crimes in 2005. Certain groups of people continue to experience greater threats than others to their security and safety, including young people, women, Māori and Pacific peoples, and people with disabilities. Other groups reporting a high level of victimisation included:

- sole parents with children (60 per cent in the 2005 survey)
- students (57 per cent) and people living with flatmates (54 per cent)
- people who were single or in de facto relationships (50 per cent and 49 per cent)
- people who rented their homes from private landlords or public agencies (49 per cent and 45 per cent)
- people who were unemployed and/or on benefits (48 per cent)
- people who lived in the most deprived fifth of New Zealand areas (45 per cent, compared with 35 per cent of those living in the least deprived areas).

Many of the characteristics associated with experiencing more crime are closely interrelated.

24 Foreign Affairs, Defence and Trade Committee (2007), Terrorism Suppression Amendment Bill as reported from the Foreign Affairs, Defence and Trade Committee, pp 5–6. Accessible online at http://www.parliament.nz/NR/rdonlyres/822D8ABB-A483-44EF-9AE2-2C7CC9B63F12/66544/DBSCH_SCR_3888_5398.pdf25

25 Human Rights Committee (2010), Concluding Observations of the Human Rights Committee: New Zealand, 7 April, para 13. Accessible online at http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.NZL.CO.5_E.pdf

26 Section 263 of the Immigration Act 2009 defines the role of the special advocate as follows: 263 Role of special advocates (1) The role of a special advocate is to represent a person who is the subject of (a) a decision made involving classified information; or (b) proceedings involving classified information. (2) In particular, a special advocate may (a) lodge or commence proceedings on behalf of the person; (b) make oral submissions and cross-examine witnesses at any closed hearing; (c) make written submissions to the tribunal or the court, as the case may be. (3) At all times a special advocate must (a) ensure that the confidentiality of the classified information remains protected; and (b) act in accordance with his or her duties as an officer of the High Court. 264 (2) The designated agency may recognise a lawyer as a special advocate if (a) the lawyer holds an appropriate security clearance given by the chief executive of the Ministry of Justice.

27 Human Rights Committee (2010), para 14

28 Ministry of Justice (2006), *New Zealand Crime and Safety Survey 2006* (Wellington: Ministry of Justice)

In 2010, police data on reported crime rates between 2000 and 2009 showed an increase in violence from 107.8 recorded offences per 10,000 population to 151.7.[29] There were 65,465 recorded 'violent' offences in the 2009 calendar year, compared with 59,937 in the previous year. The police suggest that the increase is due in part to the increased willingness to report family violence.

Sexual violence

The groups most at risk of sexual violence are young women,[30] Māori and Pacific peoples, and people with disabilities.[31] Globally, people with disabilities are up to three times more likely to be victims of physical and sexual abuse and rape, and have less access to physical, psychological and judicial interventions.[32] The chapter on human rights and women considers sexual violence in more detail.

Family violence

For a significant number of victims of violence, the most dangerous place they can be is in their home. In 2007–08, family violence accounted for approximately 39 per cent of homicides, 42 per cent of kidnappings and abductions, 44 per cent of grievous assaults, and 64 per cent of serious assaults.[33]

In 2008, there were 44,628 incidences of recorded family violence offences, up from 29,756 in 2005.

The national victimisation survey and administrative data in New Zealand indicate that women are more likely than men to be physically assaulted by intimate partners and to be victimised more frequently.[34] Statistics collected by the National Collective of Independent Women's Refuges (NCIWR) point to the over-representation of Māori women and children among those using NCIWR. In 2006, of the 28,845 who used NCIWR services, 42 per cent of the adults were Māori women and 51 per cent of the children were Māori.

Children

Within the past 5–10 years, New Zealand's standing in the OECD for rates of 'intentional injury child mortality' has been a cause of shame. Unintentional injury accounts for almost nine out of 10 injury-related deaths for children aged 0–14 years. Every week an average of 226 children suffer an unintentional injury severe enough for them to be admitted to hospital, and just under two children (1.6) die from an unintentional injury.[35]

In the five years to 2005, 36 children and young people under 15 years are recorded to have died as a result of assault.[36] Despite this, there has been a recent downward trend in child deaths from maltreatment – after rising from 0.94 per 100,000 in the 1980s to 1.07 per 100,000 in the 1990s, they have fallen to 0.79 per 100,000 since 2000.[37] Since 2004, notifications of suspected child

29 Police resolution rates also increased in this period, from 76.6 per cent to 82.1 per cent.

30 Overwhelmingly, sexual assault is perpetrated by men against women. See Ministry of Justice (2009), *Te Toiora Mata Tauherenga: Report of the Taskforce for Action on Sexual Violence* (Wellington: Ministry of Justice). Accessible online at http://www.justice.govt.nz/policy-and-consultation/taskforce-for-action-on-sexual-violence/policy-and-consultation/taskforce-for-action-on-sexual-violence/documents/tasv-report-full

31 See Ministry of Women's Affairs (2009), *Restoring Soul: Effective Interventions for Adult Victims/Survivors of Sexual Violence* (Wellington: MWA). Accessible online at http://www.mwa.govt.nz/news-and-pubs/publications/restoring-soul-pdf

32 World Health Organisation/UN Population Fund (2009), 'Promoting Sexual and Reproductive Health for Persons with Disabilities', WHO/UNFPA guidance note. Accessible online at http://www.unfpa.org/public/site/global/pid/385

33 Domestic Violence (Enhancing Safety) Bill 2008, explanatory note, general policy statement, p 1

34 Lievore D and Mayhew P (with assistance from Mossman E) (2007), *The Scale and Nature of Family Violence in New Zealand: A Review and Evaluation of Knowledge* (Wellington: MSD). Accessible online at http://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/research/scale-nature/scale-and-nature.doc

35 Alatini M (2009), Analysis of Unintentional Child Injury Data in New Zealand: Mortality (2001–2005) and Morbidity (2003–2007) (Auckland: Safekids New Zealand)

36 Ministry of Social Development (2008), Children and Young People: Indicators of Well-being in New Zealand 2008 (Wellington: Ministry of Social Development), p 152. Accessed 30 October 2008 from http://www.msd.govt.nz/about-msd-and-our-work/publicationsresources/monitoring/children-youngindicators-wellbeing/index.html

37 Doolan M, 'Hope for Kids', *Herald on Sunday*, 14 September 2008, p 33

abuse or neglect, as well as substantiated cases of child abuse, have been increasing.[38]

The Government's response to the recommendations arising from the Universal Periodic Review included a commitment to reducing violence within families and its impact on children.[39] One of the Government's key responses to the impact of violence on children and young people has been the establishment of a cross-sectoral Taskforce for Action on Violence within Families ('the Taskforce'). The Taskforce has now prioritised a separate programme of action, focussed on prevention of child maltreatment and neglect.

The chapter on the rights of children and young people considers the security of children in more detail.

Older people

Older people make up a significant and growing proportion of the population in New Zealand. Like all citizens, they have their rights protected through generic protective legislation, such as the HRA and the Protection of Personal and Property Rights Act 1988, and through specific health, social security and consumer laws.

Most older people have the same capacity to protect their personal rights and interests as younger adults. However, Age Concern New Zealand reports that abuse or neglect is experienced by 4 to 5 per cent of the older population. During the period 1 July 2004 to 30 June 2006, 944 cases of elder abuse and/or neglect were referred to Age Concern New Zealand Elder Abuse and Neglect Prevention Services.[40]

Elder abuse occurs when a person aged 65 or more experiences harmful physical, psychological, sexual, material/financial and/or social effects caused by the behaviour of another person with whom they have a relationship implying trust.[41] Elder neglect occurs when a person aged 65 or more experiences harmful physical, psychological, material/financial and/or social effects as a result of another person's failing to perform behaviours which are a reasonable obligation of their relationship to the older person/koroua/kuia and are warranted by the unmet needs of the older person/koroua/kuia.[42]

Bullying and violence in schools

Bullying and violence continues to be a major concern in New Zealand schools. New Zealand has high levels of student-to-student and student-to-teacher physical and emotional bullying in schools, compared with other countries. In 2008, New Zealand was ranked second worst among 37 countries for bullying in primary schools. The chapter on the right to education considers security in schools in more detail.

Compulsory medical assessment or treatment

The Mental Health (Compulsory Assessment or Treatment) 1992 Act (MH(CAT)) provides for the compulsory assessment and treatment of people affected by mental disorders. This is an example of an exception to the right to refuse to undergo medical treatment contained in section 11 of the BoRA and Article 7 of the ICCPR. In recognition of the gravity of such an exception, the MH(CAT) Act sets out an extensive procedural and substantive framework for the circumstances in which this can occur. Some debate continues on the wider moral and ethical implications of compulsory treatment.[43]

Under current legislation, a person could be ordered to undergo electroconvulsive treatment (ECT) by a psychiatrist without consent. The Health and Disability Commissioner and the Human Rights Commission have stated that the use of ECT should be banned for children and never used without informed consent in other cases, unless it is the only option.

38 It could be argued that this is attributable to the increase in public awareness of violence in families and its impact on children and young people.

39 Response of the Government of New Zealand to Recommendations in the Report of 11 May 2009 of the Working Group on the Universal Periodic Review, A/HRC/12/8/Add.1, 7 July 2009

40 Age Concern (2007), Elder Abuse and Neglect Prevention: Challenges for the Future (Wellington: Age Concern). Accessible online at http://www.ageconcern.org.nz/files/file/EANP-report2007.pdf

41 Age Concern New Zealand (1992). Promoting the Rights and Well-being of Older People and Those who Care for Them: A resource kit about elder abuse and neglect (Wellington: Age Concern).

42 ibid

43 The rights of patients when being compulsorily treated are discussed further in the chapter on the rights of people who are detained.

DNA testing and databases

DNA samples may be used to protect public security in the context of the apprehension and conviction of offenders. There is a strict statutory regime to govern the collection, storage and use of DNA in this area (Criminal Investigations (Bodily Samples) Act (CIBSA) 1995).

In 2009, the CIBSA was amended to allow police-wide powers to collect DNA from persons before they were charged or convicted, such as matching DNA profiles against samples from unsolved scenes of crime.

The amended legislation lowered the threshold for the police to obtain DNA samples from suspects. It also widened the spectrum of offences for which DNA sampling would be allowed.

The Attorney-General considered that the amending legislation undermined the right, in the BoRA, to be secure against unreasonable search and seizure, by allowing DNA databank collections to include people not charged with crimes and without judicial oversight.

Where DNA is collected under a voluntary regime (e.g. for the purpose of determining biological family connections in immigration), it will not be covered by the CIBSA. There may also be wider implications if DNA is used for different purposes from those for which it was obtained, and if the storage of the DNA collected outside the criminal regime is not adequately monitored.

PROTECTIONS FOR THE INDIVIDUAL

Since 2004, there has been a rise in popular anxiety about crime. Successive governments have responded by implementing legislation and policy to better protect individual security by, for example, imposing longer sentences and reducing eligibility for bail. Most recently, in 2009, legislation popularly known as the 'three strikes law' imposed a life sentence with a non-parole period of 25 years for a third listed offence other than murder, and a life sentence without parole for a second or third listed offence of murder.[44] A number of these legislative developments have tested the strength of New Zealand's human rights protections. The chapter on the right to justice considers these proposals in more detail.

A number of positive steps have also been taken to reduce offending and victimisation. In April 2009, the Minister of Justice and Associate Minister of Corrections convened a meeting on the 'drivers of crime' to identify and suggest ways of addressing the causes of crime. There was general agreement that the key solution lay in early intervention, and that this required a co-ordinated approach across a range of government sectors, rather than the justice sector alone. The Government has since announced an approach aimed at improving services for those at risk of being the offenders or victims of the future and their families. There is increased focus on addressing the issues that lead to the high number of Māori who are apprehended, convicted and imprisoned. The Government has identified four priority areas for cross-government action:[45]

- antenatal, maternity and early parenting support
- programmes to address behavioural problems in young children
- reducing the harm caused by alcohol
- alternative approaches to managing low-level offenders and offering pathways out of offending.[46]

Since 2004 the New Zealand Police have taken a number of steps to better protect the security of people in New Zealand. The 2009 police public satisfaction survey show that 72 per cent rated their trust and confidence in the police as 'full' and 'quite a lot', up from 69 per cent the previous year.

Diversity

Acknowledging the increasing diversity of the New Zealand community, equity and diversity are critical elements of the New Zealand Police's Strategic Plan to 2010. Recruiting initiatives continue to reflect cultural diversity and, in particular, target female, Māori, Asian and Pacific peoples.

44 Except where the court considers it would be manifestly unjust to do so.

45 New Zealand Government (17 December 2009), 'Drivers of Crime: a whole of government priority' (media release). Accessed 3 November 2010 from http://www.beehive.govt.nz/release/drivers+crime+whole--government+priority

46 The impact of these initiatives is to be monitored by the Ministry of Justice, and a review of progress will be carried out in 2011.

ETHNIC PROFILE OF NEW ZEALAND POLICE (2009 AND 2010) AND NEW ZEALAND POPULATION (2006) ETHNICITY (IN PER CENT)

Police profile	As at June 2010	As at June 2009	Population 2006 census
NZ European/ Pākeha	72.6	72.4	72.8
NZ Māori	11.0	11.1	14.6
Pacific peoples	4.0	4.6	7.5
Asian peoples	2.1	2.1	9.3
European	16.4	16.8	7.1
Other	0.5	0.5	1.0

New Zealand Police, 2009–10 Annual Report [47]

In 2009, the New Zealand Police launched a second edition of *A Practical Reference to Religious Diversity*. [48] It covers seven major religious faiths, including Māori spirituality, Buddhism, Christianity, Hinduism, Islam, Judaism and Sikhism. The book provides information to help frontline police gain basic awareness and understanding of religious diversity, and explains how religious beliefs and customs may impact on their role as police officers. A specialised workshop was held at the police college to train selected staff on Islam. A memorandum of understanding was signed with the Federation of Islamic Associations of New Zealand.

The New Zealand Police has also developed specific strategies to meet the needs of different groups. For example, training to improve police sensitivity to gay, lesbian, bisexual, transgender and intersex communities is incorporated in a training module on 'inclusiveness training'. It is mandatory for all new recruits and senior officers in each district. Civil society groups participate actively in this training. Along with the Commission, they have helped the police expand their diversity recruitment policies to include specific issues faced by trans police recruits.

The police have consulted the Commission, trans and intersex groups about proposed changes to the search procedures in their police manual. These discussions focus specifically on how provisions requiring same-sex searches are applied to trans and intersex people. This is part of a comprehensive revision of the police guidelines, in the light of the proposed changes to search and surveillance legislation. The Commission has emphasised that treating someone with dignity, privacy and respect is the best way to de-escalate what can be particularly uncomfortable procedures for trans and intersex people.

Community policing

Community policing aims to prevent crime by addressing the root cause of the problem. There are approximately 1000 community policing staff around the country. They usually focus on either a geographical area or a crime problem. Recently, there has been an intensified focus on community policing in areas of high crime. In South Auckland, for example, a new unit of 12 community police officers has been established, working with communities from a mobile police station to increase community safety.

Enderley, in Hamilton, had one of the city's highest crime rates and levels of gang membership. The community constable set up a panel with a cross-section of local residents, including women and men, unemployed and employed, tenants and homeowners, Māori and European. Together, they identified Enderley's core problems and the two best responses: establish a sports club and develop weeknight activities at the community centre. These could get young people off the streets and develop a sense of community. The changes dramatically reduced crime and increased community confidence in the police.

In 2010, Neighbourhood Policing Teams were established. [49] Each team usually includes a sergeant and up to six constables, and works with the same vulnerable

47 Accessible online at: http://www.police.govt.nz/sites/default/files/2010-annual-report.pdf

48 New Zealand Police (2009) *A Practical Reference to Religious Diversity* (2nd edition) (Wellington: NZP), accessible online at http://www.police.govt.nz/service/ethnic/Police%20Religion%20Handbook.pdf

49 Initially in Counties Manukau, an area where crime rates and crime resolution rates have been worse than national averages.

neighbourhood of 2000–3000 people for up to five years. They are highly visible, working at grass-roots level to build good relationships aimed at preventing crime.

The Minister of Police noted in her speech when officially launching the initiative that "the first six of 16 Neighbourhood Policing Teams planned for the Counties-Manukau District are already making a real difference in preventing crime". [50]

Challenges

Despite these initiatives, there continue to be a number of significant challenges, such as:

- bias (either perceived or actual) in the criminal justice system
- an increase in violent offending
- particular groups of people continuing to experience greater threats than others to their security.

Bias in the criminal justice system

Māori continue to be disproportionately represented in the criminal justice system. The proportion of apprehensions (arrests) involving Māori rose slightly in the past three years, from 43.5 per cent in 2006–07 to 41.36 per cent in 2008–09.

In 2009, the Ministry of Justice released a review of international and New Zealand research on bias against ethnic minority and Indigenous people in the criminal justice system. Areas examined included stop and search; arrest; charging; prosecution; conviction; sentencing (including decisions about legal representation, plea, bail, mode of trial, and pre-sentence reports); custodial-sentence management decisions in the prison system; and parole. The review found that levels of over-representation are not consistent across different discretion points, and vary by age, gender, location and offence type. Research has consistently shown that factors such as offence seriousness, offending history, victim charging preferences and socio-economic status account for most of the variation among different ethnic groups. The review said that a comprehensive policy approach must involve:

- addressing the direct and underlying causes of ethnic minority and indigenous offending
- enhancing cultural understanding and responsiveness in the justice sector (including improving public accountability)
- developing responses that identify and seek to offset "the negative impact of neutral laws, structures, processes and decision-making criteria on particular ethnic minority groups".

Tasers

Serving police officers have as much right to security as any other person in New Zealand. The onus is on the Police Commissioner to ensure that the police operate in ways that do not put officers at unreasonable risk.

In August 2008, the Police Commissioner announced the nationwide introduction of the Taser X26, following a 12-month trial in four police districts in 2006–07. An evaluation report prepared by the police analysed Taser use during the trial and reviewed international literature, health and safety issues, the Standard Operating Procedures (SOPs) used, and perceived benefits and disadvantages of Tasers. The report concluded that on balance, the Taser trial had proved successful. [51] While the report noted support for the introduction of Tasers among police and the public, some significant concerns have been raised by those opposed to Taser use. These include concerns about the risks of injuries or death resulting from Taser use, the potential for excessive or inappropriate use, and the possibility that certain groups, such as those with mental health issues, Māori or Pacific peoples, may be disproportionately affected. [52]

In 2009, the CAT recommended that Tasers be relinquished. [53] In 2010, the UN Human Rights Committee stated:

> **The State party should consider relinquishing the use of electro-muscular disruption devices**

50 Speech at the formal launch of the policing teams in Counties-Manukau, 2010

51 New Zealand Police (2008), *Operational Evaluation of the New Zealand Taser Trial* (Wellington: New Zealand Police)

52 See, for example, Auckland District Law Society Public Issues Committee, 'Think Twice about Tasers', 14 December 2007; Campaign Against the Taser (2007), *Stun guns in Aotearoa New Zealand? The Shocking Trial* (Wellington: CAT). Accessible online at http://www.converge.org.nz/pma/tasertrial.pdf

53 CAT(2009), Concluding Observations of the Committee against Torture: New Zealand, 14 May, CAT/c/NZL/CO/5, para 16. Accessible online at http://www2.ohchr.org/english/bodies/cat/docs/cobs/CAT.C.NZL.CO.5.pdf

(EMDs or 'Tasers'). While such weapons remain in use, it should intensify its efforts to ensure that its guidelines, which restrict their use to situations where greater or lethal force would be justified, are adhered to by law-enforcement officers at all times. The State party should continue carrying out research on the effects of the use of such weapons. [54]

Conclusion
Whakamutunga

For the most part, New Zealand's legislative framework and structures for protecting life, liberty and security of person are robust and consistent with international human rights standards.

Where the State or its agencies impinge on a citizen's right to life, liberty or security of person, a range of agencies are empowered to intervene or investigate. These include the Office of the Ombudsmen, the Health and Disability Commissioner, the Human Rights Commission and the Independent Police Conduct Authority.

Successive governments have made a commitment to better protect, promote and fulfil the right to life, liberty and security. Since 2004, there have been a number of significant government initiatives, such as community-based interventions, and an increased emphasis on the prevention of domestic violence, including a review of legislation and the development of a comprehensive campaign for action.

The introduction of the Policing Act 2008 has embedded human rights principles into police practices. Furthermore, the New Zealand Police has taken a number of positive steps to better protect the security of people in New Zealand, including an increased emphasis on community-based policing. The 2009 police public-satisfaction survey showed that 72 per cent of people rated their trust and confidence in the police as 'full' and 'quite a lot', up from 69 per cent in 2008.

However, a number of challenges remain:

- The rate of reported crime and, in particular, violent crime has increased. This is due, in part, to individuals being more aware of their rights and becoming increasingly willing to report crimes to the police.
- Specific groups in society continue to experience greater threats than others to their security.
- National security (counter-terrorism) measures risk impacting on the enjoyment of human rights.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance life, liberty and security of person:

Programme of action

Implementing, in partnership with civil society, a comprehensive strategy and programme of action to address the drivers of crime.

Children and young people

Developing and maintaining initiatives that support families, schools and communities to build positive, rights-respecting environments for children and that prevent violence and bullying.

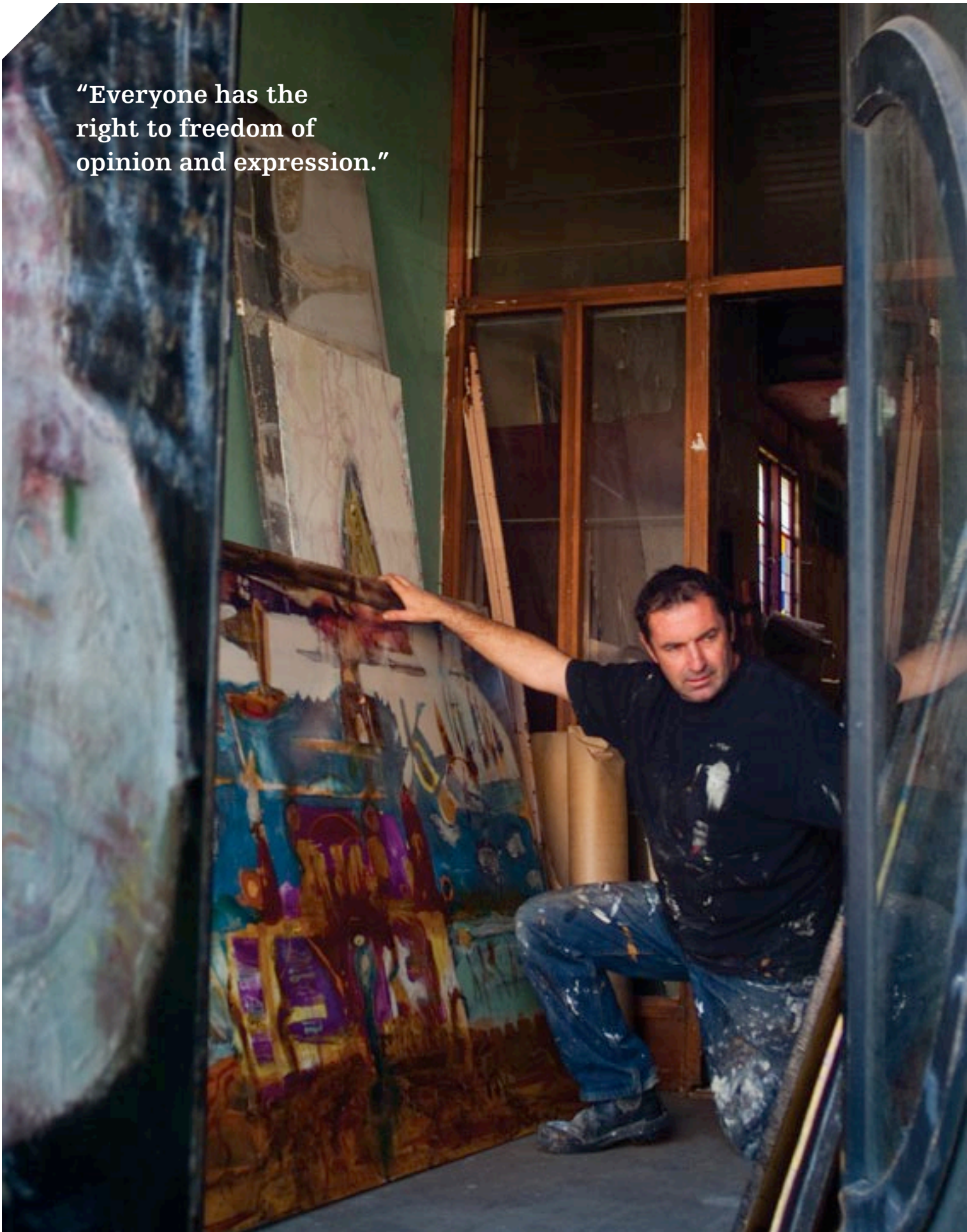
Sexual and family violence

Reducing sexual and family violence through target-setting and fully resourcing a national programme of action.

54 Human Rights Committee (2010), para 10

9. Freedom of Opinion and Expression

Wāteatanga o te Whakaaro me te Whakapuaki



Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Universal Declaration of Human Rights, Article 19

Introduction
Tīmatatanga

WHAT IS FREEDOM OF EXPRESSION?

Freedom of opinion and expression are rights which uniquely enable us to promote, protect and fulfil all other human rights. The rights enable us to expose, communicate and condemn human rights abuses. They also permit the celebration of human rights achievements.

Freedom of expression embraces free speech, the sanctity of an individual's opinion, a free press, the transmission and receipt of ideas and information, the freedom of expression in art and other forms, the ability to receive ideas from elsewhere, and the right to silence.

Freedom of expression is one of a number of mutually supporting rights (including freedom of thought, of association and of assembly, and the right to vote) and is integral to other civil and political rights, such as the right to justice, and the right to take part in public affairs. Equally, the right to freedom of expression impacts on social and cultural rights, such as the right to education.

Debate about freedom of expression is both wide-reaching and constantly evolving, in response to the development of the human mind, technological innovation and a globalised media, community practices and standards, and political and judicial responses. More constant is the fundamental idea that freedom of expression is designed to protect and enhance democratic ideals.

Three overlapping arguments have historically been used to advance the right to freedom of expression: the search for truth, democratic self-government, and autonomy and self-fulfilment.

The search for truth relates to the competition of arguments and ideals that leads to the discovery of truth. When all ideas have been freely heard, "the jury of public opinion will deliver its verdict and pick the version of truth it prefers". [1]

The role of freedom of expression in democratic self-government is best expressed by Lord Steyn:

> **The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice in the country.** [2]

The democratic rationale has been prominently used in many major court decisions in recent years in the United States, Australia, the United Kingdom and New Zealand. For example, in cases involving former Prime Minister David Lange, in Australia, New Zealand and the UK, the Courts recognised that the democratic rationale for freedom of expression requires a limitation on defamation laws so that freedom of speech about public and elected officials is not chilled by potential liability. [3]

Others have argued that freedom of expression is an end in itself, not because it assists in truth-finding nor in pursuing democracy, but because it sustains the autonomy and self-fulfilment of individuals in society. This is why art and literature are routinely protected under the umbrellas of freedom of expression, and why some oppose censorship and suppression as intrinsically negative and doing more harm than good.

Freedom of expression has always been subject to limitations. Each of the arguments for freedom of expression accommodate some restrictions. For example, while the search for truth has permitted tolerance for offensive and unsettling ideas, perjury and false advertising are

1 Hargreaves R (2002), *The first freedom: A history of free speech*. Phoenix Mill, UK: Sutton Publishing Ltd. p 302

2 R v Secretary of State for the Home Department, ex p Simms [2000] 2 AC 115 at 126 (HL)

3 Lange v Australian Broadcasting Corporation (1997), 189 CLR 520; Lange v Atkinson [1999] UKPC 46, [2000] 1 NZLR 257 (PC)

◀ Artist Brendan Ryan at work in his Lyttleton studio.

penalised. There may, too, be restrictions on the 'time, manner and place' of expression, such as the screening times of adult-only movies on public television. The autonomy argument similarly permits restrictions in the interests of the autonomy of others.

International context
Kaupapa ā taiao

LEGAL SOURCE

The most significant international legal source of the right to freedom of expression is set out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR):

1. **Everyone shall have the right to hold opinions without interference.**
2. **Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.**
3. **The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:**
   a) **for respect of the reputation or rights of others**
   b) **for the protection of national security or of public order, or of public health or morals.**

WHAT DOES ARTICLE 19 MEAN?

The right to freedom of opinion in paragraph 1 is a right to which the covenant permits no exception or restriction. It underlines that freedom of opinion is of a different character because it is a private matter. "Everyone" means natural persons (which includes public servants, teachers, members of the defence forces) and legal persons, such as companies, trusts and incorporated societies.

The right to freedom of expression in paragraph 2 is the freedom to communicate opinions, information and ideas without interference, no matter what the content. Content neutrality, the idea that expression should not be restricted because of its message, ideas, subject matter or content, is a bedrock principle. This right protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. The New Zealand High Court has stated that freedom of expression guarantees "everyone [the right] to express their thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others in the community". [4]

The dual aspect of freedom of expression both acknowledges individual rights (that no one be arbitrarily restricted in expression) and implies a collective right to receive any information whatsoever and have access to the thoughts expressed by others. [5] Expression need not be in words and may include symbolic expression, including actions and physical conduct. [6]

The freedom to seek information means that a person has a right of access to information, subject only to prescribed limitations, and the freedom to receive information basically prohibits a government from restricting that freedom. The freedom to impart or convey opinions to others implies that the right to expression includes dissemination, for example in newspapers or the mass media. "Information and ideas of all kinds" embraces pluralism of thought and tolerance for unwelcome, new and challenging ideas. "Other media" includes radio, television, the Internet, mobile telephones, theatres and movies, and anticipates future media developments.

In his submission to the Commission, media lawyer Steven Price noted, with regard to the right in paragraph 2 to "seek, receive and impart" information, the increasing international recognition that this includes the right

4 Solicitor-General v Radio NZ Ltd [1994, 1NZLR 48 at 59

5 Jayawickrama, N. (2002), *The judicial application of human rights law: National, regional and international jurisprudence*. Cambridge, UK: Cambridge University Press

6 Rishworth P, Huscroft G, Mahoney R and Optican S (2003), *The New Zealand Bill of Rights*. Melbourne, Australia: Oxford University Press

of access to information held by the Government. The Internet enormously increases the ability for such information to be made available without the need for any request for access being made.

Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason, certain restrictions on the right are permitted; these may relate either to the interests of other persons or to those of the community as a whole.

However, in a general comment on Article 19, the Office of the United Nations High Commissioner for Human Rights states that when a state party imposes certain restrictions on the exercise of freedom of expression, these may not put the right itself in jeopardy. [7] The necessity for any restrictions must be convincingly established and narrowly interpreted. In his report to the Human Rights Council in 2010, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression proposed a series of principles that will help determine what constitutes a legitimate restriction or limitation on the right to freedom of opinion and expression, and what constitutes an 'abuse' of that right. [8]

RELATED INSTRUMENTS AND INTERNATIONAL LAW

Other international instruments relevant to the right to freedom of expression include the United Nations Convention on the Rights of the Child (UNCROC), which uses almost the same words as the ICCPR, but specifically in relation to children (Article 13). The Convention on the Elimination of Racial Discrimination (CERD) also recognises the significance of freedom of expression (Article 5(d)(viii)).

Both these conventions refer to limitations on the right to freedom of expression. This indicates that certain categories of expression, such as pornography and speech inciting racial violence, are more likely to be subject to reasonable limitations than others, such as political or social speech.

Article 17(e) of UNCROC urges the encouragement of the development of appropriate guidelines for the protection of the child from information and material injurious to the child's wellbeing, bearing in mind Articles 13 and 18 concerning parental responsibilities.

In 2002, New Zealand signed the Optional Protocol to UNCROC on the Sale of Children, Child Prostitution and Child Pornography. It seeks to criminalise the production, dissemination, possession and advertising of child pornography. This was a response to international concern about the growing availability of child pornography on the Internet and other evolving technologies.

Racial incitement is specifically addressed in CERD, which requires that states declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, and all incitement to racial discrimination, as well as all acts of violence (or incitement to such acts) against any race or group of persons of another colour or ethnic origin.

The UN Committee on the Elimination of Racial Discrimination, created by CERD, has said that the prohibition of dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression.

The newest international convention, the Convention on the Rights of Persons with Disabilities (CRPD), in Article 21, emphasises accessibility. The convention obligates State parties to take all appropriate measures to ensure that disabled people can exercise freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and "through all forms of communication of their choice".

Communication is expressly defined in the CRPD as including languages, display of text, Braille, tactile communication and large print. Accessible multimedia and 'language' is defined as including spoken and signed languages and other forms of non-spoken languages.

7 Office of the High Commissioner for Human Rights (1983), *General Comment No. 10: Freedom of expression* (Article 19), 19th session – see para 4. Accessible online at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument. Accessed 16 November 2010.

8 United Nations Human Rights Council (2010), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,* 14th session, A/HRC/14/23, 20 April 2010

Article 21 of the CRPD refers to the provision of information for disabled people in accessible formats and technologies, in a timely manner and without additional cost. It also promotes the use of sign languages and Braille in official interactions. It urges private entities which provide services to the general public, including through the Internet, to provide information in accessible and usable formats. The CRPD encourages the mass media, including Internet providers, to make their services accessible, and wants the use of sign language recognised and promoted.

While the significance of the right to freedom of expression has been treated differently in national jurisdictions, a broad consensus emerges from the international human rights framework: while some restrictions on expression (not opinion) are proper, there is a core to freedom of expression relating to the holding of opinions that should not be restricted at all. Bills of rights generally affirm these basic principles.

RECENT DEVELOPMENTS

Two specific global issues are currently impacting on how freedom of opinion and expression are manifested as rights and responsibilities in modern daily life.

The first is the rise and ubiquity of the Internet. A recent global survey of 27,000 adults in 26 countries showed that four in five adults believe access to the Internet is a fundamental right. [9] The Internet and other border-defying high and low technologies have prompted vigorous debate about the extent to which governments should regulate them, if at all. Issues such as the State's involvement in Internet censorship in China, the extent to which the State moves to protect vulnerable children from pornography on the net, country bans on social networking sites such as Facebook, and the concerns about Google Earth and its impact on privacy, security and terrorism are provoking widespread public, media and political debate.

Some Internet advocates hold the view that it is simply impractical to attempt to legislate when new technology outstrips the law and its effects in day-to-day application. Others say that Internet-based issues, such as equity of access, privacy, fraud, child pornography, and the right to security, require the State to regulate both rights and responsibilities. New Zealand is not immune from this debate.

The Institute for Human Rights and Business listed "Ensuring freedom of expression, privacy and security on the Internet" at eighth on its list of the top 10 emerging business and human rights challenges for 2010. It stated:

> **Billions of people use the Internet each day. Security, openness and privacy on the Internet have become critical issues as a result of the explosive growth in online traffic around the world. The implications for human rights are enormous and will require further engagement between governments, business and civil society in the years ahead.** [10]

Access to the Internet also raises issues of inclusion, domestically and globally. The digital divide adds to the gap separating wealthy countries from poor ones, impacts on rural communities and disadvantages many women in the home.

The second worldwide phenomenon is the ongoing tension between freedom of expression and some forms of religion and belief. A 2008 amendment to a resolution on freedom of expression at the UN Human Rights Council required the UN Special Rapporteur on Freedom of Expression "to report on instances in which the abuse of the right of freedom of expression constitutes an act of racial or religious discrimination". There has been fierce criticism from some countries and sections of civil society, for example the International Humanist and Ethical Union, that the new mandate turns the role on its head. Canada, which had historically sponsored the special rapporteur, said that instead of promoting freedom of expression, the rapporteur would be policing its exercise, and withdrew its support as sponsor of the main resolution renewing the mandate.

The UN General Assembly has, for five consecutive years, although with declining support year by year, passed a non-binding resolution calling for "adequate protection

9 'Netizens consider access a human right', *ABC News*, 8 March 2010. Accessed on 16 November 2010 at: http://www.abc.net.au/news/stories/2010/03/08/2839530.htm

10 Institute for Human Rights and Business (2010), *Top 10 Emerging Business and Human Rights Challenges for 2010*. Accessed 20 April 2010 from http://www.institutehrb.org/news/top10for2010/

against acts of hatred, discrimination, intimidation and coercion resulting from the defamation of religions, and incitement to religious hatred in general." Sponsored by the 56-nation Organisation of the Islamic Conference, it has been condemned by other countries and some NGOs as laying the foundation for overly broad blasphemy laws. In general, the criticism distinguishes traditional defamation laws, which publish false statements of fact that harm individual persons, from defamation of religions that punish the peaceful criticism of ideas.

In his 2010 UN report, the special rapporteur said criminal defamation laws might not be used to protect abstract or subjective notions or concepts, such as national identity, culture, religion or political doctrine. International human rights law protected individuals and groups of people, not abstract notions or institutions which are subject to scrutiny, comment or criticism. The concept of defamation of religions did not accord with international standards regarding defamation, which referred to the protection of individuals, while religions, like all beliefs, could not be said to have a reputation of their own. [11]

Both developments, human rights and the Internet and freedom of expression as it intersects with religion, have implications in New Zealand and are specifically referred to later in this chapter.

New Zealand context
Kaupapa o Aotearoa

The right to freedom of expression is enshrined in the New Zealand Bill of Rights Act 1990 (BoRA), which states (section 14):

> **Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.**

The Court of Appeal in Moonen v Film and Literature Board of Review said the right is "as wide as human thought and imagination". [12]

Section 5 of the BoRA provides for limits on freedom of expression, as with other rights:

> **Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.**

In its General Comment on Article 19 of the ICCPR, the Office of the UN High Commissioner for Human Rights stated that it is "the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's rights". [13]

Several pieces of legislation aimed at promoting racial harmony, defending public morals, enhancing social responsibility, protecting children and protecting individual privacy and reputation, limit the scope of freedom of expression in New Zealand. Controversially, recent legislative change in New Zealand restricted political speech in an unacceptable form until it was repealed in 2009.

Because of the breadth of freedom of expression, the remaining part of the chapter concentrates on the balancing of rights and responsibilities in six major areas:

- political speech
- the right to protest
- religion
- race and ethnicity
- hate speech
- the Internet. [14]

11 United Nations Human Rights Council (2010), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,* 14th session, A/HRC/14/23, 20 April 2010

12 Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (CA)

13 Office of the High Commissioner for Human Rights (1983), *General Comment No. 10: Freedom of expression* (Article 19), 19th session – see para 3. Accessible online at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument. Accessed 16 November 2010.

14 For a discussion of freedom of expression and censorship and sexually explicit expression; the media and freedom of expression; and freedom of expression and privacy, see Human Rights Commission (2004), *Human Rights in New Zealand Today – Ngā Tika Tangata O Te Motu* (Wellington: HRC), pp 138–146. Accessible online at http://www.hrc.co.nz/report/chapters/chapter08/expression01.html

There are two topical issues about specific aspects of freedom of expression that are, or are about to be, the subject of scrutiny. The first is the use of suppression orders by courts and the effect that has on freedom of speech. In October 2010 the Government announced that it was introducing legislation intended to clarify the circumstances in which name suppression orders could be made. The second concerns access to information as provided for in the Privacy Act and the Official Information Act and its local-government equivalent. The Law Commission is conducting a review of privacy values, changes in technology, international trends and their implications for New Zealand civil, criminal and statute law. The Law Commission's review of the Official Information Act and its local-government equivalent is intended to assess the acts to ensure they continue to operate efficiently. The project's focus is on the effective operation of the legislation for members of the public, officials, journalists, researchers and politicians.

POLITICAL SPEECH

The central importance of the right of free speech as the cornerstone of a functioning democracy is widely accepted in law and in practice. For example, Lord Nicholls of Birkenhead, delivering the judgment of the Privy Council in Lange v Atkinson, said:

> **Political debate is at the core of representative democracy. Comment upon the official conduct and suitability for office of those exercising the powers of government is essential to the proper operation of a representative democracy. The transcendent public interest in the development and encouragement of political discussion extends to every member of the community.** [15]

In this section, freedom of expression relating to the financing of election campaigns and political protest is discussed.

Controversy over freedom of expression in New Zealand politics has recently centred on electoral finance reforms. The Electoral Finance Act 2007 imposed significant restrictions on election campaigns regarding what could be said, who said it and when it was said. It represented what the Commission called a "dramatic assault" on freedom of expression. The legislation was repealed in 2009, largely in response to a broad political and public consensus that it created unwarranted and unjustifiable limitations on political speech. The Commission, for example, argued that it was a fundamental breach of Article 19 of the ICCPR. Specific concerns related to the stricter regime for election campaigning by third parties and the definition of election advertising, coupled with other restrictions on freedom of speech.

For a period after the repeal, the Electoral Act 1993 was reinstated as holding legislation until a review of electoral legislation could be completed. There was effectively no single definition of election advertising in the reinstated Electoral Act 1993, but rather a number of discrete provisions scattered throughout, which did not address media developments over recent years.

Significant consultation about reform of the electoral finance legislation was undertaken in 2009 to ensure that change was based on a broad consensus among parliamentary parties and the public. In its recommendations to the Government, the Commission urged a definition of election advertising that was clear and uniformly applicable and that outlined clear exceptions for the media and individual Internet users.

The definition of election advertising contained in proposed new legislation, the Electoral (Finance Reform and Advance Voting) Amendment Bill, has the same scope as the definition in the 1993 legislation – that is, campaigning that seeks to influence voting behaviour by encouraging or persuading voters, or appearing to encourage or persuade them to vote in a particular way. It is media neutral and covers both positive and negative campaigning, as well as all forms of communication, including new media. The definition makes it clear that news media coverage, Internet blogging and text messaging, and promotion by electoral agencies are activities not covered by the definition. The reforms, as they relate to election advertising, better address fundamental concerns about freedom of expression and opinion.

15 Lange v Atkinson [1999], UKPC 46 at [6], [2000] 1 NZLR 257 at 260

However, the prohibition on political parties purchasing broadcasting during election time is an unresolved political-speech issue.

THE RIGHT TO PROTEST

Two recent decisions of the courts have given extensive consideration to the right to freedom of expression, affirmed in section 14 of the BoRA, and the right to protest.

In Brooker v Police, in a majority decision, the Supreme Court overturned Allistair Brooker's conviction for disorderly behaviour. [16] He had staged a protest outside the home of a police constable whom he believed to have acted unlawfully in obtaining a search warrant against him. The Supreme Court's decision was particularly influenced by the right to freedom of expression.

In R v Morse, in a majority decision, the Court of Appeal upheld Valerie Morse's conviction for offensive behaviour for burning a New Zealand flag at the Anzac Day dawn service at the cenotaph in Wellington in 2007. [17] The central issue considered by the court was whether the conviction was consistent with Valerie Morse's right to freedom of expression as set out in the BoRA. On 5 October 2010, the Supreme Court heard Valerie Morse's appeal against the Court of Appeal's decision.

Brooker v Police

Mr Brooker went to the house of a police constable who had previously executed a search warrant on his property. Knowing that she had come off nightshift at around 7am one day, he went to her house at 9am and knocked on her door. When told to leave, he played his guitar and sang protest songs on the footpath, as well as displaying a protest placard. Mr Brooker's conviction for disorderly behaviour was upheld on appeal to the High Court and Court of Appeal, but overturned by a majority in the Supreme Court. [18]

The majority in the Supreme Court considered that disorderly behaviour evolves with changing public expectations. The affirmation in the BoRA of the right to freedom of expression forms part of the context in which to assess the behaviour. For the majority, the behaviour did not cross the threshold that made it disorderly. The Chief Justice expressed it this way: "A tendency to annoy others, even seriously, is insufficient to constitute the disruption to public order which may make restrictions upon freedom of expression necessary."

In her decision in Morse, Justice Glazebrook commented on the effect of this case that "it can only be in exceptional and extreme cases that the right of freedom of expression (and particularly the right to protest) can legitimately be curtailed through the medium of the offence of disorderly behaviour, at least when it is exercised in a reasonable manner". [19]

R v Valerie Morse

Valerie Morse and others participated in a protest on Anzac Day 2007 at the dawn service in Wellington. As part of the protest, Valerie Morse burnt a New Zealand flag. She was charged with offensive behaviour and convicted after a trial in the District Court. An appeal to the High Court was dismissed.

The Court of Appeal, in a majority decision, dismissed an appeal against the decision of the High Court. The Court of Appeal considered whether burning the flag was protected by the right to freedom of expression and if so, whether the restriction on that right was a reasonable limit.

Justice Arnold, for the majority, concluded that the conviction for offensive behaviour was proper, even though Valerie Morse was exercising her right to free speech, protected by the BoRA, and that right includes such conduct as burning a New Zealand flag. The reasons for reaching this conclusion were:

- Anzac Day is an important commemorative day in the national psyche.
- The flag burning had taken place at the dawn service.
- Burning the flag was capable of being regarded as offensive, given what had been said in Brooker, due to the purpose and nature of the dawn service and the type of people who were present.

16 Brooker v Police [2007] NZSC 30, [2007] 3 NZLR 91 (SC)

17 R v Morse [2009] NZCA 623, [2010] 2 NZLR 625 (CA)

18 See the decision of Arnold J in R v Morse [2009] NZCA 623 at [16], [2010] 2 NZLR 625 at 630–631 (CA)

19 R v Morse [2009] NZCA 623 at [82], [2010] 2 NZLR 625 at 644 (CA)

- The flag burning had taken place in conjunction with the blowing of horns and was intended to disrupt the delivery of the major speech at the service.
- The disruption had interfered with the free-speech rights of the speaker and the audience – the right to freedom of speech includes the right to receive information and opinions from others.
- Those attending the service were also exercising their right to freedom of association.
- Valerie Morse's right to freedom of speech was being limited to the means of expression that may be used on such an occasion.

Some commentators have observed that the application of the BoRA by the courts is mixed. The consideration given to the BoRA in some court decisions and by some regulatory and administrative bodies shows that proportionality-based rights jurisprudence does not always infuse the reasoning of these bodies.

RELIGION

Tension between freedom of expression and depictions of the prophet Muhammad continues to provoke controversy. Twelve cartoons of the Prophet Muhammad, drawn by different cartoonists, were published in the Danish newspaper *Jyllands-Posten* in September 2005 and subsequently in three New Zealand newspapers and on two television channels.

The publishing of the cartoons prompted worldwide protests, death threats, trade boycotts and attacks on Danish embassies. The cartoonists involved face continuing threats five years after the initial publication.

In New Zealand, the Muslim community and others condemned the publication of the cartoons in some New Zealand media in a peaceful manner. The Prime Minister, the Rt Hon Helen Clark, rebuked the media, describing their decision to publish as "particularly ill-judged". She referred to the possibility of trade reprisals by Muslim countries such as Jordan, and expressed fears for the security of New Zealand troops in Afghanistan. [20]

Opposing views were expressed by New Zealand newspapers on the cartoons, depending on whether they had published them. Both sides cited freedom of the press. *The New Zealand Herald*, which did not publish the cartoons, said:

> **Cartoons that set out to give offence for no redeeming purpose leave a nasty taste in the mouths of most people, and media with mass circulation publications generally avoid them... There is plenty in Islam to question, criticise, satirise and cartoon, as there is in any religion, without giving offence for its own sake. No question of press freedom arises here. When events call for critical or humorous comment on any religion we reserve our right to publish it.** [21]

The Press which did publish the cartoons, stated:

> **The Press understands that the cartoons are offensive to some and acknowledges that, in themselves, the drawings are not newsworthy. But they are now at the centre of a global news story and the newspaper cannot pretend that they do not exist. Neither will it be cowed by the threat from those seeking to impose their taboos on the rest of the world. Freedom of speech – including at times the freedom to express distasteful, unfashionable and outrageous views – underpins our society. That is a principle The Press is willing and able to defend.** [22]

The Race Relations Commissioner held a meeting of 15 media representatives and religious leaders, including the Federation of Islamic Associations, which affirmed that the media who published the cartoons did not set out to insult or offend, only to inform. The media apologised for the offence caused, but did not resile from the decision to publish, based on the context at that time. The meeting also resolved to support the importance of freedom of

20 'Cartoons pose new threat to trade', *New Zealand Herald,* 8 February 2006. Accessed 20 April 2010 from http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10367290

21 'Why we did not run those cartoons', *New Zealand Herald*, 4 February 2006

22 'Freedom to disagree', *The Press*, 6 February 2006

the media. It acknowledged that such freedom is not absolute, but comes with responsibilities, which include sensitivity to diverse cultures and beliefs, and recognition of the diversity within cultures and beliefs. Two newspapers which published the cartoons, *The Dominion Post* and *The Press,* gave an undertaking not to publish them again.

The continuing debate about the cartoons was one of the subjects explored by visiting Cambridge philosophy professor Baroness Onora O'Neill. In an interview she questioned whether the current vernacular of freedom of expression claimed by the media who had published the cartoons was the "correct category for thinking about these things". [23] While 'freedom of expression' had become the words used in the 20th century rather than 'press freedom' or 'freedom of speech', traditional arguments for self-expression were based on an individual's rights to express themselves, even if the individual got things wrong or was offensive. She questioned whether major media conglomerates had similar rights of self-expression.

In 2010, the Commission provided advice about an article published in the Waikato University student newspaper about the 'Everybody Draw Mohammed Day' campaign. [24] The article was in protest against those who threatened violence against artists who drew the prophet. Some of the Muslim community were concerned about the potential impact on race relations. Dialogue between the student newspaper and the Waikato University Muslim Club prevented the issue from escalating.

RACE AND ETHNICITY

Freedom of opinion and expression should be viewed as a means of combating all forms of discrimination. The right has traditionally had a key role to play in the fight against racism and racial discrimination. Complaints about race and ethnicity which offend, but do not constitute hate speech, are often referred from the Commission to other regulatory bodies, such as the Broadcasting Standards Authority, in the case of radio and television; the New Zealand Press Council, in the case of magazines and newspapers; and the Advertising Standards Authority, in the case of advertisements. These complaints mechanisms are often more appropriate than reliance on section 61 of the Human Rights Act 1993 (HRA), as complaints seldom reach the threshold at which the HRA applies.

An example is the "Asian angst" cover story in the December 2006 edition of the magazine *North & South*, which prompted enquiries to the Commission. Potential complainants were referred to the Press Council. The story was headlined "Asian Angst: Is it time to send some back?". It discussed immigration policy and crime, and referred to demands on legal aid and health services. It stated that in 2001 Asians made up 6.6 per cent of the population but were responsible for just 1.7 per cent of all criminal convictions. It went on to say: "However, according to Statistics New Zealand national apprehension figures from 1996 to 2005, total offences committed by Asiatics (not including Indian) aged 17 to 50 rose 53 per cent from 1791 to 2751."

It used phrases such as "gathering crime tide" and said the "Asian menace has been steadily creeping up on us". Complaints were laid by the Asia New Zealand Foundation, a journalism lecturer and a group of prominent Asian academics, journalists and community leaders. The Press Council upheld the complaint, stating:

> **Freedom of expression, affirmed by the New Zealand Bill of Rights Act and central to all Press Council considerations, is not unlimited. Amongst other things, it is subject to the prohibition on discrimination in the Human Rights Act 1993. This is reflected in the Council's principle 8, which provides: 'Publications should not place gratuitous emphasis on gender, religion, minority groups, sexual orientation, age, race, colour or physical or mental disability. Nevertheless, where it is relevant and in the public interest, publications may report and express opinions in these areas.' [25]**

23 Interview with Kim Hill, *Radio New Zealand National*, 18 September 2010

24 *Nexus Magazine* (2010) http://www.nexusmag.co.nz/news/everybody-draw-mohammed-day. Accessed 16 November 2010

25 New Zealand Press Council (2007), case no. 1091; Asia New Zealand Foundation against *North & South* http://www.presscouncil.org.nz/display_ruling.php?case_number=1091 Accessed 16 November 2010

The council affirmed the right of magazines to take a strong position on issues such as immigration policy and crime rates, with the proviso: "But that does not legitimise gratuitous emphasis on dehumanising racial stereotypes and fear-mongering and, of course, the need for accuracy always remains." [26]

The council said the key issue was the absence of correlation between the Asian population and the crime rate.

HATE SPEECH

New Zealand, like many other countries, has legislated to give effect to Article 20 of ICCPR, which requires state parties to ban "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". The UN Human Rights Committee has expressed the view that the prohibitions required by Article 20 are "fully compatible with the right of freedom of expression as contained in Article 19", [27] but Article 20 does not relieve the state parties of the obligation to protect freedom of expression to the fullest extent possible.

Professor Paul Rishworth has said there are a number of reasons for racial disharmony laws that limit freedom of expression. These include avoiding harm. He states:

> **It is possible to trace genocide and acts of violence against racial and ethnic groups back to the development of attitudes in the community. And if the development of attitudes is targeted as a 'harm' to be avoided because it makes people more susceptible to incitements to violence, or more tolerant of violence being perpetrated by the state on racial groups, then the harm-avoidance rationale can be invoked to justify some speech restrictions.**
>
> **Another reason relates to attempts to discourage discrimination. This rationale in favour of regulating race-related expression suggests that speech that vilifies, promotes negative stereotypes and attitudes, so that people view those vilified as loathsome and unworthy and deserving of discrimination.**

The psychic-injury rationale suggests people should be spared the psychological harm and alienation that might follow racist remarks. The harm is not so much in the attitudes engendered in others, as in the erosion of self-worth in the victims, their withdrawal from society and the resultant inequality. Regulation that limits speech about race is also symbolic, sending positive messages of inclusion and concern to ethnic minorities and demonstrating a legislative commitment to eradicating racism. [28]

LEGISLATIVE PROVISIONS

Two provisions in the HRA limit freedom of expression about race. Section 61 prohibits expression that is threatening, abusive or insulting, and considered likely to excite hostility against or bring into contempt a person or group of persons on the ground of their colour, race or ethnic or national origins. It is the effect of what is said that counts, not whether the person did or did not intend to excite hostility. Although intention is irrelevant, the views of the "very sensitive" are not considered to be the appropriate yardstick to decide whether something is insulting. [29] There is an exception for the media: it is not unlawful to publish a report that accurately conveys the intention of the person who used the words.

Section 131 establishes a criminal offence similar to section 61, but with the additional words "with intent to excite hostility or ill will against, or bring into contempt or ridicule". Incitement to racial disharmony has been a criminal offence since the enactment of the Race Relations Act 1971.

The application of sections 131 and 61

Section 131 of the HRA and its predecessor sections have rarely been used. It requires the consent of the Attorney-General to prosecute. The 1979 Nazi pamphlet case,

26 New Zealand Press Council (2007), case no. 1091: Asia New Zealand Foundation against *North & South*, http://www.presscouncil.org.nz/display_ruling.php?case_number=1091. Accessed 16 November 2010.

27 Office of the High Commissioner for Human Rights (1983), General Comment no. 11 *Prohibition of propaganda for war and inciting national, racial or religious hatred* (Article 20), 19th session – see para 2. http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/60dcfa23f32d3feac12563ed00491355?Opendocument. Accessed 16 November 2010.

28 Rishworth P (2003), 'The right to freedom of expression', unpublished research paper written for the Human Rights Commission

29 Skelton v *Sunday Star-Times*, decision no. 12/96, CRT 24/95

King-Ansell v Police, [30] is the only reported prosecution.

Section 61 has had the most difficult history of any of the provisions of the HRA. From 1977 to 1989, section 9A of the Race Relations Act also made it unlawful to use words that were considered likely to cause racial disharmony, regardless of the intention of the person who used the words. It was repealed in 1989 as a result of a number of problems identified in the wake of the "kill a white" case. In an address to students at Auckland University marae, remarks were made about "killing a white". The provision applied to public areas only. As the comments were made on a marae, they were not considered to have been made in a public place.

The present section 61 differs in a number of significant respects from its predecessor. While extending its operation to private as well as public places, it narrows its scope by removing the reference to exciting ill will or bringing groups of persons into ridicule. The change, recognising the need to protect freedom of expression, raised the threshold at which the Commission can intervene.

Latest figures show annual complaints of racial disharmony to the Human Rights Commission to be high, as a result of the publication of an email from Hone Harawira about his trip to Paris while on official business in Belgium. In 2009, there were 799 racial disharmony approaches to the Commission, representing about 30 per cent of race-related complaints. However, 752 of these approaches were about Hone Harawira. [31] After assessing the racial disharmony complaints, the Commission declined to pursue any of them through the complaints process. The Commission has offered mediation and taken other action in a number of these cases. Its decisions have been based on the high threshold in section 61, particularly when the impact of the BoRA is considered in relation to the words used.

In letters sent to the complainants, the Commission said that the offensiveness of a race-related comment is not sufficient on its own. The comment must also be a probable cause of ethnic hostility or contempt. The vast majority of comments that are complained about are unlikely to contribute to serious ethnic unrest. In some cases, where the comments were broadcast on radio or television, complainants are referred to the Broadcasting Standards Authority.

'Hostility' and 'contempt' are not clear-cut terms, and the Commission's interpretation of them must be consistent with the right to freedom of expression set out in the BoRA.

Racial disharmony complaints often concern statements made publicly about Māori-Pākehā relations and immigration, and comments made by national and local politicians or other public figures regarding minority communities.

Most of the statements about which people complain to the Commission have been publicly disseminated in newspapers, on radio (including talkback) and on television. The majority of complainants first find out about the statements from other media, including social networking websites (for example, a newspaper report on remarks broadcast earlier on radio or the net, or vice versa). Other media that feature in small numbers of racial complaints include advertising, shop displays and direct mail flyers.

There is a legitimate public issue about the efficacy of section 61 if racial disharmony complaints seldom reach the threshold at which the Commission may intervene. The Commission believes it is time for it to review section 61 and make recommendations to the Government about whether legislative amendments are required.

In 2004, the Commission stated that there were some important reasons for retaining section 61, regardless of the fact that it had seldom been effectively used. These included the rapid dissemination of xenophobia and racial intolerance via modern media and technology, and the symbolic power of regulation, indicating New Zealand's acceptance that legislative protection and government regulation are required to protect the vulnerable. [32]

30 King-Ansell v Police [1979] 2 NZLR 531

31 Human Rights Commission (2010), *Tui Tui Tuituia – Race Relations in 2009* (Auckland: HRC). Accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/08-Mar-2010_14-17-15_HRC_RR_Report_2009web.pdf

32 Human Rights Commission (2004), *Human Rights in New Zealand Today – Ngā Tika Tangata O Te Motu* Wellington, New Zealand. Human Rights Commission, p 135. Accessible online at http://www.hrc.co.nz/report/chapters/chapter08/expression02.html. Accessed 16 November 2010.

In the ensuing six years, the Commission's additional experience of implementing section 61 has led it to recommend a thorough review of this controversial section of the HRA. One reason for review is the lack of use and effectiveness of section 61 as a statutory protection. A second reason is the fact that another section of the HRA provides stronger protection for hate speech. New Zealand's obligation to give effect to Article 20 of the ICCPR, which requires State parties to ban "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence", is met by section 131 of the HRA, which makes inciting racial disharmony a criminal offence. The Commission believes that section 131 should be retained, but there is a need to consider the adequacy of the penalty provisions; the limit for the maximum fine of $1000 for a breach of section 131, set in 1978; and the requirement in section 132 to obtain the Attorney-General's consent before instituting a prosecution under section 131.

In a submission to the Commission, the Media Freedom Committee of the Commonwealth Press Union stated that there is no need to change section 61, as its high threshold is appropriate in a democracy such as New Zealand. The Committee is opposed to removing the role of the Attorney-General in any prosecutions under section 131, as it provides for more accountability than if the decision was made by an unelected official.

In the past five years, not one racial disharmony complaint has reached the threshold that would require the Commission to intervene under section 61. In the age of the Internet and talkback radio, numerous public statements are published or broadcast that could be construed as "threatening, abusive, or insulting". This is part of what is required for such a statement to be unlawful under section 61. However, the next part of the section provides a stringent test, stating "being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the grounds of the colour, race, or ethnic or national origins of that group of persons". This rules out almost all controversial comments about race, ethnicity, national origins or colour, because while the comments may make certain individuals or groups angry or hurt, they cannot reasonably be seen as increasing the risk of hostility against or bringing into contempt of others because of their colour, race or ethnic or national origins.

THE INTERNET

Technically, 'the Internet' refers to:

> **a network of thousands of intersecting networks – a "spider's web" of connections meshing the globe, crossing all time zones and borders, wherever there is a telecommunications infrastructure.** [33]

The 'worldwide web':

> **is only one of several components that make up the big Internet picture. The most widely used application is email (electronic mail), which has become indispensable for business and personal communication... Other applications include file transfer protocol (ftp), which allows efficient movement of files from one computer directory to another, and USENET, which hosts thousands of special interest newsgroups that Internet users can subscribe to and participate in.** [34]

There is no international treaty or other instrument governing the operation of the Internet. The Internet is not governed by any single regulatory framework or a single organisation; there is no government of the Internet. A loose coalition of bodies operate technical and other policies which, taken together, allow the Internet to function.

In 2006, the United Nations established the Internet Governance Forum. The purpose of the forum is to support the UN Secretary-General in carrying out the mandate of the World Summit on the Information Society, which is to promote discussion about the Internet. The forum notes:

33 InternetNZ, 'Internet Overview' (Wellington, InternetNZ), http://old.Internetnz.net.nz/aboutnet/Internet. Accessed 16 November 2010.

34 ibid

Communication is a fundamental social process, a basic human need and the foundation of all social organisation. It is central to the information society. Everyone everywhere should have the opportunity to participate and no one should be excluded from the benefits the information society offers. [35]

There are no particular laws governing the Internet, although 61 separate statutes refer to the Internet, including the Films, Videos and Publications Classification Act 1993, the Electoral Act 1993, the Copyright Act 1994, the Crimes Act 1961 and the Telecommunications (Interception Capability) Act 2004. While there is no specific law regulating the Internet in New Zealand, the operation of the Internet is subject to general New Zealand law, including human rights. This means, for example, that consumer contracts with registrars and Internet service providers (ISPs) must comply with New Zealand law.

The Department of Internal Affairs enforces the Unsolicited Electronic Messages Act 2007 (also known as the 'spam' legislation). The act prohibits unsolicited commercial electronic messages with a New Zealand link from being sent by email, with the aim of promoting good e-marketing practice and preventing New Zealand from becoming a spam haven. The law establishes a civil penalty for non-compliance.

A 2010 report about the Internet in New Zealand [36] showed that 83 per cent of New Zealanders use the Internet, 5 per cent had formerly used it and 12 per cent had never used it. One-fifth of users were online at home for at least 20 hours a week and three-fifths for less than 10 hours. Over 80 per cent of users with a connection at home had broadband, while the rest had dial-up. The survey revealed that younger, wealthier and more urban people had more broadband access, and that Internet usage is age and income-linked. Younger people were more likely to use the Internet, and as a result were more likely to highlight its importance, create their own content and use the Internet as a way to socialise.

Statistics about access by people with disabilities are hard to find. However, the Commission noted strong net-based networks and use of electronic enquiries to complain about broadcaster Paul Henry's use of the word "retarded" about singer Susan Boyle on TVNZ's *Breakfast* show in 2009. One in 10 New Zealand users earns income from web activity and more than half use their bank's online services at least weekly.

Rural Women New Zealand based its strong advocacy over a number of years for universal rural broadband access on the right to social inclusion for all New Zealanders. Approximately 100,000 rural households missed out when some rural phone cabinets had broadband installed as part of the schools-based project in 2003–04. The Government has now promised that 93 per cent of rural communities will have access at city prices over the next six years. As well as the benefits of social connectivity, broadband access allows rural women to run home-based businesses, conduct banking services and reduce their travel. Provision of broadband access can be seen as part of the Government fulfilling its obligations in relation to imparting and receiving information. Access to the Internet is increasingly argued to be a human right.

New Zealanders also use the Internet to access the Government, mainly for information about services (47 per cent). This use of the Internet is impacting on the exercise of freedom of expression and participation in public life. For example, the volume of complaints now being received by the Commission has increased as people move to the Internet as a medium for making complaints and enquiries. At the same time, many organisations are moving into spaces such as social networking sites. Information stored on these sites is, in turn, accessed by some employers when making employment decisions, and used by some employees to comment on their employers. The implications of these developments for employment and human rights laws are still being grappled with. Of increasing concern, too, are the privacy implications of medical professionals in the United States accessing information about patients.

35 Internet Governance Forum Freedom of Expression and Freedom of the Media on the Internet http://www.intgovforum.org/cms/dynamic-coalitions/75-foeonline. Accessed 16 November 2010.

36 World Internet Project New Zealand (2010), *The Internet in New Zealand 2009* (Auckland: Institute of Culture, Discourse and Communication, AUT University). Accessible online at http://www.aut.ac.nz/news/aut-news/2010/march/Internet-now-integral-to-new-zealandersa-daily-life

Some people's behaviours or attitudes are changing as a result of their use of the Internet – for example, attitudes to privacy. People's expectations of privacy are being changed and in some situations eroded by their behavioural patterns, or being reshaped by digital technology such as the ubiquity of telephones with cameras, the posting of personal information and images on social networking sites, and Street View being available on Google. In a submission to the Commission, the Media Freedom Committee of the Commonwealth Press Union observed that: "people are increasingly living their lives remarkably openly on the Internet".

The Internet has also changed the context in which freedom of expression might be assessed in at least three ways. [37] First, the Internet is cross-jurisdictional – there are no geographical or 'state' boundaries in the traditional legal or physical sense. Instead, a new space, the worldwide web, has been created. Second, copying information is exact and instantaneous in a digital world. Third, the gatekeeper role of other forms of media publication has been removed: anyone can access the Internet and anyone can provide information on the Internet. Another way the Internet has also changed the context in which freedom of expression might be assessed is that published information now has an infinite shelf-life.

The result is that there are new spaces in which rights and freedoms can be exercised, such as the freedom to publish and the freedom to receive information. At the same time, the exercise of this freedom through the Internet may challenge other fundamental human rights, such as the presumption of innocence, the right to a fair trial and the rule of law.

In relation to the rule of law, the most comprehensive judgment on name suppression involving the Internet is the 70-page decision of District Court Judge David Harvey in the 'whale oil' case. [38] Judge Harvey described it as a "case about the law speaking in the light of changing technologies", not a case about regulating the Internet.

The case involved a blogger campaigning against name suppression, who was found to have breached non-publication orders in various district and High Court cases. Judge Harvey said:

- A blog is conceptually no different from any other form of mass- media communication and fulfils the concept of publishing and publication.
- Publication of the information took place where the material was downloaded and comprehended, i.e. New Zealand, even though the server hosting the website was located in the United States.

The real essence of the case was about human behaviour, he said. He addressed the idea of "electronic civil disobedience" through the publication of certain names that were suppressed, saying that the blogger "seems to have acted in the mistaken belief that, for some reason, such behaviour utilising the Internet was beyond the reach of the law, and that the Internet introduced an element unanticipated by the law when the Criminal Justice Act was enacted in 1985".

The case suggests that there is nothing exceptional about the communications technology associated with the Internet that would save bloggers from being charged with breaches of law.

The democratising influence of the Internet also poses challenges to the ways in which the State seeks to uphold the rule of law. These are "challenges for which the State is not well equipped or accustomed". [39] Commentators have noted that, in some respects, the Government is at a technological disadvantage compared with the general public, and this poses risks both to its duty to uphold the rule of law and to the means by which it is able to respect and protect the rights of citizens. [40]

On 19 October 2010, the Hon Simon Power, Minister Responsible for the Law Commission, asked it to undertake a review of the current regulatory regime for news media with respect to its adequacy in catering for

37 March Dr F, R v The Internet (Seminar Proceedings, December 2009. InternetNZ, Wellington). Accessible online at http://www.r2.co.nz/20091203/. Accessed on 16 November 2010.

38 The Police v Cameron John Slater DC, CRN 004028329-9833, 14 September 2010 (DC)

39 Collins Dr D QC, Solicitor-General: R v The Internet (Seminar Proceedings, December 2009. InternetNZ, Wellington). Accessible online at http://www.r2.co.nz/20091203/. Accessed on 16 November 2010.

40 See, for example, Professor Tony Smith and compare Steven Price and Robert Lithgow QC: R v The Internet (Seminar Proceedings, December 2009. InternetNZ, Wellington). Accessible online at http://www.r2.co.nz/20091203/. Accessed on 16 November 2010.

new and emerging forms of news media. The minister requested that the review deal with the following matters:

- how to define "news media" for the purposes of the law
- whether the jurisdiction of the Broadcasting Standards Authority and/or the Press Council should be extended to cover currently unregulated news media and, if so, what legislative changes would be required to achieve this end
- whether the current criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence and privacy are effective in the new media environment.

The Attorney-General, the Hon Chris Finlayson, has asked Professor Tony Smith, the Dean of Law at Victoria University, Wellington, to examine whether contempt-of-court laws are affected by the Internet. Professor Smith is undertaking the research in conjunction with recently retired Court of Appeal judge the Hon Sir Bruce Robertson.

A trial of a teenage boy in March 2010 for the murder of a teenage girl illustrated some of the tensions arising from the posting of information on the Internet. During the trial, the media were prohibited from photographing or filming the defendant; the prohibition extended to the sentencing process. The trial judge ruled that, despite his conviction, the defendant had a right to privacy, because of his youth; filming during the sentencing process would place undue pressure on the defendant and could have a detrimental effect on his future rehabilitation. Following the lifting of orders suppressing the defendant's name, the media showed images of the defendant that he had posted on the Internet some time before the killing had taken place. The right to a fair trial can be also threatened when prejudicial information is posted on the Internet, where it might be Googled by jurors.

There are tensions in the diverse responses to Internet technological developments across the broad sweep of public policy. Tensions are evident, for example, in relation to proposals to filter, through Internet service providers (ISPs), the content of material that users can lawfully access when they go online. On the one hand, the availability of a voluntary system by which ISPs may filter child pornography is seen as one of a number of essential tools which the State can use to prevent the harms related to child pornography. [41] On the other, the use of state-sanctioned content-filtering mechanisms is seen, in principle, to raise major human rights questions and concerns about the chilling effect of state suppression of access to information, however objectionable such information might be. [42] The use of filtering without the authority of laws passed by Parliament has also raised concerns. [43] This in turn raises the question of how the appropriate lawful balance can be determined in an otherwise unregulated environment.

There were similar tensions in proposals for termination of user accounts in relation to copyright violations. The Copyright (New Technologies) Amendment Act 2008 proposed termination of user accounts for 'repeat infringers'. Some Internet advocacy groups have vigorously opposed termination of user accounts for repeated infringements of copyright. These groups argue that access to the Internet should be regarded as a fundamental human right, citing recent initiatives to legislate for this in Sweden and Switzerland.

Others argue that new freedoms should not permit the unfettered exercise of new violations of the rights of others. The tension caused when balancing the rights to freedom of expression and the intellectual property rights of copyright owners remains. [44] A key challenge is how these tensions can be negotiated to achieve technology-neutral and appropriate application of human rights standards.

Debates about responsible exercise of rights and negotiation of reasonable limitations on rights in the

41 'InternetNZ: Child porn filter "not the answer"', *New Zealand PC World*, 28 January 2010, http://pcworld.co.nz/pcworld/pcw.nsf/feature/Internetnz-child-porn-filter-not-the-answer. Accessed on 16 November 2010.

42 See, for example, 'Internet Filtering', Tech Liberty NZ, http://techliberty.org.nz/issues/Internet-filtering/. Accessed on 16 November 2010.

43 See, for example, 'Internet Filtering', Tech Liberty NZ, http://techliberty.org.nz/issues/Internet-filtering/. Accessed on 16 November 2010.

44 Department of Internal Affairs (2007), *Creating Digital NZ: Working Paper 2: Strategy and Intellectual Property – Scoping the Legal Issues* (Wellington: Department of Internal Affairs). The proposals have been reviewed, with disputes to be referred to the Copyright Tribunal.

context of the Internet have, in part, been obscured by claims that the regulation of content is simply not possible because the Internet itself cannot be controlled. The implication is that attempts to apply human rights and other standards are futile and should be abandoned. [45] Others vigorously deny that attempts to uphold human-rights standards are ineffectual and insist that this is possible, at least in relation to locally hosted content. [46]

As David Farrar noted in a submission to the Commission, there are two approaches to censorship on the Internet. One is to have sanctions for certain activities, such as viewing objectionable material or breaching name-suppression orders. The other is to have filters designed to prevent those activities in the first place. Farrar preferred the first approach, as the second had greater potential for abuse.

In its submission, Netsafe supports the idea of local regulation for locally hosted content, particularly to remove the possibility of New Zealand becoming a "safe haven" for such content, and notes that "a number of families report distress at young people consuming self-harming media hosted on United States servers that would be restricted in New Zealand". Schools' use of Internet companies that filter information on sexuality education and other topics is another issue that warrants debate, states Netsafe. "To what extent can such filtering be argued as 'protecting' young people and/or fitting the 'moral' exception for limiting freedom of expression?" The relationship between children's' rights under the United Nations Convention on the Rights of the Child (UNCROC) and the responsibilities of schools, and the ensuing contest between freedom of expression and protection from harm, raise human rights issues.

Another key challenge is how the law can keep pace with the Internet and related technology, the very use of which both upholds fundamental aspects of and challenges the reasonable limits of the exercise of the right to freedom of expression. For example, commentators in the Google Earth controversy, relating to security fears, have noted that there is little, if any, directly applicable international law.

There is a need to develop a human rights framework to apply both to the infrastructure of the Internet and to substantive Internet-related policy developments. This framework is needed to ensure a consistent approach to new technological developments, and the uniform application of universal and indivisible human rights standards. The fact that the Internet context is new and technologically complex should not deter efforts to scrutinise and apply these standards.

The Commission and InternetNZ began a discussion about human rights and the Internet at a July 2010 roundtable. It was agreed that the idea of a 'charter of Internet rights' should be further explored by those attending the next Internet Governance Forum in Lithuania, in September 2010. It was resolved that InternetNZ and the Commission, together with other stakeholders, would work to increase debate about the human rights elements of the Internet; advocate for equal opportunity and high quality access, especially for those living in rural areas; help promote minimal intrusion into individual freedoms and privacy; and promote digital citizenship. It was agreed that there was a need for greater research on the demographics of Internet use and the extent of the 'digital divide' in New Zealand. The UN special rapporteur will also focus primarily on the issue of access to electronic communications and freedom of expression on the Internet in his 2011 report.

Technology can be adapted to uphold human rights standards. and New Zealand human rights law. In response to the proposals for internationalised domain names, for example, the Domain Name Commission Limited, which has oversight of the .nz domain name space, has introduced new rules to allow the registration of Māori language macrons in .nz domain names. This step upholds both the right to language and recognises that te reo Māori is an official language pursuant to the Māori Language Act. These new macrons were released during Māori Language Week 2010.

45 See, for example, 'Internet Filtering', Tech Liberty NZ, http://techliberty.org.nz/issues/Internet-filtering/. Accessed on 16 November 2010.

46 See, for example, Law Commission (2009), NZLC R 109: *Suppressing Names and Evidence* Wellington, New Zealand; and Young W, Deputy President Law Commission: R v The Internet (Seminar Proceedings, December 2009. InternetNZ, Wellington). Accessible online at http://www.r2.co.nz/20091203/. Accessed on 16 November 2010.

Conclusion
Whakamutunga

New Zealand has an enviable international reputation for upholding the right to freedom of expression. Invariably New Zealand achieves a high placing on the two international press-freedom indices, for example ranking eighth on the Press Freedom Index 2010. Where the right is infringed, there is strong legal, public and media comment, which tends to influence subsequent legislation, policy and practice. New Zealand has ratified Article 19 of ICCPR, the right to freedom of opinion and expression, and legislated domestically for freedom of expression in section 14 of the BoRA.

The BoRA has had the positive effect of progressively influencing the legislature, the judiciary, policy-making and public thinking about the importance of freedom of expression in a modern democracy, and has ensured a higher profile for this fundamental human right. The courts have also given a very high value to the right to freedom of expression, and have keenly scrutinised limits placed upon it.

The Commission believes that there is merit in reviewing the controversial section 61 of the HRA, relating to hate speech and race, because it is ineffective as a statutory protection and because there is another section which provides for stronger protection.

New Zealand enjoys a light-handed regulatory regime for broadcasting, the self-regulation of the print media and advertising. There is increasing debate about freedom of expression and the Internet. Higher-level discussion about rights and responsibilities is to be welcomed, given the pervasiveness of the Internet as a source of information and entertainment in the daily lives of New Zealanders. There is an opportunity for the Internet and human rights communities to continue to work together to lead debate about the rights and responsibilities inherent in Article 19, the right to freedom of opinion and expression.

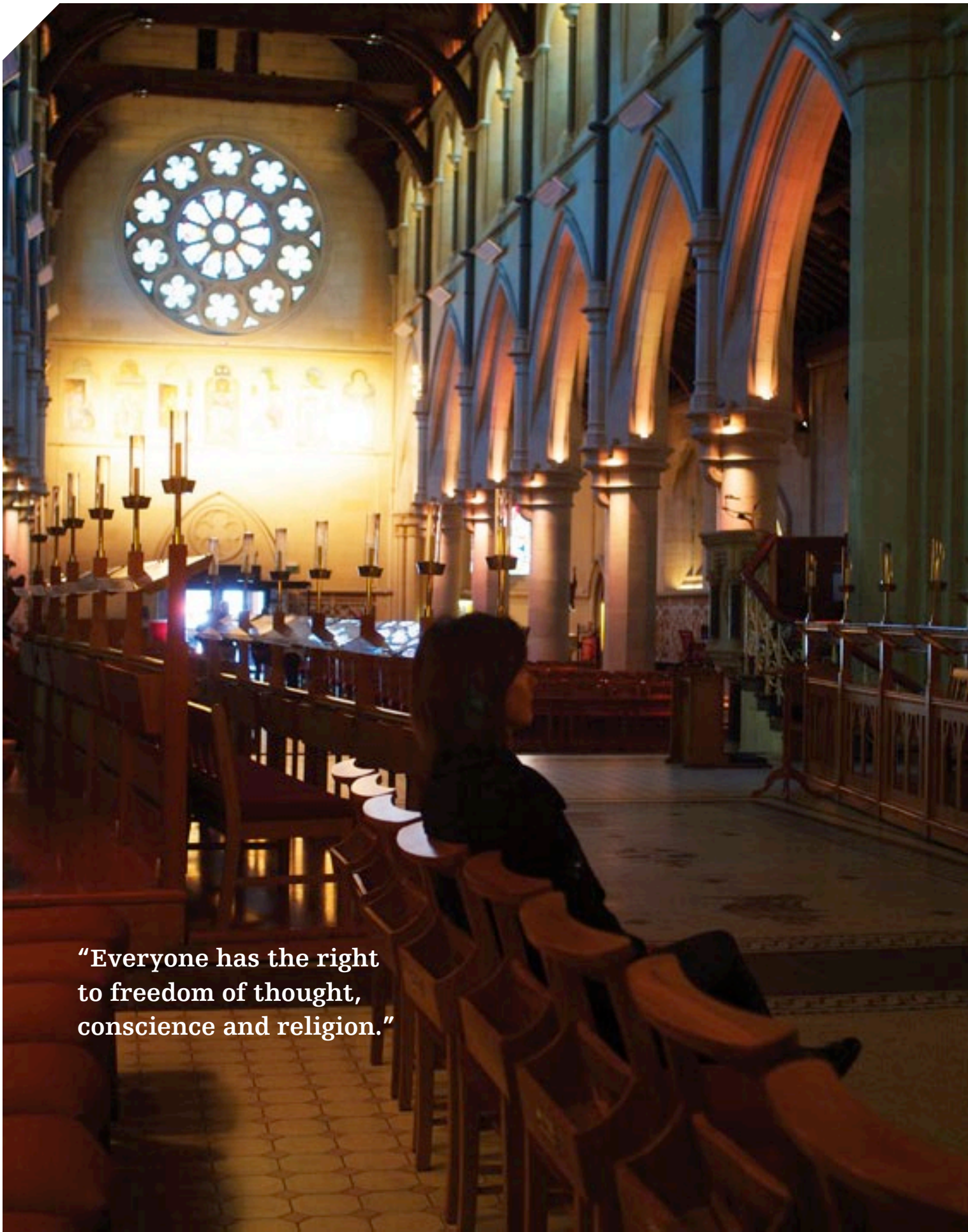
The Commission has consulted with interested stake-holders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance the right to freedom of opinion and expression:

Section 61 of the Human Rights Act
Reviewing section 61 of the Human Rights Act 1993, to ensure that it fulfils its legislative purpose.

Human Rights and the Internet
Promoting and facilitating debate about access to the Internet as a human right, and considering whether a charter of Internet rights should be developed in New Zealand.

10. Freedom of Religion and Belief

Wāteatanga o te Whakapono



Everyone has the right to freedom of thought, conscience and religion.

Universal Declaration of Human Rights (plain text version), Article 18

Introduction
Tīmatatanga

The right to freedom of religion and belief includes the rights to hold a religious or ethical belief, change one's religion or belief, express one's religion or belief, and not to hold a belief. The right to believe is not limited to religion. It also includes atheistic beliefs, as well as matters of conscience such as pacifism and conscientious objection to military service (Jayawickrama, 2002, p 653).

The United Nations' Human Rights Committee (UNHRC) views the right to freedom of thought, conscience and belief as "far reaching and profound", considering it to encompass "freedom of thought on all matters, personal conviction and the commitment to religion and belief, whether manifested individually or in community with others". The UNHRC has also stated that 'religion or belief' includes minority and non-mainstream religions and theistic, non-theistic and atheistic beliefs (general comment no. 22, 1993).

The protection of religion and belief extends to communities of interest as well as individuals. It does not preclude criticism of beliefs, but requires respect for the right of others to hold a different belief.

The right to express a religious or ethical belief encompasses a range of activities (Office of the High Commissioner for Human Rights, 1981, Article 6) including:

- to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes
- to establish and maintain appropriate charitable or humanitarian institutions
- to make, acquire and use to an adequate extent the necessary Articles and materials related to the rites or customs of a religion or belief
- to write, issue and disseminate relevant publications in these areas
- to teach a religion or belief in places suitable for these purposes
- to solicit and receive voluntary financial and other contributions from individuals and institutions
- to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief
- to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief
- to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

Worshipping, observing and teaching one's beliefs can be practised in the community of interest or alone, both publicly and privately.

The UNHRC has stated that "neutral and objective" teaching of religion in public schools is permitted, although public education which includes instruction in a particular religion or belief is not permitted "unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians" (general comment no. 22, 1993). The New Zealand Human Rights Commission and Victoria University of Wellington (2009, p 7) have expanded on this, saying that "schools are free to teach about different religions and the role that religion has played in politics, culture, art, history and literature … Schools are … free to teach about religions so long as they teach students about beliefs rather than instruct them on what to believe."

This chapter is primarily concerned with the right to freedom of religion and belief, although it intersects particularly with the chapter on the right to freedom of opinion and expression. Where these two rights come into conflict, a 'balancing of rights' is necessary and may require legal adjudication.

LIMITATIONS

The freedom to act in accordance with one's religious or ethical belief is not as wide as the freedom to hold those beliefs. Limitations can be imposed on how religion and belief is expressed, particularly where matters of public safety or the fundamental rights and freedoms of others are affected.

A contemplative moment in Christchurch Cathedral. The cathedral is a living house of prayer. It is a place of welcome, ministering to people of all faiths and those who have none.

The UNHRC has stated:

> **Limitations may be applied only for those purposes for which they are prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.**
> (general comment no. 22, 1993)

CHANGES SINCE 2004

Government engagement with faith communities has increased through participation in the 'Alliance of Civilisations' initiative, the Asia-Pacific regional interfaith dialogue, the Building Bridges programme and the marking of major religious festivals in Parliament.

New resources to assist understanding of religious diversity have been developed, including the New Zealand Police Practical Reference on Religious Diversity, the Funeral Directors Association's guide to death and dying in diverse cultures, and materials to support the diversity strand in the new school curriculum.

Interfaith councils in a number of centres now meet annually in a national interfaith forum and are looking to establish a national structure to promote interfaith dialogue. The establishment of new bodies, such as the Hindu Council and the Buddhist Council, has enabled greater representation of minority religions.

The Human Rights Commission has established a religious diversity network, including a monthly e-newsletter and an annual religious-diversity forum. With the Victoria University Religious Studies Programme, the Commission has published the Statement on Religious Diversity and guidelines on religion in schools. It has also dealt with a range of complaints of discrimination on the grounds of religious and ethical belief.

A joint Islamic Studies Centre has been established at Victoria and Otago Universities, and a UNESCO chair of interreligious understanding has been established at Victoria University.

International context
Kaupapa ā taiao

The right to freedom of religion and belief is referred to in a number of international treaties. The most significant is the International Covenant on Civil and Political Rights, which:

- affirms the right to freedom of thought, conscience and religion, and the right not to be coerced into choosing or changing a religion, and identifies situations where legal limitations may be appropriate (Article 18)
- affirms the right of parents to ensure the religious and moral education of their children in a manner consistent with their own convictions (Article 18)
- affirms the right to hold opinions without interference and the right to freedom of expression (Article 19)
- urges the prohibition by law of the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Article 20(2))
- affirms the equality of all before the law and the right to freedom from discrimination, including on the basis of religion and political or other opinion (Article 26)
- affirms the right of ethnic, religious or linguistic minorities to enjoy their own culture, profess and practise their own religion and use their own language (Article 27).

International Labour Organisation Convention 111 on Discrimination (Employment and Occupation) prohibits discrimination in employment on the grounds of religion or political opinion.

The Convention on the Rights of the Child makes explicit the rights and duties of parents to provide direction to the child regarding freedom of thought, conscience and religion in a manner consistent with the evolving capacities of the child. It also provides that, when a child is temporarily or permanently deprived of his or her family environment, in determining the alternative care for the child, "due regard shall be paid to the … child's ethnic, religious, cultural and linguistic background" (Article 20(3)). It affirms the right of children who are

indigenous or belong to a religious minority group to profess and practise their own religion. Education shall be directed inter alia toward development of respect for human rights, his or her own values and the values of the country in which they live or originate, and preparation for responsible life in a free society "in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin" (Article 29).

The UN Declaration on the Rights of Indigenous Peoples (2007) affirms the right of Indigenous peoples to their spiritual and religious traditions, customs and ceremonies, as well as to access and protect sacred sites, ceremonial objects and the remains of their ancestors (Article 12). The same article provides that states have a responsibility to either return or enable access to ceremonial objects or human remains in their possession. Article 37 of the declaration affirms that Indigenous peoples have the right to the recognition, observance and enforcement of existing treaties and agreements. In affirming the foundational status of the Treaty of Waitangi, the declaration therefore upholds the rights conferred by that agreement, including protections for religions and beliefs.

New Zealand context
Kaupapa o Aotearoa

NEW ZEALAND BILL OF RIGHTS ACT 1990

The New Zealand Bill of Rights Act (BoRA):

- affirms the right to freedom of thought, conscience, religion and belief, including the right to hold and embrace views without interference
- protects the right to express religion and belief in worship, observance, teaching and practice
- affirms the right of minorities to be free from discrimination.

HUMAN RIGHTS ACT 1993

The Human Rights Act (HRA) prohibits discrimination based on religious and ethical belief (which the HRA defines as lack of a religious belief, whether in respect of a particular religion or religions or all religions) in employment; business partnerships; access to places, vehicles and facilities, the provision of goods and services, and the provision of land, housing and accommodation. The act provides for specific exceptions for purposes of religion, for example, in relation to the employment of a principal or teacher in an integrated or private school, or of a social worker by an organisation whose members are adherents of a particular belief (section 28(2)). It also allows for educational establishments maintained wholly or principally for students of one religious belief (section 58(1)).

The exceptions in the HRA are designed to respect religious beliefs. The international human rights standards give protection to the expression of a particular religion and belief regardless of whether it embraces doctrines that contradict those standards. Within their own communities, religious groups are able to discriminate. In some churches, for example, the office of minister can be held only by men. Religious groups are also able to exclude people in same-sex relationships from official positions.

The act requires employers to accommodate the religious or ethical belief practices of an employee as long as any adjustment required "does not unreasonably disrupt the employer's activities" (section 28(3)).

EDUCATION ACT 1964

There is an important distinction between religious instruction and religious education, which applies to all schools. Education about religions (also called religious studies) in the school curriculum is a means of fostering religious understanding and tolerance and of highlighting the universal values expressed by the world's major religions. By contrast, religious instruction means teaching aspects of a particular faith in its own right. Religious instruction carries an implicit or explicit endorsement of a particular faith and/or encourages students to engage with and make decisions about accepting it at a personal level (Human Rights Commission and Victoria University of Wellington, 2009, p 4).

The Education Act 1964 sets out the secular character of primary schooling and makes provision for optional religious instruction when the school is closed. Before a school can set time aside for religious instruction, there has to be agreement from the board of trustees (Education Act 1964). Teaching in kura kaupapa Māori

must be secular in character during the hours the school is open.

Teaching in secondary schools does not have to be explicitly secular. Section 27 of the act gives boards of trustees considerable discretion regarding religious instruction. However, secondary schools are required to comply with the Bill of Rights Act, so that if they do provide religious instruction or observance, it must be in a non-discriminatory way and students must be able to opt out if they wish (Human Rights Commission and Victoria University of Wellington, 2009, p 5).

The Private Schools (Conditional Integration) Act 1975 provides for religious primary and secondary schools to receive public funding subject to certain requirements. If an integrated school established under the act has a special character provision in its charter, then the school is obliged to offer appropriate religious instruction and observance without closing the school. Parents can still choose, however, to withdraw students from such activities, on the grounds, for example, that the student is of a different faith (Human Rights Commission and Victoria University of Wellington, 2009, p 5).

TREATY OF WAITANGI

Articles 2 and 3 of the Treaty of Waitangi provide protection for Māori to observe and practise their religions and beliefs. Article 2 does so by reference to taonga or "everything that is held precious" in the Māori version. Article 3 provides for Māori to have "the same rights as those of the people of England". Although it is not part of the text of the Treaty, Lieutenant-Governor Hobson, in response to a question from Catholic Bishop Pompallier, made the following statement prior to the signing:

> **"The Governor says that the several faiths (beliefs) of England, of the Wesleyans, of Rome, and also Māori custom shall alike be protected"** (Te Puni Kokiri, 2001, pp 40–41).

Some legislation dealing with the environment makes specific reference to Māori sacred places and spiritual beliefs. For example, both the Resource Management Act 1991 and the Hazardous Substances and New Organisms Act 1996 (HSNO) require decision-makers to take into consideration "[t]he relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, valued flora and fauna, and other taonga" (HSNO, 1996, section 6(d)). The Historic Places Act 1993 also has specific provisions relating to wāhi tapu.

THE SUMMARY OFFENCES ACT 1981 AND SENTENCING ACT 2002

The Summary Offences Act 1981 contains a range of offences, including disorderly behaviour, offensive behaviour, offensive language, intimidation, assault and damage to property, that apply to instances of hate crime. Although the Summary Offences Act does not list offences that are specifically motivated by hostility towards religion or belief, the Sentencing Act 2002 makes it an aggravating factor in sentencing if the offender commits an offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic, such as race, religion or sexual orientation.

THE MENTAL HEALTH (COMPULSORY ASSESSMENT AND TREATMENT) ACT 1992

The Mental Health (Compulsory Assessment and Treatment) Act 1992 says that a person's religious beliefs are not enough on their own to invoke the procedures and processes set out in the act.

STATEMENT ON RELIGIOUS DIVERSITY 2007

A statement on religious diversity in Aotearoa New Zealand was produced by the New Zealand Diversity Action Programme in 2007. The statement provides a framework for the recognition of New Zealand's diverse faith communities and their harmonious interaction with each other, with the Government and with other groups in society. It has been endorsed by a range of organisations, [1] and has a foreword by the Prime Minister.

The statement comprises eight principles:

1. The State and religion

The State seeks to treat all faith communities and those who profess no religion equally before the law. New Zealand has no official or established religion.

2. The right to religion

New Zealand upholds the right to freedom of religion and

1 Accessible online at http://www.hrc.co.nz/home/hrc/racerelations/tengirathenzdiversityactionprogramme/statementonreligiousdiversity/statementonreligiousdiversity.php

belief and the right to freedom from discrimination on the grounds of religious or other belief.

3. The right to safety
Faith communities and their members have a right to safety and security.

4. The right of freedom of expression
The right to freedom of expression and freedom of the media are vital for democracy but should be exercised with responsibility.

5. Recognition and accommodation
Reasonable steps should be taken in educational and work environments and in the delivery of public services to recognise and accommodate diverse religious beliefs and practices.

6. Education
Schools should teach an understanding of different religious and spiritual traditions in a manner that reflects the diversity of their national and local community.

7. Religious differences
Debate and disagreement about religious beliefs will occur but must be exercised within the rule of law and without resort to violence.

8. Cooperation and understanding
Government and faith communities have a responsibility to build and maintain positive relationships with each other, and to promote mutual respect and understanding.

The statement is used by the Human Rights Commission as a policy statement specifically with regard to interfaith and religious diversity issues, rather than to the wider right to freedom of religion and belief.

New Zealand today
Aotearoa i tēnei rā

OVERVIEW

New Zealand has no state religion, and church and state institutions are separate. In legislation and policy, the State respects freedom of thought, conscience and religion. There are few constraints on the freedom to manifest one's religion or beliefs.

Elements of New Zealand's Christian heritage are reflected in public life: for example, the Christian festivals of Easter and Christmas are observed as public holidays, and Christian prayers often form a part of public ceremonials. There is also a degree of statutory recognition of Māori spiritual beliefs, which are inextricably connected to Maori culture.

Any group based on either religious or ethical belief can set up and operate in New Zealand without legal constraints or state interference, while still required to conform to the law like everyone else. Like other groups in society, those based on religious or ethical belief have the right to publicly influence the political process and societal norms in light of their values, within the bounds of the law. Parents are free to direct the religious and moral education of their children, and religious minorities are able to profess and practise their own religion.

AFFILIATION

The religion with the most adherents in New Zealand is Christianity. The decrease in affiliation with Christian denominations has, however, continued since the 1991 Census, when 67 per cent of the population identified as Christian. This decreased to 59 per cent in 1996, 55 per cent in 2001 and 51 per cent in 2006.

There was an increase in people affiliating with non-Christian religions. The number of Sikhs increased by 83 per cent to 9507 between 2001 and 2006; the number affiliated with Hinduism rose by 62 per cent, from 39,798 to 64,392; and the number affiliated with Islam increased by 53 per cent, from 23,631 to 36,072.

The proportion of the population indicating that they had no religion continued to rise: from 20 per cent in 1991 to 24 per cent in 1996, 28 per cent in 2001 and 32 per cent in 2006.

TRENDS

Religion and belief continue to impact on and form part of public and political discussion. This is due to a range of factors, including:

- the emergence of a more religiously diverse New Zealand, with an increased presence of Muslims, Buddhists, Hindus, and other religious communities whose religious practice sometimes challenges current public policies
- the shift away from mainstream Christianity and the rise of newer forms of Christianity

- the rise in those reporting having no religion
- the growing interface between science, its actual and potential discoveries and traditions of belief, especially in regard to ethical dilemmas
- the emergence of issues related to accommodation and dissent in pluralist societies, including internal religious debates, questions around cultural diversity, respect for difference and human rights
- the growing acknowledgement of the contribution that religious communities make to the social capital of a nation, through activities such as volunteering.

The practice of religion is sometimes seen as limiting individual freedoms. At times, it has focussed on issues of individual rights relating to gender or sexual orientation, or the discrimination against individual members of religious groups by members of differing belief systems.

Many religious groups, however, have also played a positive role in civil society. They have been a source of support for human rights initiatives, education in constructive values of society, and the championing of those vulnerable groups and individuals who experience discrimination.

THE STATE AND FREEDOM OF RELIGION AND BELIEF

New Zealand law does not discriminate on the basis of religion and belief. There are, however, some practices that have caused concern among parts of the community:

Public displays of religion in official ceremonies

Public displays of religion in state, government and local authority ceremonies and activities have prompted some people to complain about official religious expression or Christian observance, which they consider exclusive and potentially discriminatory. The issue of being able to use sacred texts other than the Bible for the swearing of oaths has also been raised, although there is already considerable flexibility provided for in the Oaths and Declarations Act 1957. This act was the subject of a review by the Ministry of Justice in 2004, which led to the introduction of an Oaths Modernisation Bill. The select committee considering the bill was unable to reach agreement on whether it should be passed. In June 2010 it was discharged as an order of the day for second reading.

Parliament has traditionally opened its sittings with a prayer. In 2003, a petition was submitted to amend the wording to make it no longer specifically Christian in nature. MPs were surveyed in 2007 and said they generally wished to retain the prayer in its current form, though some did not agree or identify with the prayer. The Speaker of the House recommended that the prayer remain unchanged.[2]

Education

Schools face a number of issues in respecting the diversity of their pupils' beliefs. These range from wearing religious attire or other symbols (for example, Muslim headscarves, Sikh turbans, Jewish yarmulke, Christian crosses, taonga Māori) to the content of the curriculum and classes, and particularly the issue of religious instruction in schools. The Commission, in conjunction with the Victoria University Religious Studies Programme, published *Religion in New Zealand Schools: Questions and Concerns* in 2009 to provide guidance to school boards of trustees, teachers and parents dealing with these issues. It sets out the legal framework for religious observance, education and instruction, and explains the provisions that enable parents and students to 'opt out' of religious instruction or observance in a way that provides dignity and security for all.

Promotion of interfaith initiatives

Parliament has held an official reception to mark Diwali, the Hindu Festival of Lights, since 2003[3] and the Islamic festival Eid-ul-Fitr, which marks the end of Ramadan, since 2005. The Jewish festival of Rosh Hashanah has also been marked.

The Office of Ethnic Affairs, in association with the Federation of Islamic Associations of New Zealand and New Zealand's Muslim communities, has delivered the Building Bridges programme since 2005. The programme

2 'MPs vote to retain prayer', press release, Office of the Speaker, New Zealand Parliament, 15 June 2007. Accessed 5 November 2009 from http://www.parliament.nz/en-NZ/AboutParl/HowPWorks/Speaker/PressReleases/6/1/b/61b20eda0d2847aa8ca98bfa6ebfea44.htm

3 Henry Johnson and Guil Figgins, 'Diwali Downunder: Transforming and Performing Indian Tradition in Aotearoa / New Zealand', *New Zealand Journal of Media Studies*, 9:1. Accessed 5 November 2009 from http://www.nzetc.org/tm/scholarly/tei-Sch091JMS-t1-g1-t5.html

aims to demystify Islam and promote participation by Muslims in New Zealand society. This is done through a series of training workshops, forums and visibility activities. [4]

The Government adopted a national implementation plan in 2008 for the United Nations Alliance of Civilisations initiative, established to improve understanding and relations among religions and cultures and to promote intercultural dialogue. The plan drew on existing initiatives such as Building Bridges and the Diversity Action Programme. It also outlined new initiatives, including an Islamic studies centre, a media literacy and standards programme, strengthening the focus on religions and cultures in the school curriculum, and scholarships to promote religious understanding in the Asia-Pacific region. [5] The Office of Ethnic Affairs is now responsible for the 'Alliance of Civilisations' work and interfaith dialogue.

Immigration policy for religious workers

A number of religious organisations, including the Federation of Islamic Associations of New Zealand, the Auckland Sikh Society, the New Zealand Indian Central Association and the New Zealand Buddhist Council, have raised the issue of the barriers ministers of religion face in obtaining permanent residency and work visas. They consider that ministers' applications for permanent residency are being declined due to the evaluation criteria under the 'general skills' category, which fails to take account of the nature of religious ministry. This issue also impacts on religious communities in New Zealand that are seeking to retain appropriate spiritual leadership within this country.

In June 2010 the Department of Labour announced a review of immigration policies available to religious workers. The review was initiated in response to the issues raised above. It aims to ensure that visa pathways are relevant and appropriate to the needs of New Zealand and its religious communities, and problems identified with existing policies, along with potential risks, are well-managed. [6]

Policing

In 2009 the New Zealand Police launched the second edition of *A Practical Reference to Religious Diversity*. Covering seven major religious faiths, the guide provides information to help front-line police officers gain basic understanding and awareness of religious diversity, and explains how religious beliefs and customs may impact on their role as police officers. Also in 2009, a specialised workshop on Islam was held at the Police College and a memorandum of understanding was signed with the Federation of Islamic Associations of New Zealand.

DISCRIMINATION

Of the 1508 discrimination complaints and enquiries received by the Human Rights Commission in 2009, only 82 (3.6 per cent) claimed discrimination on the basis of religious or ethical belief. Almost a quarter of these complaints and enquiries were in the area of employment (24 per cent); 21 per cent related to government activity; and 20 per cent related to the provision of goods and services. The main issues raised by these complaints were personal allegations of discrimination relating to specific religions; matters of appearance (such as the wearing of turbans or burqas); accommodation of prayer and holy days; accommodation of religious diet (particularly in prisons); the saying of karakia or prayers in schools and workplaces; and the practice of religious instruction in schools.

MĀORI SPIRITUALITY – WAIRUATANGA

While aspects of Māori beliefs were suppressed in the past, some Māori spiritual practices, such as karakia, occupy a visible place in public ceremonies today. Those who object to Christian prayers in public ceremonies on the grounds of their belief raise similar objections to Christian prayers in Māori, or any recognition of spiritual beliefs at all in such ceremonies.

Māori spirituality is an inherent part of tikanga Māori, linking mana atua, mana whenua and mana tangata. In accordance with international human rights standards

4 Office of Ethnic Affairs, 'Building Bridges'. Accessed 5 November 2009 from http://www.ethnicaffairs.govt.nz/oeawebsite.nsf/wpg_URL/Resources-Ethnic-Affairs-Publications-Leadership-Development?OpenDocument

5 Human Rights Commission (2009), *Tūi Tūi Tuituiā–Race Relations in 2008* (Auckland: Human Rights Commission)

6 Department of Labour, *Review of Immigration policies available to religious workers*. Accessed 21 June 2010 from http://www.dol.govt.nz/consultation/religious-workers/consultation.asp

DISCRIMINATION COMPLAINTS AND ENQUIRIES

Year	2005	2006	2007	2008	2009[7]
Number of discrimination enquiries and complaints	1981	1886	1486	1518	1508
Number of ethical or religious belief complaints and enquiries	89	95	81	65	82
Percentage of ethical or religious belief complaints and enquiries	4.5%	5.0%	5.5%	4.3%	5.4%

7 The figure for 2009 excludes 752 complaints and enquiries relating to a single incident.

and the Treaty of Waitangi, Māori spiritual beliefs cannot therefore be separated from the recognition and protection of tikanga Māori.

References to Māori spirituality in environmental legislation have attracted some criticism, either on the grounds that Māori spirituality should not have special recognition if other spiritual beliefs are not recognised, or that no spiritual beliefs of any sort have a place in environmental legislation. While the Resource Management Act provides explicitly for Māori spiritual beliefs only, it does provide for 'historic heritage' generally as a matter of national significance. This definition does not specifically include spiritual significance. But the act, in defining historic places, includes reference to places or areas that possess "spiritual significance or value", and these factors must be considered under the Resource Management Act.

In balancing Māori spirituality with scientific and commercial concerns (particularly if no explicit alternative exists), the weighting is towards scientific and commercial concern (Adhar, 2003). For example, in the approval process to conduct bioengineering trials that sought to fuse a human gene with that of a cow, a local hapū expressed opposition on the basis of their kaitiaki status, as identified in the legislation (Adhar, 2003). The concerns of the local Māori were not upheld in that case.

FREEDOM OF EXPRESSION

Generally, New Zealand does well in balancing the right to freedom of expression and the right to freedom of religion and belief. There have, however, been flashpoints when these two rights have publicly come into conflict. One such example was the unease about media representation of Muslims, which reached a peak with the publication of caricatures of the Prophet Muhammad in the New Zealand media in 2006, in the context of a worldwide controversy. At a meeting between media and faith community representatives, convened by the Race Relations Commissioner, parties agreed that New Zealand's increased diversity of cultures and faiths raised new challenges for the media and the New Zealand community. They affirmed the importance of freedom of the media, but noted that such freedom was not absolute. It included responsibilities to be sensitive to diverse cultures and beliefs and the diversity within cultures and beliefs, to inform the community about diverse cultures and beliefs, and to provide dialogue and channels of communication between the media and faith communities.

In 2006 the Broadcasting Standards Authority considered a complaint about an episode of the television cartoon series *Southpark* that contained images of the Virgin Mary deemed offensive by many Christians. The authority found that airing the episode was not in breach of broadcasting standards, because "showing disrespect does not amount to the sort of vicious or vitriolic attack normally associated with the denigration standard". They also said that the episode was "of such a farcical, absurd and unrealistic nature that it did not breach standards of good taste and decency in the context in which it was offered".

In 2009 and 2010, there was controversy over a Christmas billboard by St Matthew-in-the-City which depicted Mary and Joseph in bed together,[8] and the Atheist Bus Campaign, whose proposed advertising campaign was initially turned down by the New Zealand Bus company on the grounds that it might be offensive.[9] The Broadcasting Standards Authority considered but did not uphold two complaints concerning religion: the first related to comments on the *Paul Holmes Breakfast Show* about Muslims and terrorism in the context of the Mumbai attacks; the second related to a Radio Tarana programme alleged to ridicule Hinduism while promoting Christianity.[10]

RECOGNITION AND ACCOMMODATION

An employer is required by the Human Rights Act to accommodate the religious or ethical belief practices of an employee as long as any adjustment required "does not unreasonably disrupt the employer's activities" (section 28(3) HRA). In one case, following a complaint to the Commission, a shift worker and his employer reached an agreement to enable the employee's shifts to be adjusted so that he could honour his religion's sacred day. The Commission, in conjunction with the Victoria University Religious Studies Programme, is preparing guidelines on religious diversity in the workplace for employers and employees. These were initiated after the topic was addressed at the annual Religious Diversity Forum in 2009.

Observance of holy days

The manifestation of belief can include the observance of days of religious significance, including ceremonies and festivities. In New Zealand, although some public holidays observe major Christian festivals, there are no public holidays covering festivals of equal significance for other religious groups. Some employment agreements do make provision for the observance of these holidays, either through special leave or the option of taking alternative days to the Christian public holidays.

In 2009, a review of the Holidays Act 2003 asked the public for their views on whether the act should provide employees with the option of transferring current public holidays for other days of religious observance. The resulting Holidays Amendment Bill, introduced to Parliament in August 2010, will enable employers and employees to agree to transfer the observance of public holidays to another (identified) working day. The change is intended to "better reflect that New Zealand is a multi-cultural society and some employees may prefer to work a current public holiday in exchange for being granted a day off on a day that has special significance to their culture or religion that would otherwise be a normal working day".[11]

Clothing and religious symbols

Some groups manifest their belief by wearing particular clothing or other symbols, for example headscarf, turban, cross, taonga or dreadlocks. Some people who have been denied access to goods and services or employment because of their religious attire have complained to the Commission. Health and safety requirements may in some circumstances constitute a justification for removing such attire.

Medical treatment

Some groups object to medical treatment as a breach of their religion or belief. The BoRA allows adults, in line with their religious belief, to refuse health care, unless they are legally unfit to make their own decisions. This is not the case for children, as the State has a responsibility to protect the lives of children and can enforce healthcare over the religious concerns of parents and guardians (Rishworth, Huscroft, Optican & Mahoney, 2003). Concerns have also been raised about the marginal pastoral-care provision in relation to medical treatment for people from non-Christian backgrounds.

8 Lincoln Tan, "Church scraps billboard after attack", *New Zealand Herald*, 19 December 2009. Accessed 24 June 2010 from http://www.nzherald.co.nz/religion-and-beliefs/news/article.cfm?c_id=301&objectid=10616487

9 For more information on the controversy and the campaign, visit the campaign website at http://www.nogod.org.nz/

10 For further details of the two BSA cases, see the summaries in Human Rights Commission (2010), *Tūi Tūi Tuituiā: Race Relations in New Zealand in 2009* (Auckland: Human Rights Commission), p 75. Accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/08-Mar-2010_14-17-15_HRC_RR_Report_2009web.pdf

11 New Zealand Parliament, http://www.parliament.nz/en-NZ/PB/Legislation/Bills/BillsDigests/c/6/e/49PLLawBD17981-Holidays-Amendment-Bill-2010-Bills-Digest-No-1798.htm

EMPLOYMENT OF CLERGY AND RELIGIOUS OFFICERS

There has been contention over the employment of clergy and religious officers. For example, where employment as a religious officer is refused because of the applicant's sex, sexual orientation or marital status, this discrimination breaches the applicant's human rights. In 2003, the Human Rights Commission sought the opinion of four experts on the question of the employment of gay and lesbian clergy. A key question is whether clergy are employed at all. Three of the experts were of the view that they are not, and that the prohibition on employment does not apply. This view is supported by a 1998 decision of the New Zealand Court of Appeal that, for the purposes of the Employment Contracts Act and in relation to the situation prevailing in the Methodist Church, the relationship between clergy and the Church is not an employment relationship. According to this view, the question of whether the discrimination exception provision for churches in the HRA (section 28) is applicable does not arise, because the parties are not in an employment relationship in the first place.

A different view, under the HRA rather than the Employment Contracts Act, was that clergy are in an employment relationship with their church authorities, and that this is why section 28 exists and discrimination is therefore lawful. All the opinions lead to the same conclusion: that the HRA allows churches to discriminate on grounds of sex (including sexual orientation) with respect to the engagement of clergy.

SAFETY

There continue to be instances of hate crimes, such as the vandalising of mosques and temples, desecration of Jewish graves, and verbal abuse or threatening behaviour towards people wearing religious attire, such as a hijab or turban.

Conclusion
Whakamutunga

The right to freedom of religion and belief is incorporated in New Zealand law, and New Zealand generally complies with and exceeds international standards. Some challenges remain in relation to accommodation of differences in religion and belief in practice, particularly in balancing the right to freedom of expression with the right to freedom of religion and belief, as reflected in a number of high-profile incidents. Maintaining respect for all religions and beliefs and all rights-holders requires continual work, particularly in developing relationships of mutual respect and recognising that there is an equal right to religion and ethical belief.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance the freedom of religion and belief:

Guidelines

Developing guidelines for respecting diversity of religion and belief in domains such as the workplace, media, universities, health services and the criminal justice system

Teacher training and support

Providing training and support for teachers, and further educational resources about religion and belief to support the school curriculum, as well as information to aid public understanding

Immigration policy

Amending immigration policy to enable leaders of religious groups to take up or retain their positions with their communities in New Zealand

Lines of communication

Establishing clear lines of communication between government and communities of religious and ethical belief at the national and local level, and appropriate structures to support them.

11. Right to Health

Tika ki te Whai Oranga

Everyone has the right to enjoy the highest attainable standard of physical and mental health.

Convention on the Elimination of Racial Discrimination, Preamble (edited)

Introduction
Tīmatatanga

The right to health encompasses not just the absence of disease or infirmity but "complete physical, mental and social well being".[1] It includes access to both timely and appropriate healthcare as well as the underlying social and economic determinants of health, such as conditions of work and adequate food and shelter.[2]

Since the Commission's review of human rights in New Zealand in 2004,[3] there has been improvement in some areas, but little or none in others. Poor health outcomes for Māori and Pacific people are still unacceptably high compared with the rest of the population,[4] and rates of youth suicide and disease and death from smoking (particularly among Māori and Pacific people) remain a problem. There have also been cuts in public health initiatives developed over the past decade to promote and protect the health of communities (despite their acknowledged success), and more cuts are possible in the interests of economic efficiency.[5]

On the positive side, there has been an increase in overall life expectancy.[6] Māori-led health initiatives (including the introduction of the Whānau Ora programme) have been strengthened to improve health outcomes for Māori, and there is greater recognition of, and willingness to address, the difficulties facing trans people in accessing health services.

Internationally there is increasing acceptance of a human-rights-based approach to health. The World Health Organisation (WHO) has committed to promoting the integration of human rights norms and principles in the design, implementation, monitoring and evaluation of health-related policies and programmes. The principles of equality and freedom from discrimination – including on the basis of sex and gender roles – are considered fundamental to the development of health policy, along with recognition of the rights of vulnerable groups and universally accessible health systems.[7] For example, the United Nations Population Fund (UNPF) has developed a training package based on a human rights approach, with a particular focus on gender equality and reproductive rights.[8]

There have also been some significant additions to the international instruments. The new Convention on the Rights of Persons with Disabilities (CRPD) – designed to ensure that people with disabilities can enjoy the same human rights as everyone else – has helped to reinforce a

1 Preamble to the Constitution of the World Health Organisation. Accessible online at http://www.who.int/about/definition/en/print.html

2 UN Commission on Human Rights (2003), *Economic, social and cultural rights: The right of everyone to the enjoyment of the highest attainable standards of physical and mental health: Report of the Special Rapporteur, Paul Hunt,* (E/CN.4/2003/58,13 February). Accessible online at http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/9854302995c2c86fc1256cec005a18d7/$FILE/G0310979.pdf

3 It should be read in conjunction with other chapters in this review, such those on the rights of disabled people, rights of women, rights of sexual and gender minorities, rights of children and young people, right to housing and right to social security.

4 Ministry of Foreign Affairs and Trade (2009), *New Zealand National Universal Periodic Review Report* (April) (Wellington: MFAT), p 3. Accessible online at http://www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/Human rights/Universal-Periodic-Review/Final-Report/index.php

5 Ministerial Review Group (2009), *Meeting the Challenge: Enhancing Sustainability and the Patient and Consumer Experience within the Current Legislative Framework for Health and Disability Services in New Zealand,* Report of the Ministerial Review Group (Wellington: MRG), 31 July. Accessible online at http://www.beehive.govt.nz/sites/all/files/MRG%20Report%20Meeting%20the%20Challenge.pdf

6 Ministry of Health (2008), *Health and Independence Report 2008* (Wellington: MoH), para.2.2.1. Life expectancy in New Zealand is still lower than in a number of OECD countries such as Japan, Switzerland, Australia and Italy, according to OECD Health Data 2010, accessible online at http://www.oecd.org/health/healthdata

7 World Health Organisation (2010), *World Health Report – Health systems financing: the path to universal coverage*. Accessible online at http://www.who.int/whr/2010/en/index.html

8 Human Rights Council (2007), *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt*, (A/HRC/4/28, 17 January), para 10. Accessible online at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/102/97/PDF/G0710297.pdf/OpenElement

◀ Andrea Ventling doing tricks with Dash, at Monarch Park, Auckland

paradigm shift to a social model of disability, emphasising the effects of a disabling environment rather than the more traditional medical model, which focusses on disease or illness. An Optional Protocol to the International Covenant on Economic Social and Cultural Rights (ICESCR), which will allow individuals to complain to the relevant international treaty body about breaches of the rights in the Covenant, has been agreed to by the United Nations. There is increasing acceptance that the courts have a role to play in relation to the delivery of social and economic rights – that is, that such rights are justiciable. [9] Very recently, the International Labour Organisation (ILO) adopted a standard aimed at preventing discrimination against people with HIV in the workplace, emphasising the importance of work and income-generating activities for workers living with HIV, particularly in terms of continuing treatment. [10]

International context
Kaupapa ā taiao

The right to health is fundamental to human rights and is expressly referred to in a number of core international treaties. The most significant is the ICESCR, which refers to the right to the "enjoyment of the highest attainable standard of physical and mental health". [11] Other international treaties also refer to the right to health. In some it applies generally; others address the rights of particular groups such as women or children. There is also a body of international standards and declarations relating directly or indirectly to the right to health. These are not binding in the same way as the treaties, but have a significant impact, particularly if they achieve the status of customary international law.

Numerous conferences and declarations, such as the International Conference on Primary Health Care in 1978 (which resulted in the Declaration of Alma-Ata), and the United Nations Millennium Development Goals, have also helped clarify aspects of public health and reaffirmed commitment to the realisation of the right to health generally. [12]

INTERNATIONAL HUMAN RIGHTS TREATIES RECOGNISING THE RIGHT TO HEALTH

- **Convention on the Elimination of all Forms of Racial Discrimination (CERD): Article 5(e) (iv),(1965)**
- **International Covenant on Economic, Social and Cultural Rights (ICESCR): Article 12 (1966)**
- **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Articles 11(1)(f), 12 and 14 (2)(b) (1979)**
- **Convention on the Rights of the Child (UNCROC): Article 24 (1989)**
- **Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (Migrant Workers Convention): Articles. 28, 43(e) and 45(c)(1990)**
- **Convention on the Rights of Persons with Disabilities (CRPD): Article 25(2006)**

By ratifying the ICESCR, a state agrees to protect the health of its citizens and provide the services, policies and budgetary means to promote good health and ensure the elimination of health-based discrimination. [13] This is qualified by recognition of finite resources and the concept of progressive realisation: given the cost of

9 New Zealand remains ambivalent on the direct enforceability of social and economic rights through the courts. See *Implementation of the International Covenant on Economic, Social and Cultural Rights, Third Periodic Report by New Zealand* (2009), paras 20–21. Accessible online at http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E.C.12.NZL.3AUV.pdf

10 ILO (2010), HIV and AIDS and the World of Work (Geneva: ILO). Accessible online at http://www.ilo.org/lang--en/docName--WCMS_141898/index.htm

11 ICESCR, article 12

12 OHCHR/WHO (2008), The Right to Health: Fact Sheet No.31. Accessible online at www.ohchr.org/Documents/Publications/Factsheet31.pdf

13 Glazebrook S, Baird N and Holden S (2009), *New Zealand: Country Report on Human Rights, Victoria University of Wellington Law Review* 40, pp 57–102, p 89

health services, compliance is contemplated as happening incrementally, or progressively, depending on available resources and the competing claims and priorities on those resources. [14]

To avoid resource constraints being used as a reason for non-compliance, states must demonstrate that they have made every effort to use what resources they have to satisfy at least the minimum obligations in the covenant. States therefore need to establish some form of monitoring mechanisms, including a system of benchmarks and indicators; collection of health data that is disaggregated on certain grounds such as sex, age and rural/urban; and the ability to demonstrate progressive implementation of the rights in the ICESCR. [15] Although the right to health is recognised in a variety of international treaties, each instrument is reported on individually. This can make it difficult to determine how well the right is realised overall by particular states.

As with other rights, the right to health imposes three types of obligations on a state [16], including:

- to respect the right which requires states to refrain from interfering with it directly or indirectly – for example, denying access to healthcare services or discriminating in how the services are provided
- to protect the right which requires states to prevent third parties from interfering with the right to health, which may require states to enact legislation to ensure that individuals comply with the appropriate standards or prohibit doing acts harmful to the health of others – for example, prohibiting female genital mutilation
- to fulfill the right which requires states to adopt progressive legislative, administrative, budgetary and other measures to fully realise the right to health – for example, adopting national immunisation policies.

The committee responsible for monitoring implementation of the ICECSR also stresses the need for intersectoral action – that is, working across all levels of government (not just in the heath sector) to address the social, political, economic and environmental factors that influence health and inequities in health. [17]

How the right to health is delivered is considered in relation to the availability, accessibility, acceptability and quality of health services.

FIGURE 1: A HUMAN RIGHTS-BASED APPROACH TO HEALTH

Source: OHCHR/WHO (2009), A Human Rights-Based Approach to Health, www.who.int/hhr/en

14 Alston P and Quinn G (1987), The Nature and Scope of States' Parties Obligations under the International Covenant on Economic, Social and Cultural Rights, *Human Rights Quarterly* 9(2), pp156–184

15 For an example of how indicators have been addressed domestically, see Advisory Committee on Official Statistics (2009), *Good Practice Guidelines for the Development and Reporting of Indicators* (Wellington: StatsNZ); Ministry of Health (2008), Health and Independence Report 2008 (Wellington: MoH)

16 United Nations Committee on Economic Social and Cultural Rights, *General Comment No.14: The right to the highest attainable standard of health* (Article 12) (2000) E/C.12/2000/4, p 27

17 New Zealand is described as having done a particularly good job in monitoring inequalities and reporting on those inequalities in ways that best facilitate action, in WHO and Public Health Agency of Canada (2008), *Health Equity Through Intersectoral Action: An Analysis of 18 Country Case Studies*, p 34. Accessible online at http://www.who.int/pmnch/topics/health_systems/healthequity_who/en/index.html

New Zealand context
Kaupapa o Aotearoa

LEGISLATIVE FRAMEWORK

While there is no express right to health in New Zealand law, by ratifying the ICESCR the Government has accepted an undertaking to comply with the standards in the Convention. This is achieved by a range of laws, including legislation directly linked to the delivery of health services:

- New Zealand Public Health and Disability Act 2000
- Health and Disability Services (Safety) Act 2001
- Health Practitioners Competence Assurance Act 2003 and the Health Act 1956.

Other legislation deals with specific issues, including the:

- Mental Health (Compulsory Assessment and Treatment) Act 1992 (MH(CAT) Act)
- Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act)
- Alcoholism and Drug Addiction Act 1966 (ADA Act).

Employment-related legislation, such as the Health and Safety in Employment Act 1992 and the Smoke-Free Environments Act 1990, deals with health in the workplace. The Injury Prevention, Rehabilitation and Compensation Act 2001 provides no-fault personal insurance cover for injury through the Accident Compensation Corporation scheme. The National Administration Guidelines (NAGs) for school administration set out statements of desirable principles of conduct, requiring boards of trustees to provide a safe environment and promote healthy food and nutrition for all students. [18]

The right to health is also protected by the New Zealand Bill of Rights Act 1990 (BoRA) through the right to freedom from discrimination, [19] the right not to be subjected to medical or scientific experimentation, [20] and the right to refuse medical treatment; [21] the Human Rights Act 1993 (HRA), which deals with discrimination and human rights generally; the Health and Disability Services Act 1994 (together with the accompanying Code of Consumer Rights); and the Privacy Act 1993 (which, together with the Health Information Privacy Code 1994, protects individual privacy).

The future of some of this legislation is uncertain. The ADA Act, considered out of date for many years, is under review, with proposals for reform expected to be considered by Cabinet before the end of 2010. The MH (CAT) Act was considered to comply with existing human rights standards when it was introduced, but must now be seen in light of the increasing international recognition that committal does not mean a person automatically loses their capacity to consent to treatment. [22] The IDCCR Act is currently the subject of litigation concerning the adequacy of statutory direction about which criteria will justify extending an order under the act. [23]

New Zealand today
Aotearoa i tēnei rā

New Zealand has a publicly funded health system which functions well for the most part. Although the proportion of GDP spent on health falls short of a number of other OECD countries, the funds allocated to the health vote amount to the second largest area of expenditure of public monies. [24] There is a strong legislative framework, and numerous strategies and policies are designed to ensure the provision of healthcare and the underlying determinants of the right to health. The Health and Disability Commissioner Act 1994 (HDC) establishes

18 CERD/C/NZL/CO/66 10 August 2007, para 24

19 CAT/C/NZL/CO/5 14 May 2009, para 6

20 CCPR/C/NZL/CO/5 25 March 2010, para 16

21 Detention is possible only if the person is liable for deportation under section 164(3) IA 2009, because Articles 32.1 or 33 of the Refugee Convention apply, or where a protected person can be sent to a country where they are not in danger of torture or death. Even this has led to criticism by the UN Human Rights Committee (CCPR/C/NZL/CO/5 25 March 2010).

22 See also the case of Chief Executive of the Department of Labour v Hossein Yadegary and Anor [2008] NZCA 295 for exceptional circumstances that would permit continued detention.

23 Supra fn 20, para 13

24 Supra fn16, para 6

a complaints system to deal with issues of informed consent, consumer rights and the duties and obligations of healthcare providers, while also providing a strong accountability mechanism via a human rights-based Code of Health and Disability Services Consumers' Rights.

Over the past decade, greater emphasis has been placed on the delivery of primary healthcare. Primary healthcare that focusses on the underlying determinants of health is regarded as the most effective way to address health needs. While it is recognised that improved life expectancy, delayed onset of disability associated with chronic disease and the reduction of inequalities can be attributed to the relatively strong commitment to public health programmes, not everyone can afford to access services such as doctors (with the result that people often rely on emergency departments in public hospitals for conditions that can be easily prevented or treated in primary healthcare settings). This suggests that further spending in this area, at the expense of more immediate health needs, might be necessary to reduce future health costs.

In the coming years, New Zealand will need to address the effects of an ageing population. This, coupled with increased longevity, will impose growing demands on the health system, exacerbated by the impact of diabetes, smoking and obesity and the long-term effects of child abuse.

It is beyond the scope of this chapter to address the entire range of health issues confronting New Zealanders. Rather, the chapter highlights certain key issues and focusses on community or population groups proven to have the poorest health outcomes – people on low incomes, Māori and Pacific people, people with experience of mental illness, refugees and asylum seekers, and trans people. The chapter also looks at some of the health issues facing men, sexual and reproductive rights, and the possible implications of recent developments in the area of genetics.

HEALTH INEQUALITIES – AVAILABILITY AND ACCEPTABILITY

Although health outcomes have generally improved in recent years, inequalities still persist – particularly for people with disabilities,[25] those on low incomes, Māori and Pacific people, and other minority sections of the population. The entrenched inequalities play a significant role in poor health outcomes for these particular groups. This in turn affects children and young people, highlighting the importance of underlying determinants such as adequate housing and nutrition in ensuring good health generally. New Zealand's child-health and safety statistics are among the worst in the OECD.[26] The number of children living in poverty has increased exponentially since the mid 1990s as a result of economic policies that impact adversely on children to the point that today 22 per cent of New Zealand children live in poverty.[27]

Given the link between health status and underlying social and economic conditions, it is probably inevitable that poor health is correlated with income disparity. Health and social problems are almost invariably worse in countries where there are greater inequalities in income.[28] While socially disadvantaged groups may be expected to have poorer health, to be more likely to be exposed to greater health hazards and to find it more difficult to access adequate health services,[29] the overall population also suffers where there are wide income gaps. For example, a higher level of mental illness across all groups is found in countries (such as the United States and New Zealand) where there are greater disparities in income.

Health inequalities cannot be explained simply by economic factors. Māori and Pacific people continue to have

25 For further on the difficulties experienced by people with disabilities, see the chapter on the rights of disabled people.

26 UNICEF (2007), Child Poverty in perspective: An overview of child well-being in rich countries, Innocenti Report Card 7 (Florence: UNICEF Innocenti Research centre). Accessible online at http://www.unicef-irc.org/publications/pdf/rc7_eng.pdf

27 Asher I (2008), *Improving our poor child-health outcomes – what more can New Zealand do?* Keynote address to Paediatric Society of New Zealand Annual Scientific Meeting. Accessible online at http://www.paediatrics.org.nz/files/PSNZ%20Asher%20Child%20Health%20Oct%202008%20formatted.pdf

28 Wilkinson R and Pickett K (2009), *The Spirit Level: Why More Equal Societies Almost Always Do Better* (London: Allen Lane)

29 *Implementation of the International Covenant on Economic, Social and Cultural Rights, Third Periodic Report by New Zealand* (2009), para 438. Accessible online at http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E.C.12.NZL.3AUV.pdf

poorer health outcomes generally, and this cannot be attributed solely to economic and social circumstances. Disparities in mortality between Māori and non-Māori persist within income groups.[30] The Government has acknowledged that the situation is "unacceptable".[31] In 2003 the ICESCR Committee recommended that New Zealand "adopt effective measures to improve the health situation of the indigenous Māori people".[32]

Overall, New Zealand is considered to do a good job of monitoring inequalities and reporting on them in ways that facilitate action. For example, the New Zealand Deprivation Index is used to evaluate data from the Census in order to "boost intersectoral interest in inequities, facilitated discussion … about the root causes of inequities and provided social agencies with evidence on which they could plan programmes and policies to address health inequities".[33] Improving the effectiveness of mainstream services to ensure better health outcomes for Māori and Pacific people is recognised as an important priority.[34] This has led to a shift from increasing the number of Māori providers to strengthening existing services to ensure that they serve Māori better in terms of accessibility and quality. The Government also recently announced the introduction of the Whānau Ora programme. This is an innovative approach to the provision of services, designed to empower families rather than focus on individuals. The programme will require government agencies to work together and with families, to provide advice on employment and welfare matters as well as health services, and has the potential to address the entire range of health determinants.

Despite this, finite resources mean that prioritising which services get funded is inevitable. The criteria which determine the allocation of health funding can be contentious. At present, decisions about which services and interventions are funded are made by district health boards, taking into account nationally determined priorities tempered by local needs and requirements. The decision-making, which is based on need, has been criticised as lacking objectivity and transparency, and being overly responsive to lobby groups with vested interests, with the result that those least able to promote themselves and their healthcare needs are the most likely to miss out.[35]

One area where this is likely to come to a head is age. As New Zealand has an ageing population, there will be increasing demand for health services by older people and corresponding costs to the health system.[36] The committee responsible for the implementation of the ICESCR (CESCR) has indicated that in realising the right to health for older people, it is necessary to bear in mind not simply access to treatment but investment through the whole of life, including encouraging the adoption of healthy lifestyles.[37] This is provided to a large extent through the Ministry of Health's strategy for the health of older people. The strategy aims to encourage older people to participate to the fullest in decisions about their health, and to provide "support that will ensure access to flexible, timely and co-ordinated services and living options", including any community-based care and support they may require.[38]

30 Ministry of Health (2004), *Tracking Disparity: Trends in Ethnic and Socioeconomic inequalities in mortality, 1981–2004 (*Wellington: MoH). Accessible online at http://www.moh.govt.nz/moh.nsf/indexmh/tracking-disparity-inequalities-mortality-1981-2004?Open

31 Ministry of Foreign Affairs and Trade (2009)

32 UN Committee on Economic, Social and Cultural Rights (2003), Concluding Observations/Comments (30th Sessions: E/C.12/1 Add.88) at para 33

33 WHO and Public Health Agency of Canada (2008), p 19

34 Ministry of Health (2006), *Whakatataka Tuarua: Māori Health Action Plan 2006-2011* (Wellington: Ministry of Health). Accessible online at http://www.moh.govt.nz/moh.nsf/by+unid/2860946B115F26EACC25723B00032ADD?Open#information

35 Morgan G and Simmons G (2009), *Health cheque: The truth we should all know about New Zealand's public health system* (Auckland: Public Interest Publishing), p 144

36 By 2028 it is expected that 50% of health spending will be on people over 65: Ministry of Health, *Briefing for the Incoming Minister* (2008).

37 CESCR (1995), *General Comment 6: The economic, social and cultural rights of older persons:* (08/12/1995), para 35. Accessible online at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/482a0aced8049067c12563ed005acf9e?Opendocument

38 Ministry of Health (2002), *Health of Older People Strategy.* Accessible online at www.moh.govt.nz/publications/hops

The Ministerial Review Group tasked with ensuring the continuation of affordable access to a strong public health and disability system in New Zealand recognised the benefits of a productive and longer-living workforce.[39] However, encouraging people to live healthier lives does not necessarily translate into corresponding savings in health and disability costs. As people age, their need for health and support services increases, and a significant amount of health funding is spent on the last year of life.[40] The elderly are also likely to suffer from multiple conditions related to ageing, and longer life expectancy means that people will live longer with chronic conditions.[41]

ICESCR requires rights to be provided on a non-discriminatory basis, but where resources are limited they should be targeted at the most vulnerable. A human rights approach which promotes an understanding of the right to health and the shared nature of obligations would allow a more equitable and transparent means of distributing health resources. There is some way to go before the needs of the most vulnerable groups are adequately addressed in New Zealand. For example, people with intellectual disabilities encounter persistent and enduring barriers to exercising and enjoying their human rights in most spheres of daily life.

MENTAL HEALTH SERVICES – QUALITY AND AVAILABILITY

Between 2005 and 2009 the Commission received 773 complaints and inquiries relating to mental health matters.[42] A significant number (131) related to the way in which mental illness impacted on the ability to participate in society (and therefore on the right to health in its wider sense). They included being refused insurance or offered it on different terms and conditions; experiencing difficulty in obtaining custody of children; and being turned down for employment, prevented from performing certain tasks or not being promoted as a result of mental illness.

The quality of mental health services improved in New Zealand with the introduction of the concept of community care in the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MH(CAT) Act).[43] While a range of services is provided in the community, ensuring safe, recovery-oriented environments remains a challenge, particularly for Māori and Pacific people and young people.[44] There is some concern among community groups that the recession and recent changes in policy could impact adversely on the funding available for community mental-health initiatives.[45]

The gaps in mental services for children and young people include:

- a lack of forensic, residential placements[46]
- a shortage of mental-health professionals who specialise in working with children and young people (although there have been attempts to address this and the workforce more than doubled over the last decade)[47]
- a shortage of addiction services for young people and those with parenting responsibilities
- inadequate co-ordination among the multiple agencies involved in the care and treatment of young people with very high needs (although this is being addressed through a variety of programmes with other government agencies).[48]

39 Ministerial Review Group (2009), para 115

40 Data from the Ministry of Health suggests that this amounts to 10–15 per cent.

41 Ministerial Review Group (2009), para 114

42 The Commission interprets mental health as including conditions such as depression, anxiety, alcohol misuse and addictions generally.

43 Ministry of Foreign Affairs and Trade (2009), para 3.2.9

44 ibid

45 Budget papers released at the beginning of July indicate that more than $20 million has been cut from mental health programmes: *New Zealand Herald*, 15 July 2010

46 The ministry has prepared a youth forensic guidance document for DHBs in preparation for further development when funding is available.

47 The shortage of trained professionals in this area is not limited to New Zealand but presents as an international problem.

48 For example, the Ministry of Health is working with the Ministries of Social Development and Education on health and education assessments for children coming into the care of CYFs and improving information-sharing mechanisms between agencies working with children and their families.

The Deaf community is also poorly served by mental health services. Research suggests that 10 per cent of the Deaf population is at the chronic/severe end of the mental health spectrum, compared with 3 per cent in the mainstream population. Yet services are frequently inaccessible for Deaf people, [49] and there is little awareness of the special needs of Deaf mental-health consumers, signalling a need for a nationally co-ordinated Deaf mental health service. [50]

In relation to the act itself, people have complained to the Commission about repeat hospitalisation, the use of seclusion and Electroconvulsive Therapy (ECT) and the need for greater oversight of the Act, particularly the implications of compulsory treatment (see the chapter on the Rights of people who are detained).

The priorities in the Commission's first action plan included ensuring that any practice involving confinement, isolation and reduction of sensory input was acknowledged as seclusion in guideline documents, clarifying the human rights issues around the use of seclusion and requiring district health boards to report on the use of seclusion in service profiles. In 2008, the Human Rights Commission and the Mental Health Commission published *Human Rights and Seclusion in Mental Health Services* to clarify the human rights matters that can arise in the practice of seclusion. [51] Instances of seclusion are now routinely reported on by DHBs, a new reporting template on the use of seclusion for DHBs was introduced in 2006, and the Health and the Restraint Minimisation and Safe Practice Standards (2008) include a broader definition of seclusion. The Ministry of Health also published guidelines on the use of seclusion in 2010 as part of its ongoing commitment to promote a decrease in its use. The use of seclusion is now monitored but, although there has been a decrease in the incidence of seclusion, for a small number of patients the duration of seclusion has increased.

The use of ECT was the subject of examination by a parliamentary committee in response to petitions presented in 1999 [52] and 2007. [53] One result of the 1999 petition was that reports on the use of ECT are now published annually. It also recommended that there be an independent review of the use of ECT in New Zealand. [54] Following the 2002 petition, the second opinion required that, where a patient refuses consent to the administration of ECT, this must now be obtained from a specialist who practices independently of the clinical team providing the treatment.

The issue of capacity and the tension between compulsory treatment [55] and the right to refuse mental health treatment, to make an informed choice and give informed consent were also priorities in the original action plan and have been raised by mental-health service users on many occasions (and constitute the most common complaint received by the Commission in relation to mental health issues). There is now a series of cases in like-minded jurisdictions on this topic which have changed the way in which capacity is viewed internationally, [56] and which indicate that simply because a person is defined as mentally disordered, it does not necessarily follow that they have lost the ability to consent to treatment. The CRPD, with its emphasis on individual capacity, has also shaped thinking in this area. While the Director of Mental Health has acknowledged that the discussion on capacity is in its infancy in New Zealand, he has also noted that "future revisions of mental health law will need to be consistent with recent international and domestic human rights developments". [57]

49 Bridgman G (2000), *Deaf Mental Health Research Project: Reducing Risk in Deaf Mental Health*, paper presented at Challenges Choices and Strategies, Mental Health Conference 2000, Parkroyal Wellington, November

50 Report to be published by the HRC in 2010

51 Human Rights Commission (2008), *Human Rights and Seclusion in Mental Health Services* (Wellington: HRC)

52 Petition 1999/30 of Anna De Jonge and others

53 Petition 2007/162 of Helen Smith

54 Ministry of Health (2004), Use of Electroconvulsive Therapy (ECT) in New Zealand: A Review of the Efficacy, Safety and Regulatory Controls (Wellington: MoH). The review found that ECT is an effective treatment for some seriously ill patients.

55 A clinician should still try to obtain the consent of the patient even if there is a compulsory treatment order in place.

56 Starson v Swayze 1 SCC 32 (2003)

57 Chaplow D (2010)

Article 12 of the ICESCR refers to the right to the highest attainable standard of both physical and mental health. Yet all too often mental health comes a poor second to physical health, principally because it has traditionally been viewed as simply a health issue. A human rights-based approach which acknowledges the social, economic and political forces that shape the way in which people with mental illness are treated may be more appropriate, provided it ensures the participation and leadership of people with mental illness in addressing the inequalities and discrimination they encounter. [58]

PROVISION OF SERVICES – ACCESSIBILITY, ACCEPTABILITY AND QUALITY

Access to health services remains a concern for some people. At various times over the past five years this has been raised in relation to treatment for certain types of cancer (where patients were funded to go to Australia because of the time they would have had to wait to access radiotherapy locally), [59] the availability of elective surgery [60] and, more recently, cutbacks to home-based residential care for elderly people. Refusal of, or difficulty in accessing, treatment is also the subject of individual complaints to the Commission. [61]

Access to medicines has also been contentious. New Zealand spends less on medicines per capita than other comparable countries, largely as result of the way in which PHARMAC (the Crown entity responsible for purchasing pharmaceuticals for the Government) prioritises and procures medicines. It is PHARMAC's ability to negotiate deals with the drug companies that has made viable the supply of drugs at an affordable price for ordinary New Zealanders.

In 2008, PHARMAC was judicially reviewed over its decision not to fund certain types of early breast-cancer treatment. The court accepted that PHARMAC had failed to consult the public and other interested parties adequately before reaching its decision. [62] However, the authors of a recent report on access to high-cost, highly specialised medicines, [63] while acknowledging the importance of participation and transparency and involvement of the community in medicine assessment and prioritisation processes, noted that "increased transparency needed to be balanced against PHARMAC's continuing ability to perform its purchasing activities".

WORKFORCE ISSUES – AVAILABILITY AND QUALITY

Resources in the health sector generally remain a problem. New Zealand has far below the OECD average number of doctors per head of population, although slightly above the average number of nurses. In 2008, New Zealand had 2.5 practising physicians per 1000 of the population. This is well below the OECD average of 3.2. [64] The ratio of specialists to population is also lower. [65] Māori are under-represented in all regulated health occupations, and Pacific peoples are under-

58 Burns J (2009), Mental Health and inequality: A human rights approach to inequality, discrimination and mental disability, Journal of Health and Human Rights, 11(2)

59 MOH figures suggest that 2007 was a low point and the situation has improved subsequently but also that delays may still arise as a result of workforce, equipment or other facility-based constraints: Ministry of Health (2008), *Health and Independence Report 2008* (Wellington: MOH) at para 3.5

60 The number of elective surgery procedures has been increasing steadily over the past 10 years, with the current Government claiming a 10% increase since taking office.

61 Over the five years from 2004 to 2009, there were 122 complaints about inequalities in healthcare.

62 Walsch and Ors v Pharmaceutical Management Agency HC WN CIV 2007-485-1386 [2008]. In 2009 the National Government decided to fund 12 month courses of Herceptin to fulfill a promise it had made during the election campaign.

63 McCormack P, Quigley J and Hansen P (2010), *Review of Access to High-Cost, Highly-Specialised Medicines in New Zealand: Report to Minister of Health, Hon.Tony Ryall*, 31 March 2010. Available online at http://img.scoop.co.nz/media/pdfs/1005/Review_of_Access_to_High_Cost_Highly_Specialised_Medicines_31_April_2010.pdf

64 Organisation for Economic Co-operation and Development (2010), *OECD Health Data 2010 – Country Notes*, p 2. Accessible online at http://www.oecd.org/dataoecd/43/22/40905041.pdf

65 Commission on Competitive and Sustainable Terms and Conditions of Employment for Senior Medical and Dental Officers Employed by the District Health Boards (2009), 'Senior Doctors in New Zealand: Securing the Future', Report of the Director-General of Healths (Wellington: MoH)

represented in the health workforce generally. [66] There is a growing need for the nursing workforce to better reflect the ethnic diversity of the population, in order to meet diverse cultural needs.

In 2006 the number of doctors who had been trained in other countries reached 39.9 per cent. [67] The reliance on overseas-trained doctors suggests that New Zealand is not training enough practitioners for its increasing population. It is also difficult to retain foreign doctors once they are here (with 75 per cent of foreign-trained doctors leaving New Zealand within six years). [68] Yet refugee and some migrant doctors can find it difficult to obtain work, because of what some claim to be overly stringent entry criteria and the absence of programmes enabling them to be accredited in the New Zealand health system. New Zealand also has a high proportion of foreign-born and overseas-trained nurses. In some hospitals, up to 80 per cent of the nursing workforce on any given ward may hold internationally obtained qualifications.

Conversely, New Zealand nurses are leaving New Zealand to enter the global market, resulting in a substantial number of locally trained nurses being lost to other countries each year. Nurses will be the primary providers of healthcare for people experiencing the effects of long-term conditions in the future. The lack of trained practitioners – both doctors and nurses – coupled with an ageing population with chronic long-term conditions and greater expectations of the health system as a result of developing technology constitutes a significant workforce challenge for the New Zealand health system.

ACCESS TO ACCIDENT COMPENSATION – AVAILABILITY AND ACCEPTABILITY

The Commission receives a steady stream of complaints and enquiries relating to accident compensation and the Accident Compensation Corporation (ACC). Over the past two years, the nature of complaints has changed. Complaints about the level of assistance and ability to access adequate compensation have become more common and there are fewer complaints about service delivery. This may reflect in part the development of the Code of Claimants' Rights in 2002, designed to ensure a high standard of service and fairness. The code is based on a claimant's right to be treated with dignity and respect; to be treated fairly and have their views considered; to have their culture, values and beliefs respected; to have a support person present; to expect effective communication; to be fully informed; and to have their privacy respected.

Recent complaints received by the Commission have included concerns at the manner in which eligibility for sensitive claims – that is, claims arising out of mental injury resulting from sexual abuse – is decided, the imposition of a threshold for hearing loss, and limitations on claims by seasonal workers. Although the issue of sensitive claims remains contentious, recent changes have ameliorated the situation to some extent.

There have been questions about the differences in treatment and level of resources provided to people disabled as a result of an accident and to those requiring similar services because of illness. In 2008 the High Court dismissed a claim that the provision of healthcare under the ACC scheme discriminated against those whose care did not arise from an accident. [69] Earlier, however, the Human Rights Review Tribunal had observed that it had considerable sympathy for the plaintiff's argument that there was "substantial social inequity arising out the fact that similarly circumstanced people are treated differently depending on the cause of their disability" and it was "far from clear … how that state of affairs might be justified", conceding that the plaintiff had a legitimate political point to make. [70] Similar sentiments can be found in Atkinson and Ors v Ministry of Health, [71] in which the tribunal commented (in relation to services funded by ACC and those funded by the Ministry of Health) that it seemed "artificial to make a distinction as to payment options to family members for home care, purely on the basis of the cause of the disability".

66 Ministry of Health (2008), *Health and Independence Report 2008* (Wellington: MoH), para 2.6.4

67 ibid

68 Black J, 'The public health system: this is going to hurt', *NZ Listener*, November 2009

70 Trevethick v Ministry of Health [2008] NZAR 454

71 Trevethick v Ministry of Health [2007] NZHRRT 13 (24 October 2007), para 3

REFUGEES AND ASYLUM SEEKERS – ACCESSIBILITY AND AVAILABILITY

In addition to the difficulties that face the wider population, refugees experience difficulties in accessing interpreters and health professionals trained to respect customary practices.

Asylum seekers not formally recognised as refugees can encounter extra difficulties in accessing health services. While they have access to public health doctors, they are unable to access specialist services, such as dentistry, mental health care or optometry. [72] Refugee spokespeople say that beyond the main centres, mental health services are often ill-equipped and lack trained professionals to deal with experiences unique to refugees, such as trauma resulting from torture or anxiety over family reunification.

Refugee groups have welcomed the introduction of the Whānau Ora programme, which they consider to have many elements appropriate to refugee families, and hope it will be developed further to apply to refugee communities. [73]

TRANS PEOPLE – ACCESSIBILITY

In submissions to the Commission's Transgender Inquiry, trans people [74] and health professionals consistently raised the difficulties trans people have in accessing general health services and being treated with dignity and respect when they did use them.

Trans people also require a range of specific health services if they wish to physically transition. The Commission's report identified major gaps in the availability, accessibility, acceptability and quality of these services. Many of the health services required by trans people are available within the public health system for other medical conditions (e.g. access to hormone specialists, assessments by mental health professionals and some surgical procedures, including mastectomies and orchidectomies), but trans people and their clinicians face significant barriers accessing these procedures. [75]

Positive developments since the inquiry include the ongoing development of quality-of-life measures for prioritising access to elective surgeries which have the potential to ensure more equitable access to these procedures, including for trans people. Counties Manukau District Health Board has received a small amount of funding to co-ordinate a national project on gender-reassignment health services for trans people in New Zealand. In 2010–11 it will work with clinicians and trans health consumers to develop a multimedia training package based on current best practice and a database of health professionals working with trans people as a first step to implementing the inquiry's recommendation that standards of care and treatment pathways are developed for gender-reassignment services.

SEXUAL AND REPRODUCTIVE HEALTH RIGHTS – ACCEPTABILITY, ACCESSIBILITY

Sexual and reproductive health and rights are an integral part of the right to health. As such they have gained increasing prominence internationally over the past decade. The Beijing Platform for Action was adopted at the Fourth World Conference on Women, and the Millennium Development Goals include goals aimed at reduced maternal mortality, empowerment of women and universal access to reproductive health by 2015. In 2009, the Human Rights Council adopted a resolution on preventable maternal mortality and morbidity and human rights which paves the way for more substantive discussion on women's rights generally, and emphasises

72 This is in contrast to many countries – even less affluent EU countries – which guarantee full access to both asylum seekers and refugees. See Liebaut P (2000), *Legal and social conditions for asylum seekers and refugees in Western European countries* (Danish Refugee Council & European Commission: Brussels).

73 Awad A, Speech to the National Refugee Health and Wellbeing Conference (2009)

74 The Commission's inquiry – Human Rights Commission (2007), *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (Wellington: HRC) – raised, but did not deal with, the issue of discrimination and related human rights issues affecting intersex people. The Commission has now initiated further work, including treatment of intersex infants and children. For further comment on intersex issues, see the chapter on the rights of sexual and gender minorities.

75 Human Rights Commission (2007), *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (Wellington: HRC), p 96, paras 9.19 and 9.20

the human rights implications of the relevant Millennium Development Goals. [76] Although New Zealand played a prominent part in the negotiations which preceded the resolution, concern has been expressed domestically at the absence of explicit reference to sexual and reproductive rights in New Zealand's reports to international bodies such as CEDAW.

In 2008, the Human Rights Commission and Family Planning International brought together community leaders for a dialogue on sexuality and human rights in New Zealand. [77] Among other issues, participants noted that matters relating to sexuality, gender and human rights remain politically contentious, and that nuanced discussions of gender have been overtaken by simplified debates about relationships between the sexes. Participants considered that a rights-based approach or reference to a human rights framework would provide an opportunity to progress these issues.

NGOs have also raised concerns about the high level of unintended teenage pregnancies; the gendering of responsibility for sexually transmitted infections (for example, targeting the HPV vaccine at young women); uneven access to effective sexuality and relationship education and information; HIV testing of pregnant women; and the refusal of some doctors to refer patients to abortion services on the grounds of 'conscientious objection'.

The provision of abortion services and the role of the Abortion Supervisory Committee (the Committee) was scrutinised in judicial review proceedings in 2008 and 2009. The High Court noted that while the law does not establish a legal right to life for an unborn child, the circumstances in which abortions may be performed are limited by the Contraception, Sterilisation and Abortion Act 1977. It held that the Committee had failed to fulfil its statutory duty by adopting an overly liberal interpretation of the act by not reviewing or scrutinising the decisions of consultants. [78] The outcome could be to further limit access to abortion.

Access to sexuality education and information for disabled people is proving controversial, as it challenges historical or stereotypical notions that disabled people do not have sexual feelings or are capable only of behaving inappropriately. Disability advocates are also concerned that entrenched stereotypes about disabled people and fears of prospective parents about having a disabled child, coupled with prejudice and stigmatisation of disabled people generally, could result in uninformed choices by families about termination of pregnancies. [79] More generally there are issues for some groups of disabled people who want to manage their own health beyond their disabled condition and need to be able to access information about cervical-smear testing, mammograms and kits for pregnancy testing. Lack of accessible information may mean that some disabled people do not receive the healthcare they need.

MEN'S HEALTH ISSUES – AVAILABILITY, ACCESSIBILITY

As in most modern societies, women in New Zealand generally live longer than men. [80] Men tend to have higher mortality rates and are more likely to engage in high-risk activities, resulting in increased rates of injury and hospitalisation, as well as ACC claims. They are also over-represented in suicide statistics. [81] Women, on the other hand, tend to have higher morbidity rates, especially as they age.

Men also appear to have difficulty in accessing services. Research demonstrates that men – particularly those aged between 15 and 74 – are less likely to seek professional

76 United Nations Human Rights Council (2009), *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development* A/HRC/11/L.16/Rev.1 (16 June 2009).

77 Family Planning International and New Zealand Human Rights Commission (2008), *Voices: Talking about sexuality, gender and human rights in Aotearoa New Zealand* (Wellington: FPI & HRC)

78 Right to Life New Zealand Inc v The Abortion Supervisory Committee HC WN CIV-2005-485-999 (9 June 2008); Right to Life New Zealand Inc v The Abortion Supervisory Committee (Relief Decision) (HC WN CIV- 2005-485-999 (3 August 2009)

79 The UN Convention on the Rights of Persons with Disabilities includes protection for sexual and reproductive health and rights.

80 Johnson L, Huggard P and Goodyear-Smith F (2008), 'Men's health and the health of the nation', *Journal of the New Zealand Medical Association*, vol 121 no. 1287. In New Zealand, life expectancy for Maori men is almost nine years less than for non-Maori: Ministry of Health (2010), *Tatau Kahukura: Māori Health Chart Book 2010* (2nd ed, Wellington: MoH).

81 Men are three times as likely to commit suicide but half as likely to intentionally harm themselves requiring hospital admission: Ministry of Health (2007), Suicide Facts. Accessible online at www.moh.govt.nz/suicideprevention

help, [82] even though almost 70 per cent of deaths (including from heart disease, lung cancer and suicide) in this age group are preventable through early detection and treatment. [83] Approaches to the Commission on men's health issues are consistent with this pattern. Only 10 complaints were received between 2005 and 2009, six of which related to inequalities between men and women in the health sector. Some related to a perceived emphasis towards women's health at the expense of men's, while others related to the perception that men are the primary perpetrators of domestic violence and consequently experience unequal access to services and a reluctance from health professionals to treat them. Much of the behaviour and resistance to seeking help is attributed to traditional stereotypes and the "psyche of the New Zealand male". [84] A study of Britain's National Health Service found that men could find it difficult to engage with health services, whether because of lack of knowledge about what is available or because of inappropriate times when services are available. [85]

New Zealand has been slow in developing a national men's health policy. [86] The Ministry of Health recently announced an intention to develop programmes and initiatives to encourage men to be more aware of their health and access healthcare, including tailoring existing health services so they are more accessible by providing targeted health checks at times and locations convenient for men; supporting workplace-based health initiatives; community-based health initiatives; and developing a men's social-marketing strategy. [87]

GENETIC TESTING – ACCESSIBILITY

In its 2004 review of human rights in New Zealand (and the subsequent action plan), the Commission identified the need to ensure that the HRA and the BoRA prevent genetic discrimination in certain areas, monitor the implications of the new technology for disabled people and consider whether further legislative change is necessary.

Insurance is relevant to the underlying determinants of health, since it can dictate whether people are able to obtain income-protection insurance and hence a mortgage (in order to access housing). In 2004, the Law Commission's report on life insurance in New Zealand [88] recognised that the existing situation relating to genetic information (a voluntary moratorium whereby the industry can require an individual to disclose the results of a test but cannot require them to submit to one) might be unsatisfactory, because it depended on the goodwill of the participants and could not be enforced. The Law Commission questioned whether the HRA process was adequate for deciding the actuarial relevance of the genetic information provided, and whether it was appropriate to rely on it, given that complaints are addressed on a case-by-case basis. It suggested that there may be some merit in establishing an independent regulatory body to provide advice on the scientific reliability and actuarial relevance of genetic tests (as has been proposed in other countries). [89] Although this suggestion was not progressed, the Law Commission recommended that the Government monitor the situation and make amendments if necessary.

In 2006, the Commission itself undertook a review of the Insurance Guidelines it had produced in 1997. [90] The initial discussion document noted that developments in the field of genetics – including increasing access to genetic testing – had the potential to raise significant,

82 Ministry of Health (2004), 'A Portrait of Health: Key results of the 2002/03 New Zealand Health Survey' (Wellington: MoH)

83 ibid

84 Kirkpatrick J and Driver E (2009), 'The State of Men's Health in Canterbury and New Zealand 2009: Identifying Trends and Opportunities'. Accessible online at http://nzmenshealth.org.nz/wp-content/uploads/2009/12/the-state-of-mens-health-in-canty1.pdf

85 Banks I (2001), 'No man's land: men, illness and the NHS', *British Medical Journal* 323, p 1058. See also Johnson L, Huggard P and Goodyear-Smith F, Men's health and the health of the nation, *Journal of the New Zealand Medical Association* (2008).

86 Jones R and McCreanor T (2009), 'Men's health in New Zealand', in Wilkins D and Savoye E (eds), *A review of policy and progress across 11 countries* (European Men's Health Forum: Brussels). Accessible online at www.emhf.org/resource_images/11countries.pdf

87 Ministry of Health (2009), Men's Health. Accessed 17 November 2010 from http://www.moh.govt.nz/menshealth

88 New Zealand Law Commission (2004), *Report 87: Life Insurance* (Wellington: Law Commission).

89 ibid

90 Human Rights Commission (2006), Discussion Paper: Review of the Guidelines on Insurance and the Human Rights Act 1993 (Wellington: HRC), para 5.2

contentious human rights issues for the industry. Highlighting the significance of the human rights approach set out in the relevant international instruments [91] and the requirement to balance the public good with the need for confidentiality, the Commission sought feedback on whether the moratorium was satisfactory, or whether other options (including legislative amendment) were necessary. Most of those who responded considered that the situation was adequate. Although no substantive change to the HRA was recommended, the Commission considered that retaining the moratorium provided an opportunity to monitor overseas developments and best practice internationally, and promote debate within New Zealand. [92]

In 2009, the multi-disciplinary Human Genome Research Project published its final report on the human genome. [93] The research project covered a variety of areas. In relation to insurance, the team concluded that legislative change was not necessary, and recommended either that an independent body assess the relevance of genetic information, or that a concordat be established between the Government and the industry to assess the fair and reasonable use of genetic information in the underwriting process. [94]

Over the years, disabled persons have made it clear to the Commission that they have concerns about the way in which genetic testing may devalue disabled people. The genome project addressed the issue of prenatal testing and the possibility of a child being born with a congenital disability. The researchers noted the resistance by some disability advocates to prenatal testing, on the grounds that even permitting such testing devalued those already born with impairments, and that it was discriminatory as a result. While recognising the social model of disability, the researchers commented that:

> **…not all the difficulties with disability are socially constructed; and parents may legitimately seek to avoid having their children experience significant functional limitations. Nor is it incompatible to wish on the one hand to avoid transmitting a genetic mutation, but on the other hand to support attempts to minimise discrimination towards the disabled and to support policies which assist the disabled to achieve their potential… for parents to wish to avoid the harms of impairment that are accentuated by lack of social support is not necessarily to collude in discriminatory practices…** [95]

The current policy relating to such testing is that prospective parents can access it only if they are at risk of transmitting a serious genetic disorder. In deciding whether to abort a foetus because of the presence of such a disorder, there should not be an assumption that parents are likely to make certain choices, but rather that they should be supported by non-directive counselling and information about the relevant disorder. [96] The Commission's contribution to the development of policy was that counselling should include factual information about the value and potential of disabled people's lives, rather than simply describing the disability.

Conclusion
Whakamutunga

Overall, the health system in New Zealand performs fairly well in terms of international standards on a comparatively low budget. Human rights principles are increasingly obvious in shaping the debate and there is recognition of the importance of open participation. The

91 Universal Declaration on the Human Genome and Human Rights (1997), Universal Declaration on Human Genetic Data and Universal Declaration on Bioethics and Human Rights (2005)

92 Human Rights Commission (2007), *Guidelines: Insurance and the Human Rights Act 1993* (Auckland: HRC). Accessible online at http://www.hrc.co.nz/home/hrc/humanrightsenvironment/guidelinesoninsuranceandthehumanrightsact1993/guidelinesoninsuranceandthehumanrightsact1993.php

93 Law Foundation Human Genome Research Project (2009), *Genes, Society and the Future, Vol. III: Using Genetic Knowledge for the Public Good* (Wellington: Brookers)

94 ibid

95 Law Foundation Human Genome Research Project (2007), *Genes, Society and the Future: Vol.1*, p 42

96 Law Foundation Human Genome Research Project (2007), p 43. The writer also observes (p 51) that individual choices may not be universally endorsed, but this does not mean that certain activities should necessarily be prohibited.

right to health itself, while not reflected as a free standing right, is protected by a strong legal framework, and there are a large number of strategies and policies designed to address specific health issues.

Since the Commission's 2004 review, there have been some significant international developments. New Zealand was active in some of these, including the adoption of the CRPD and the recent UN resolution on preventable maternal mortality and morbidity and human rights. More generally, there is a greater emphasis on the reduction of maternal mortality, access to reproductive health and empowerment of women. Increased mechanisms for holding States accountable for their performance under the ICESCR include the UN's adoption of an Optional Protocol to ICESCR, and increasing recognition that economic and social rights are justiciable. There is also greater acceptance of the importance of adopting a human rights approach to the provision of health services.

Domestically, there is a clear willingness to acknowledge problems or omissions and an openness to work constructively to address them. Health service funders generally recognise the need for, and fund, services that are accessible and acceptable and provided on a non-discriminatory basis. There is also greater recognition of the importance of an intersectoral approach to delivering the right to health, and new mechanisms (such as the Whānau Ora programme) for delivering it.

Nevertheless, challenges remain. These include inadequate mechanisms for assessing New Zealand's performance in realising the right to health overall, the continuing disproportionately poor health outcomes for Māori and Pacific people and children in low income families, and recognition of capacity in non-consensual mental health treatment.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance the right to health:

Monitoring

Ensuring the right to health is monitored across the treaty body reporting framework.

Social, economic and cultural rights

Extending the Bill of Rights Act to include social, economic and cultural rights to provide a more complete, substantive set of rights to better address the needs of all New Zealanders.

Inequalities

Tackling entrenched inequalities via a systematic, comprehensive, long term, whole of government approach with explicit targets and timelines and clear indicators to monitor the impact.

Capacity

Encouraging debate about the redrafting of the Mental Health (Compulsory Assessment and Treatment) Act 1992 to better reflect the concept of capacity in line with international developments and the UN Convention on the Rights of Persons with Disabilities.

12. Right to Education

He Tāpapa Mātauranga

Everyone has the right to free primary education.

Universal Declaration of Human Rights, Article 26 (plain text)

Introduction
Tīmatatanga

New Zealand has a proven international reputation as a provider of quality education, particularly with regard to its innovative policies and approaches. In a number of areas, New Zealand students' participation and achievement statistics rate amongst the highest of the OECD countries. Yet New Zealand continues to face the challenge of ensuring all children and young people receive an education appropriate to their needs, interests and aspirations.

In 2004, the Human Rights Commission first considered the extent to which the right to education was realised in New Zealand, as part of a national assessment of human rights. The Commission found that there was a wide range of educational opportunities for children and young people at early childhood, primary and secondary levels, and that a high percentage of New Zealand children were performing well by international standards. The Commission also found there were barriers to successful participation for specific groups of children and young people, that standards in education varied for some, and that some experienced discrimination, bullying and harassment.

The Commission's review of human rights in 2004 formed the basis for the *New Zealand Action Plan for Human Rights 2005–2010 – Mana ki te Tangata*. It prioritised actions to realise the right to education in New Zealand. This chapter is an overview of the past five years. It identifies areas where improvement has been made, where issues are still outstanding and where new issues are apparent.

WHAT IS THE RIGHT TO EDUCATION?

Education is both a human right in itself and an indispensable means of realising other human rights. Education is essential for the development of human potential, enjoyment of the full range of human rights and respect for the rights of others. It is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.

The right to education involves learning about rights and responsibilities. It is also about creating high-quality teaching and learning environments where there is freedom from violence, bullying and harassment; where individuality and diversity are respected; and where all those involved are able to participate fully. The right to education encompasses civil and political rights, and economic, social and cultural rights.

Core elements of the right to education include (as specified in international treaties):

- entitlement to free and compulsory primary education
- availability of different forms of secondary education
- access to higher education on non-discriminatory terms
- education directed to develop individuals to their fullest potential and to prepare them for responsible life in a free society, including development of respect for others and for human rights
- availability of accessible educational and vocational information
- measures developed by the State to ensure full participation in education
- availability of some form of basic education for those who may not have received or completed primary education
- protection and improvement of conditions for teachers
- respect for the right of parents/legal guardians to choose schools other than those established and funded by the State, and to ensure that the religious and moral education of their children conforms to their own convictions
- respect for academic freedom and institutional autonomy, including the freedom to express opinions about a workplace institution or system, fulfil functions without discrimination or fear of sanction, and participate in professional or representative academic bodies.

The late Katarina Tomasevski, UN Special Rapporteur on the right to education from 1998 to 2004, proposed a set of four broad standards (the 4-A standards) as a basis from which the realisation of the right to education could be assessed. These are:

◀ Pupils Jacob and Elise during a break at Cashmere Primary School, Christchurch.

- Availability: ensuring free and compulsory education for all children and respect for parental choice of their child's education
- Accessibility: eliminating discrimination in access to education as mandated by international law
- Acceptability: focussing on the quality of education and its conformity to minimum human rights standards
- Adaptability: ensuring education responds and adapts to the best interests and benefit of the learner in their current and future contexts.

In the 2004 review of human rights in New Zealand the 4-A standards were developed into a framework for use in the New Zealand context (see Figure 1). The framework has been developed to inform the current assessment.

FIGURE 1: THE RIGHT TO EDUCATION FRAMEWORK – HE WHARE TĀPAPA MĀTAURANGA

International context
Kaupapa ā taiao

The right to education is set out in a number of international treaties, the most significant of which are the International Covenant on Economic, Social and Cultural Rights (Articles 13 and 14) and the Convention on the Rights of the Child (Articles 28 and 29).

Other treaties include the International Convention on the Elimination of All Forms of Racial Discrimination (Articles 5(e) and 7), the International Convention on the Elimination of All Forms of Discrimination against Women (Article 10), the UN Convention on the Rights of Persons with Disabilities (Article 24), and the UNESCO Convention against Discrimination in Education. The UN Declaration on the Rights of Indigenous Peoples also refers to the right to education (Article 14).

The UN Convention on the Rights of the Child provides that education should be directed at:

- **the development of the child's personality, talents and mental and physical abilities to their fullest potential**
- **the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations**
- **the development of respect for the child's parents; his or her own cultural identity, language and values; for the national values of the country in which the child is living; the country from which he or she may originate; and civilisations different from his or her own**
- **the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin**
- **the development of respect for the natural environment [Article 29].**

In meeting the right to education of every child and young person, it is not sufficient to provide the same education for all. In order to ensure that all children and young people have the opportunity to fully engage in education, it is necessary to provide different and additional support.

This may mean, for example, providing specialist teachers for children with particular education needs, and ensuring access to good quality Braille, New Zealand Sign Language and other communication assistance. It may also mean indigenous children having access to education in their own culture and language, subsidised transport for rural children to get to school, and additional benefits to attract quality teachers to isolated schools.

The international instruments also provide for special measures to ensure that particular groups are not disadvantaged, such as tertiary institutions offering preferential entry to groups which would otherwise be underrepresented.

New Zealand context
Kaupapa o Aotearoa

NEW ZEALAND LAW

New Zealand has ratified all the international treaties listed in the previous section, and is taking progressive steps towards fulfilling them.[1] In addition, the Government has ratified the International Labour Organisation (ILO) Convention 111 on Discrimination in Respect of Employment and Occupation, the ILO Convention 182 on Worst Forms of Child Labour, and the UNESCO Convention against Discrimination in Education.

The right to education is not explicitly provided for in New Zealand law, although elements are reflected in the Education Act 1964 (section 3 sets out the right to free enrolment and free education in state schools for those aged 5–19), the Education Act 1989, the Education Standards Act 2001 (an amendment to the Education Act 1989), and the Private Schools Conditional Integration Act 1975. The Education Standards Act responds directly to the Human Rights Act 1993 by ensuring compliance with human rights standards, particularly in the areas of gender, marital status and disability. Education policy and

1 New Zealand technically has a reservation to UNCROC with regard to education. However, work is under way to have this removed in 2010.

administrative practice further supplement the realisation of this right. The Human Rights Act 1993 states that it is unlawful to treat people differently on various grounds in specific areas of life, including the provision of education.

New Zealand today
Aotearoa i tēnei rā

Education in New Zealand includes compulsory and non-compulsory sectors. In both sectors, education can be funded by the State, privately or through a combination of both.

A range of compulsory and non-compulsory education institutions is available. Parents and guardians have a choice of schooling options within and between state-run schools, integrated schools and private schools. Institutions that provide te reo Māori immersion and are founded on Māori principles are available at all levels. Early childhood education and schooling provision in Pacific languages are also available.

Education is compulsory for all children aged from six to 16 years, with entitlement for free schooling to the age of 19. In practice, most children begin school on their fifth birthday. Students assessed as having high special education needs under the Ongoing and Reviewable Resourcing Schemes are entitled to free enrolment up to 21 years.

CHILDREN AND YOUNG PEOPLE

Children and young people make up a decreasing proportion of the population. Currently, New Zealand's 1.05 million children (those aged 0–17 years of age) make up 26 per cent of the population. [2] There are fewer children and young people in rural areas and more in urban areas. The gender balance is equal. Ten per cent of children have a disability.

The most significant demographic feature is the increasing ethnic diversity of the population, particularly among children and young people. Currently, the population is European 67.6 per cent, Māori 14.6 per cent, New Zealand 11.1 per cent, Asian 9.2 per cent, MELAA (Middle Eastern, Latin American and African) 0.9 per cent. In July 2009, domestic students were 55.8 per cent NZ European/Pākehā, 22 per cent Māori, 9.6 per cent Pacific, 9 per cent Asian and 2.4 per cent other.

The poverty rate in New Zealand continues to be above the average of other developed countries. This affects the right to education for some children and young people. The most recent Ministry of Social Development survey of living standards reported 19 per cent of children experiencing "serious hardship" and "unacceptably severe restrictions on their living standards". [3]

ADULTS IN TERTIARY EDUCATION (16 YEARS AND OVER)

Following a three-year decline, the number of students enrolled in formal tertiary study increased from 2008 to 2009 by more than 5 per cent at every qualification level, except lower-level certificates, which fell by 5.5 per cent. Study for graduate and postgraduate certificate and diploma qualifications rose by 15 per cent during this period. [4]

Overall, New Zealand has a high proportion of tertiary qualified adults and, in particular, a very high proportion with vocational qualifications. Despite high levels of tertiary-qualified adults, one in five adults aged 25 to 34 does not have a year 12-equivalent school qualification or higher (a rate which is higher than some countries we might normally compare with). [5]

Asians (4.9 per cent) and Europeans (3.3 per cent) had considerably higher participation rates in bachelor's degree courses than Pacific peoples (2.9 per cent) and Māori (2.8 per cent).

2 Statistics New Zealand (2006), *Census of Population and Dwellings* (Wellington" StatsNZ). Accessible online at http://www.stats.govt.nz/Census.aspx

3 Ministry of Social Development (2009), Non-income measures of material wellbeing and hardship: first results from the 2008 New Zealand Living Standards Survey, with international comparisons. Accessed 24 March 2010 from http://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/monitoring/2008-living-standards-survey-wp-01-09-main-report.doc.

4 Ministry of Education (2009). Accessed 6 October 2010 from http://www.educationcounts.govt.nz/publications/series/2531/79882/2

5 Education Counts (2010) Accessed 6 October 2010 from http://www.educationcounts.govt.nz/publications/tertiary_education/81180/5

In 2008 females were more likely than males to participate in tertiary study. Participation by Māori females (3.6 per cent) and Pacific females (3.8 per cent) was more than for European males (2.6 per cent). [6]

Tertiary completion rates vary according to demographic characteristics:

- Qualification completion rates are higher for women than for men, but the gap reduces at higher qualification levels.
- Asian students have the highest rates of completion of any ethnic group, while rates are lower for Pacific and Māori students (particularly at postgraduate level).
- In the 2006 census, among disabled adults, almost twice as many had no formal qualification, compared with non-disabled adults. [7]

The number of industry trainees and those in modern apprenticeships almost doubled from 2001 to 2009. Gender segregation persists in the Modern Apprenticeships scheme, with the three industries that dominate the scheme (building and construction, motor engineering and engineering) remaining overwhelmingly male. Hairdressing remains the only industry classification that has more female than male apprentices. [8] In 2008 NZ European/Pākehā made up 76.2 per cent of modern apprenticeships, Māori made up 15.2 per cent, and Pacific and 'other' each made up 0.3 per cent.

WHAT HAS HAPPENED SINCE 2005?

Ministry of Education statements of intent since 2006 recognise that while education provision in New Zealand is good and the majority of students are doing well by international standards, there are significant groups of students for whom education provision at all levels is not delivering – for example, Māori and Pacific students, those from poorer communities, those with disabilities and specific groups of male students. The Ministry has amended sections of its regulatory framework and developed policy initiatives accordingly.

Arguably, the most significant government initiative in the compulsory sector has been the development and implementation of the National Curriculum (NZC), which is being implemented in English-medium schools in 2010. The NZC:

- focusses on notions of identity and belonging of all New Zealanders
- includes references to the Treaty of Waitangi throughout
- encourages students to "respect themselves, others and human rights" in its values statement
- recognises te reo Māori, New Zealand Sign Language and English as official languages for the delivery of the curriculum and as taught subjects
- acknowledges that a curriculum that reflects and values te ao Māori strengthens the identity and belonging of all New Zealanders
- recognises the special place of Pacific languages
- recognises cultural diversity and inclusion.

Te Marautanga o Aotearoa is New Zealand's first curriculum to be developed and written in te reo Māori and in consultation with the Māori education sector. It will be implemented in Māori-medium schools in 2011.

The Ministry sees the NZC as a guiding framework that goes beyond the learning content to the environment within which the learning occurs. The NZC focusses on fostering positive relationships; creating environments that are caring, inclusive, non-discriminatory, and cohesive; building good relationships with the wider school community; working with parents and caregivers as key partners; and attending to the cultural and linguistic diversity of all students. It gives schools the scope to design their curriculum for their particular communities of students.

During the consultation process, questions were asked about whether school communities have the requisite capability, resources and tools to design curricula that

6 Ministry of Social Development (2010). 2009 The Social Report. Accessed Oct 6 2010 from http://www.socialreport.msd.govt.nz/knowledge-skills/participation-tertiary-education.html

7 Statistics New Zealand (2008), Disability and Education in New Zealand in 2006 (Wellington: Statistics New Zealand).

8 National Equal Opportunities Network (2009). Accessed 22 September 2010 from http://www.neon.org.nz

realise the intent of the NZC across the system. There is also dispute about whether the inclusion of human rights is explicit enough, or effectively supported by wider policy and regulatory mechanisms, to guide schools and communities toward providing human rights-based education and ensuring that education provision meets human rights standards. According to a number of schools, the ability of the NZC to empower notions of diversity, identity and belonging has been undermined by the introduction of National Standards in 2010. The standards, they claim, focus predominantly on English literacy and numeracy, do not encourage full diverse human potential, and have been developed without the participation or inclusion of those on which they impact.

A priority over the next period for the Government, school communities, academic and research institutions, civil society organisations, human rights organisations, iwi and hapū, and others, could be to co-ordinate efforts to achieve the vision of the NZC and Te Marautanga o Aotearoa.

Further government initiatives have focussed on encouraging student engagement and successful participation; [9] monitoring and reporting achievement by ethnicity, gender and school decile rating (though no statistics are available for disabled students); [10] supporting students' successful transition to work or further education; [11] and targeting the inequitable achievement rates for Māori and Pacific children and young people. [12]

Positive Behaviour for Learning School-Wide began in 2009, to address the high incidence of bullying and violence in early-childhood education centres and schools. The Government has supported specific 'positive behaviour', bullying, harassment and restorative justice programmes initiated by schools and supported by non-government organisations. [13] Many schools have included explicit bullying and violence programmes as part of their student management systems.

From July 2007, the Government has provided up to 20 hours' free optional early-childhood education (ECE) to all 3- and 4-year-olds in teacher-led services.

Civil society organisations have contributed to building human rights awareness in education. The Human Rights in Education – Mana Tika Tangata initiative focusses on ensuring that human rights are embedded in the educational environment. [14]

9 An electronic student-tracking system aimed at monitoring students moving between schools and those not enrolled; and an early leaving application and approval processes strengthened in order to reduce the number of early-leaving exemptions

10 Ministry of Education (2009), *The State of Education in New Zealand* (Wellington: MoE); (2008), accessible online at http://www.educationcounts.govt.nz/publications/series/2551/34702/34656

Ngā Haeata Mātauranga – The Annual Report on Māori Education (2010) (Wellington: MoE), accessible online at http://www.educationcounts.govt.nz/publications/series/5851/75954

Ministry of Social Development (2009). *Children and Young People: Indicators of Wellbeing in New Zealand 2008* (Wellington: MSD). Accessible online at http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/monitoring/children-young-indicators-wellbeing

11 Tertiary Education Commission (2010). Gateway. Accessible online at http://www.tec.govt.nz/Funding/Fund-finder/Gateway

Work and Income (2010). *Youth Transition*. Accessible online at http://www.workandincome.govt.nz/community/yts

Ministry of Education (2010). *Youth Apprenticeship Scheme*. Accessible online at http://www.minedu.govt.nz/NZEducation/EducationPolicies/Schools/Initiatives/YouthApprenticeships/YouthApprenticehipsScheme.aspx

12 Ministry of Education (2010)

Ka Hikitia - Managing for Success: The Māori Education Strategy 2008. Accessible online at http://www.minedu.govt.nz/theMinistry/PolicyAndStrategy/KaHikitia

Te Kotahitanga (2010) Improving the Educational Achievement of Māori Students in Mainstream Education; http://tekotahitanga.tki.org.nz

He Kākano (2010–2012). Accessible online at http://www.educationalleaders.govt.nz/Leadership-development/He-kakano

13 Peace Foundation, Amnesty International, Aotearoa Global and Development Education Network, Safe Schools 4 Queers, Save the Children Fund, UNICEF

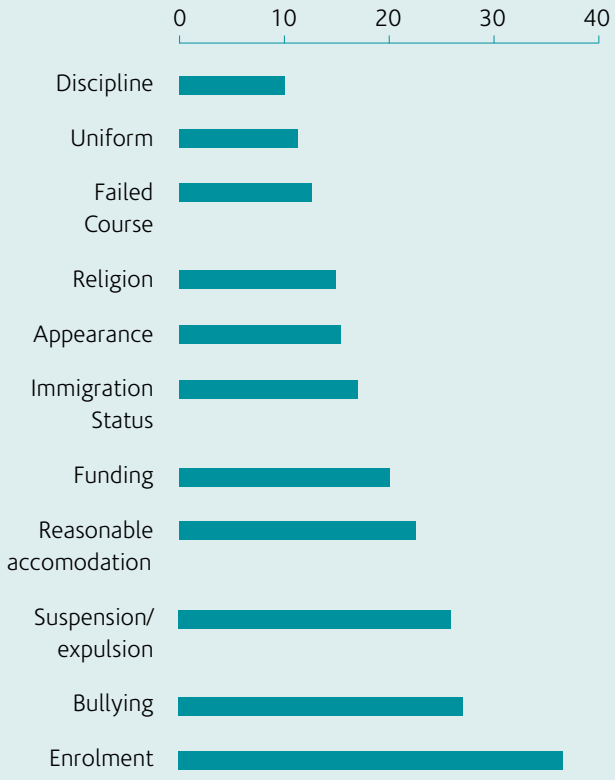
14 Accessible online at www.rightsined.org.nz

ACTIVITIES OF THE COMMISSION

Over the past five years, the Commission has focussed on the right to education as one of the elements of its work programme. The Commission has provided advice to Parliament, the Government and government agencies, and to schools and early-childhood centres on the right to education. A core component of the Commission's right-to-education work has been its collaboration with and support of Human Rights in Education.

Of the education-related complaints and enquiries received by the Commission in 2009, disability accounted for 26 per cent; race-related issues 19 per cent; religious belief 7 per cent; and sex 6 per cent (see Figure 2). Eleven themes were apparent, of which enrolment and bullying were the most prominent. [15]

FIGURE 2: NUMBER OF EDUCATION-RELATED APPROACHES TO HRC (2009) BY THEME



The Commission continues to monitor the extent to which disabled children and young people are prevented from accessing quality, appropriate education. The Commission's Transgender Inquiry evidenced the high rates of discrimination and bullying based on sexual orientation and gender identity.

WHAT ARE THE KEY ISSUES NOW?

The Right to Education Framework (Figure 1) is the basis for assessing how well New Zealand is realising the right to education and meeting its international obligations. Since the Human Rights Commission's 2004 review, progress has been made in a number of areas:

- The overall number of children participating in early-childhood education services has increased.
- The NZC includes human rights and diversity in its values statement.
- There has been a focus on Māori and Pacific children and young people as educationally disadvantaged groups.
- There is an improvement in achievement rates for Māori and Pacific students and those from low-decile secondary schools, and the number of those leaving without a qualification registered on the National Qualifications Framework is decreasing.
- Government and non-government organisations have initiated programmes that focus on student engagement and participation; achievement; transition to further education or work; discrimination; bullying and harassment; and decreasing information and technology gaps.
- The annual assessment State of Education in New Zealand uses measures such as 'accessibility', 'achievement of potential' and 'diversity' to highlight education priorities – these measures parallel those of the right to education reflected in international instruments.
- Changes to the Immigration Act 2009 mean that undocumented children can be legally enrolled at school, and the 2010 Budget allocated funds over four years to enable them to access state schools.

However, fundamental human rights issues remain:

15 Each theme involved 10 or more approaches to the Commission.

RIGHT TO EDUCATION	4-As
Early childhood education is still not universally accessible	**Accessibility**
Barriers to engagement in education exist for specific groups, including Māori, Pacific, disabled, specific groups of male students and those from refugee families.	**Accessibility** **Acceptability** **Adaptability**
Formal and informal costs of education still create barriers to successful participation	**Accessibility**
Successful participation and achievement rates continue to be disproportionately low for some groups, including Māori, Pacific, disabled children and young people, those from low-decile schools and specific groups of male students.	**Accessibility** **Adaptability**
Discrimination, bullying and harassment persist. Particularly vulnerable groups include disabled; ethnic minorities; and same-sex-attracted, trans and intersex children and young people.	**Acceptability**
There is currently no nationwide human rights education provision.	**Availability**

EARLY CHILDHOOD EDUCATION

New Zealand is a world leader in early childhood education, as demonstrated by the Ministry of Education's Pathways to the Future – Ngā Huarahi Arataki. This 10-year strategic plan focusses on quality, participation and collaboration, a commitment to a fully qualified registered teaching workforce, and the groundbreaking curriculum Te Whāriki.

The 20 hours granted to teacher-led services in 2007 aimed to reduce cost barriers and increase participation rates in early childhood education (ECE). Recent impact assessments show, however, that it is middle- and higher-income families who are benefiting most from these hours.

Since 2004, the growth in the participation rate for Māori in ECE has slowed, and there has been little change in the proportion of Pacific new entrants attending ECE services before starting school.[16] In 2008, children in low-decile schools were much less likely to have attended an ECE service (82 per cent at decile 1 schools) than children in high-decile schools (97 per cent at decile 6 schools and 99 per cent at decile 10 schools).

The findings of the Office of the Children's Commissioner inquiry into the education and care of infants and toddlers[17] highlighted concerns about long waiting lists for places, inequitable access and variance in quality.

The 2010 Budget included the retention of 20 ECE hours and additional support for community-led ECE initiatives. It also lowered the additional funding previously tagged to providers with more than 80 per cent fully qualified and registered teachers. This will have an impact on current providers with more than 80 per cent qualified staff, as their government funding will be reduced. Rates to parents are likely to rise and services may lose the incentive to employ 100 per cent qualified teachers.

BARRIERS TO ENGAGEMENT

A Ministry of Education survey released in March 2010 showed that truancy rates remain high, with 30,000 students truanting daily and 2500 not enrolled at school.

The Ministry of Education's 2009 truancy survey showed that truancy rates were 80 per cent higher at decile 1 schools than decile 10 schools, and Māori and Pacific students were twice as likely as other students to skip

16 Ministry of Social Development (2009) *MSD Social Report 2009*. Accessible online at http://www.socialreport.msd.govt.nz

17 Carroll-Lind J (2009), *School Safety: An Inquiry into the Safety of students at school* (2009) (Wellington: Office of the Commissioner for Children). Accessible online at http://www.occ.org.nz/__data/assets/pdf_file/0016/6028/OCC_SchoolSafetyReport_160309.pdf

FIGURE 3: PARTICIPATION IN EARLY CHILDHOOD EDUCATION

Most recent level	Trend	Variation within population	International comparison
92.3% of 3-year-olds and 99.7% of 4-year-olds (2009)	Continuous increase since 1988	Lower for Pacific and Māori children and those in low-decile areas; regional differences	Higher than OECD median

Source: Education Counts (2009)

classes. The Young Person's Reference Group (YPRG) of the Office of the Children's Commissioner explained that "students truant because they can and it's better than going to class". It considered that, if teachers were stimulating and the work was at an appropriate level, many more students would choose to attend classes rather than truant.

The Student Engagement Initiative (SEI) has resulted in decreases in the suspension rates of Māori and Pacific students. However, high suspension, exclusion and expulsion rates remain an issue for Māori, males and students from low-decile schools. [18] Likewise, a greater number of early-leaving exemptions are granted to Māori and males.

There is a clear correlation between the socio-economic mix of the school and stand-down, suspension, exclusion and expulsion rates. Students in the lowest deciles (1 and 2) are four times more likely to be excluded from school than students in the highest deciles (9 and 10). Although the statistics vary slightly between categories, evidence shows that a minority of schools stand down, suspend, exclude and expel the majority of students. Continual disobedience, physical assault on other students and issues relating to drugs (including substance abuse) are the key reasons for stand-downs, suspension, exclusion and expulsion.

In 2008, the exclusion rate was 2.6 times higher for males than females, while the expulsion rate was 3.4

FIGURE 4: TRUANCY AND RETENTION AT SCHOOL

	Most recent level	Trend	Variation within population
School truancy:	Absence rate of 2.3% of students (2006)	Increase since 2004	Higher for Māori, Pacific and older students and those at low-decile schools; regional differences
Retention of students in secondary schools:	60.8% of all students stayed at school to age 17.5 (2007)	Little change in past four years	Lower proportions for Māori, European, males, and those from low-decile schools

Source: Children and Young People: Indicators of Wellbeing in New Zealand (2008)

18 Ministry of Education (2010), Education Counts: Indicators. Accessed 22 September 2010 from http://www.educationcounts.govt.nz/indicators/student_participation.

times higher for males. For Māori and European/Pākehā students in the original cohort of SEI schools, the overall age-standardised suspension and exclusion rates have decreased by 66 per cent and 56 per cent respectively since 2000.

Submissions to the Commission have recommended the establishment of an independent appeal authority, similar to the Employment Relations Authority, which can act quickly to determine whether expulsion is fair procedurally and based on substantive grounds which are lawful.

Research conducted during the development of Ka Hikitia (Māori Education Strategy 2008–2010) shows Māori students in Māori immersion and bilingual schools have a lower rate of stand-downs, unjustified absences and truancy than Māori in English-medium schools. The latest achievement data on Māori immersion education also show students achieving NCEA qualifications at rates that surpass those of their English-medium education peers. [19]

In 2007, 75 per cent of students stayed at school to the age of 17. Māori students had the lowest retention rates (57.5 per cent), compared with an estimated retention rate of 80.1 per cent for Pacific and 76.6 per cent for European/Pākeha students. Boys in this age bracket were less likely to stay at school (57.9 per cent) than girls (66.9 per cent) in 2008.

New Zealand has 163 alternative education (AE) centres for students aged 13 to 15. They provide an alternative for students for whom the mainstream system has failed, and who have either been excluded from school or have stopped attending. A review of AE (2009) recognised aspects of AE that are not working. [20] The review proposed aligning steps to improve AE outcomes, whilst also strengthening schools' capability and resources to meet the needs of 'at-risk' students before they disengage from the mainstream system.

FORMAL AND INFORMAL COSTS OF EDUCATION

The Education Act 1989 stipulates that every person who is not a foreign student or attending a private or integrated school is entitled to free enrolment and free education at any state school from the ages of 5 to 19.

School donations: Ministry of Education guidelines say that state and state-integrated schools are to make clear that donations are voluntary. No charges are to be made for anything used to deliver the curriculum, such as photocopying, paper or internet access. There is both empirical and anecdotal evidence, however, that parents are increasingly coming under pressure from state-funded schools to contribute to the cost of their child's education. It appears that not all schools are fully aware of the guidelines, some are misinterpreting them, and some are choosing to ignore them.

Pressure on families to pay school donations has included:

- students being unfairly or unlawfully excluded from subjects or activities, or in other ways penalised, when their parents are unwilling or unable to make certain payments
- the names of parents/guardians who have not paid the donation being published
- schools reporting unpaid donations to collection agencies or hiring agencies to phone parents to remind them to pay
- students being prevented from accessing school activities, such as school balls, graduation and receiving the school magazine.

The situation is complex. Some schools report difficulty operating within the government funding they receive. Fundraising is resource-intense and difficult, particularly in poorer communities and during the increased economic pressures of the past two years. Some boards of trustees claim that, in the interest of fairness for parents whose donation does help support resourcing, the pressure is warranted. In some cases, private-sector groups are subsiding and sponsoring state schools.

General costs: In addition to school donations, families are expected to pay for uniforms, stationery, course-related materials, school trips and associated adequate equipment and clothing. A 2010 Office of the Children's

19 Ministry of Education (2008), *Ka Hikitia – Managing for Success: The Māori Education Strategy 2008–2012* (Wellington: MoE). Accessible online at http://www.minedu.govt.nz/theMinistry/PolicyAndStrategy/KaHikitia.aspx

20 Ministry of Education (2009), *Findings of Review of Alternative Education and Future Directions* (Wellington: MoE). Accessible online at http://www.minedu.govt.nz/NZEducation/EducationPolicies/Schools/PolicyAndStrategy/SchoolingInNewZealand/AlternativeEducation.aspx

Commissioner report[21] describes young people's shame and alienation from peers because they were unable to participate in activities or pay for basic school items.

Ministry of Education Circular 1998/25 offers guidance about payments by parents in state and state-integrated schools. It notes that it is reasonable to expect parents to pay travel costs for school-organised activities away from school as part of the curriculum. It also notes that students should not be excluded from such trips because of their parents' or guardians' inability or unwillingness to pay. In reality, some students are excluded from school trips because they are unable to pay.

Students have also reported that the cost of some subjects has determined which subjects they choose to study, and that some could not afford to pay for such items as NZQA resubmits or recounts in examination papers, school stationery, student IDs and school locker rentals. Obligations blurred around school fees and donations, with some students denied access to other school activities if the school donation was not paid. [22]

A 2009 OECD Report[23] concluded that New Zealand should spend considerably more on younger, disadvantaged children and should ensure that current high rates of spending on older children are much more effective in meeting the needs of the disadvantaged among them.

The issue of differential state financial support to state, integrated and independent schools was raised during consultation.

DISABLED CHILDREN AND YOUNG PEOPLE

Article 24 of the Convention on the Rights of People with Disabilities (CRPD) recognises the right of persons with disabilities to education, without discrimination, on the basis of equal opportunity, with the purpose of achieving "the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity". The United Nations Special Rapporteur on the Right to Education has provided advice on how countries that have ratified the CRPD can provide an inclusive education system.[24]

Section 8(1) of the Education Act 1989 recognises the right of disabled people to the same access to compulsory education as others. Despite this, many disabled students and their families have difficulty accessing inclusive education aimed at fulfilling the promises of the CRPD. Official reports on special education highlight specific concerns such as inadequate support for students and teachers, the high number of suspensions and expulsions, and complaints of student discipline and bullying. [25]

ADULT EDUCATION SPENDING

From 2010, the adult and community education sector has faced significant funding cuts, reducing the number of community-based programmes provided by schools, community groups and national organisations. The impact of these cuts is yet to be fully established, although it is clear that they will have a greater negative effect on those for whom adult education offers a second chance – women, disabled, Māori and Pacific adults. It is also likely that the reduced availability of community education opportunities, where people gain the skills and confidence to enter the workforce, could impact on the longer-term economic environment.

21 Office of the Children's Commissioner (August 2010), *This Is How I See It: Children, Young People and Young Adults' Views and Experiences of Poverty* (Wellington: OCC). Accessible online at http://www.occ.org.nz/home/childpoverty/the_report

22 Office of the Children's Commissioner (August 2010). Young Person's Reference Group. Consultation outcomes received by email 3 August 2010

23 OECD (2009), Doing Better for Children.Accessible online at http://www.oecd.org/document/12/0,3343,en_2649_34819_43545036_1_1_1_37419,00.html

24 Muñoz V (2007), Report of the Special Rapporteur on the Right to Education. The right to education of persons with disabilities. Human Rights Council. Accessible online at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/108/92/PDF/G0710892.pdf?OpenElement

25 Controller and Auditor-General (2009), Ministry of Education: Managing support for students with special educational needs (Wellington: Office of the Auditor-General); Education Review Office (2009), Resource Teachers: Learning and Behaviour, An Evaluation of Cluster Management (Wellington: ERO). Accessed online 24 March 2010 from www.ero.govt.nz/ero/publishing.nsf/Content/rtlb-cluster-sep09; Office of the Ombudsmen (2009), Report of the Ombudsmen: Nga Kaitiaki Mana Tangata (Wellington: Office of the Ombudsmen) Accessed online 24 March 2010

PARTICIPATION AND ACHIEVEMENT RATES

Overall, the proportion of students leaving school with at least NCEA Level 2 is increasing, and the numbers of Māori and Pacific students leaving without a qualification registered on the National Qualifications Framework are decreasing. Recent improvements in rates of academic achievement by students from low-decile secondary schools were sustained during 2008.

While students from poorer schools (deciles 1, 2 and 3) have pass rates that are much lower than those of students from wealthier schools (deciles 8, 9 and 10), this gap appears to have narrowed since 2004. NCEA results for the 2008 academic year have consolidated these gains. A similar improvement is also apparent in NCEA level 3 pass rates by year 13 students.

The gap between those achieving at an average rate and those not achieving has narrowed, but is still large compared with other OECD countries. Only two OECD countries had significantly lower proportions of students achieving no higher than level 1. [26]

BOYS' ACHIEVEMENT

While data on boys' achievement [27] shows many are doing well at school, it has highlighted some issues in the area of male educational engagement and achievement:

- Girls perform better than boys in all literacy measures across all years of schooling.
- Literacy differences are observed in qualification attainment, where girls are more likely than boys to gain the literacy requirements for NCEA level 1 and gain English as a subject at all NCEA levels and Scholarship.
- Boys tend to have a wider spread of scores than girls and tend to be overrepresented in the lowest achieving group – this is especially true for Māori and Pacific boys.
- Higher proportions of boys, across all ethnic groupings,

FIGURE 5: ACHIEVEMENT LEVELS

	Most recent level	Trend	Variation within population	International comparison
Reading literacy at age 15	Combined mean reading literacy score of 521 (2006)	No change between 2000 and 2006	Lower mean scores for Māori, Pacific and male students	Higher than OECD average
Mathematical literacy at age 15	Mean score in mathematics literacy of 522 (2006)	No change between 2003 and 2006	Lower mean scores for Māori and Pacific students	Higher than OECD average
Scientific literacy at age 15	Mean score in science literacy of 530 (2006)	Different method of measuring scientific literacy	Lower mean scores for Māori and Pacific students	Higher than OECD average
Higher qualifications	66% of school leavers gained NCEA level 2+ (2007)	Improvement since 2003	Lower proportions for Māori, Pacific and male students, and those from low-decile schools	No comparison available

26 OECD (2009), 'Doing Better for Children'. Accessed 24 March 2010 from http://www.oecd.org/dataoecd/20/42/43589854.pdf

27 Ministry of Education (2007), *Boys' Achievement: A Synthesis of the Data* (Wellington: MoE) draws on a wide range of evidence from research, such as the longitudinal Competent Learners Study, national assessment initiatives (for example, asTTle, NEMP) and international assessment studies (for example, PIRLS, PISA, TIMSS), the NCEA and tertiary qualifications.

receive 'not achieved' grades in English, mathematics and science NCEA achievement standards.

- Boys account for over 70 per cent of stand-downs and suspensions and their overrepresentation increases in the formal removal of students from school (exclusions and expulsions). Early leaving exemptions are also more frequently granted for boys, particularly for Māori.
- Girls tend to stay at school longer and attain higher formal qualifications than males – 79 per cent in 2007, compared with 73 per cent for boys.
- In 2007, 5.2 per cent of boys and 4.7 per cent of girls left school with few or no formal qualifications. Girls (45 per cent) were more likely than boys (33 per cent) to achieve a university entrance standard.

IMPACT OF POVERTY ON EDUCATIONAL ACHIEVEMENT

The impact of poverty on the ability of children to successfully engage in education is unequivocal. The State of Education in New Zealand (2006) report[28] makes explicit the connection between economic and social factors and a child's or young person's ability to engage in and benefit from education.

The Household Economic Survey of 2008 showed that 20 per cent of New Zealand children lived in relative poverty. Average family incomes are low by OECD standards, and child poverty rates are high. The proportion of New Zealand children who lack a key set of educational possessions, such as those required to successfully participate in school, is above the OECD median.[29]

Students from low socio-economic communities are less likely than others to attain higher school qualifications. The NCEA level 1 pass rate at the poorest 30 per cent of secondary schools is only two-thirds that of the wealthiest 30 per cent of schools. The NCEA level 3 pass rate at decile 1 to 3 high schools is still only half that of decile 8 to 10 schools.

YOUNG PEOPLE WHO OFFEND

A lack of educational provision puts young people who offend at risk of non-participation and failure. Not only does this breach their legal right to education, but it is also a lost opportunity for reducing recidivism.

A 2009 report found that at that time there were around 560 prisoners in the 15–19 year age group.[30] Although these were of school age, few of them were receiving their educational entitlement.

DISCRIMINATION, BULLYING AND HARASSMENT

Bullying and violence continues to be a major concern in New Zealand early-childhood centres and schools.[31] New Zealand has high levels of student-to-student and student-to-teacher physical and emotional bullying in schools compared with other countries. In 2008, New Zealand was ranked second worst among 37 countries for bullying in primary schools.

The cross-sectoral Behaviour Summit (March 2009) identified a number of areas for action which have been worked into the Ministry of Education's Behaviour and Learning Action Plan. The Human Rights Commission recommended to the Ministry in its development of the plan that:

1. the Ministry consider whether the Education Review Office has sufficient powers to enable it to effectively assess schools' management and reporting of peer-to-peer bullying, violence and abuse
2. human rights responsibilities be explicitly included in the National Education Guidelines.

Emerging international evidence demonstrates that a human rights-focussed school contributes to the development of a stronger culture of respecting rights, with a decrease in incidents of violence, bullying and abuse.

28 Key indicators used in the State of Education report include participation, accessibility, teaching practice, teacher qualification, foundation knowledge, student engagement, school-leaving qualifications, and transition to tertiary education.

29 OECD (2009), 'Doing Better for Children'. Accessed 24 March 2010 from http://www.oecd.org/dataoecd/20/42/43589854.pdf

30 Baragwanath S (Feb 2009), 'Boys In Prison: What about their education?' (IPS Criminal Justice Forum). Accessed 6 October, 2010 from http://ips.ac.nz/events/downloads/2009/Susan%20Baragwanath.doc

31 Carroll-Lind J (2009), *School Safety: An Inquiry into the Safety of Students at School*. (Wellington: OCC). Accessible online at http://www.occ.org.nz/_data/assets/pdf_file/0016/6028/OCC_SchoolSafetyReport_160309.pdf; Carroll-Lind J (2010), *Responsive Schools* (Wellington: Office of the Children's Commissioner) Accessible online at http://www.occ.org.nz/_data/assets/pdf_file/0006/7269/OCC_Responsive_01.04.10.pdf

HUMAN RIGHTS EDUCATION

Building human rights education communities requires making explicit in legislation, policies and practice the human rights values, principles and statements set out in the Universal Declaration of Human Rights. While human rights is an obligatory part of the National Curriculum, there is no nationwide systematic human right education strategy.

In the absence of clear legislation, some ECE centres and schools are successfully using human rights approaches to tackle barriers that deny children and young people their right to education. A Commission-contracted study [32] found that while ECE services and schools had a general understanding of human rights-based education, this was not articulated as such. International evidence shows that in a human rights-based school, children and young people have more self-esteem, understand their responsibilities and the rights of others, are more accepting of diversity and have higher achievement rates. Teachers use more democratic styles of teaching, report better classroom behaviour and are able to spend more time on teaching.[33] The study also found that specific human rights resources were limited, as was the capacity of the sector to embed human rights into early childhood services and schools.

Conclusion
Whakamutunga

Children and young people in New Zealand have access to a rich array of educational services. Parents and guardians have a choice of schooling options within and between state-run schools, integrated schools and private schools. Institutions that provide Māori language immersion and validate Māori knowledge, structures, processes, learning styles and administration practices are available at all levels of education.

Three complementary curricula are provided: Te Whāriki for early childhood education, and the New Zealand Curriculum and Te Marautanga o Aotearoa for the school sector. These curricula have an important role in educating young people with a well-founded understanding of human rights. They also support schools to give effect to the Treaty of Waitangi and New Zealand's international human rights obligations.

The New Zealand Curriculum recognises New Zealand's official languages: te reo Māori, New Zealand Sign Language and English. It envisages that all three may be studied as first or additional languages and used as mediums of instruction across all learning areas. Current resource allocations limit this.

By international standards a large percentage of New Zealand students are performing well in reading, mathematics and science literacy. A review of the right to education in New Zealand shows that since 2005, progress has been made. The 20 Hours ECE policy has increased the number of children participating in early-childhood education services. The focus on Māori and Pacific children and young people as educationally disadvantaged groups has seen an improvement in achievement rates. Likewise there has been an improvement in achievement of those from low-decile secondary schools. Fewer are leaving school without a qualification. Changes to the Immigration Act 2009 mean undocumented children can be legally enrolled at school and Vote Education 2010 has allocated funds to facilitate enrolments.

The assessment of the right to education has also shown that there are fundamental issues to be addressed. Some of these are ongoing issues which were present at the 2004 review. Some are new challenges presented by the changing demographics and situations of children and young people. Most significant are the increasing ethnic diversity of children and young people, and the proportion who live in poverty.

The right to education is not explicit in law. Early childhood education is still not universally accessible. Barriers to access and successful engagement in education still exist for specific groups of children and young people. Some groups are disproportionately underachieving. There is no nationwide human rights education provision.

32 Human Rights Commission (2006). *Baseline Study: Human Rights education in early childhood centres and schools* (Auckland: HRC)

33 'LIFT OFF! Ireland'. Accessible online at http://www.liftoffschools.com
RRR Initiative: UK. Accessible online at http://hants.gov.uk/education/hias/childrensrights
Children's Rights Centre: Canada. Accessible online at http://discovery.uccb.ns.ca/children

Children and young people still experience bullying and discrimination at early childhood services and schools. Funding cuts to the adult and community education sector will have negative effects, particularly on those for whom adult education offers a second-chance education.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance the right to education:

Legal recognition of the right to education
The right to education stated explicitly in law, thus acknowledging the inalienable right of children and young people to a quality education.

National Curriculum
Establish mentoring and monitoring processes to ensure that the human rights values explicit in the New Zealand Curriculum and Te Marautanga o Aotearoa are evident in schools' philosophies, structures, curricula, classrooms and relationships.

Underachievement
Address underachievement by:

- ensuring universal provision of quality early-childhood education
- ensuring equitable access to quality education for all, focussing particularly on Māori, Pacific and disabled children and young people
- removing any financial and other barriers to full participation in education.

ECE and school environment
Support early-childhood services and schools to build environments:

- that are free from violence
- where diversity is respected
- where all children and young people are able to participate fully.

13. Right to Work

Tika ki te Whai Mahi

"Everyone has the right to work, the right to equal pay for equal work and the right to a decent income and working conditions."

Everyone has the right to work, the right to equal pay for equal work and the right to a decent income and working conditions.

Universal Declaration of Human Rights, Article 23 (plain text)

Introduction
Tīmatatanga

The quality of life of New Zealanders is dependent on decent work. For many people, particularly Māori and Pacific youth and disabled people, the challenge is how to access it. For those caring for families, particularly women, the challenge is how to reconcile paid and unpaid work. For the increasing number of older people, the challenge is how to exit the workplace with dignity. For others, the challenges are the lesser value placed on unpaid work and protection from unemployment.

The work landscape is constantly changing, in response to a recessionary world economy that is witnessing new and more complex patterns of production and consumption. No one in the workplace is immune from technological change, the requirements of 'knowledge work' and globalisation. These have changed where we might work, how we might work, and the nature of our employment rights and responsibilities. What remains constant is that the workplace is a strategic entry point to a society free from discrimination. [1]

At the time this chapter was written, the New Zealand Government had announced a number of proposed changes to employment conditions. [2] In the Commission's view, the cumulative effect of these changes will impact on workers' rights.

THE RIGHT TO WORK

The right to work is a fundamental human right, strongly established in international law. It recognises that work is not solely a source of income that provides for the basic necessities in life, but has the potential to satisfy social, intellectual and personal needs and therefore is integral for a life of human dignity.

The right-to-work agenda is firmly rooted in the foundation of universal human rights. Former United Nations High Commissioner for Human Rights Mary Robinson noted that "sixty years ago, the drafters of the Universal Declaration of Human Rights (UDHR) knew that decent work was fundamental in a world where all human beings would be born equal in dignity and rights". [3]

In terms of the right to work, Article 23 of the UDHR states that employment must be "freely chosen", under "just and favourable conditions" and equally giving the right to "just and favourable remuneration", "protection against unemployment" and "to form and to join trade unions". [4]

The right to work underpins the realisation of other human rights, such as housing, education and culture. Article 24 of the UDHR states that everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

The following human rights elements are used to analyse the employment cycle of the right to work. The Human

FIGURE 1: RIGHT TO WORK FRAMEWORK

1 ILO (2007), *Equality at work: tackling the challenges, Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva, International Labour Organisation), para 1

2 See the New Zealand context section of this chapter.

3 *"Working out of crisis: aligning finance with decent work and a fair globilisation,"* background paper for workshop organised by NGLS,ILO and Realising Rights on 1 December 2008 as a side event at the UN Conference on Financing for Development, Doha

4 ibid

Duncan, Sue and Tahu, (from right), early childhood workers at Rutland Street Kidsfirst, St Albans, Christchurch.

Rights Commission uses the framework when advocating for the right to work, which spans protection from unemployment and how people access work, through to their exit from the labour market. It also incorporates human rights elements, including participation and non-discrimination.

International context
Kaupapa ā taiao

The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains the most comprehensive provisions on the right to work. In Articles 6–8, the covenant defines the core elements of the right to work as:

1. the opportunity to work
2. free choice of employment
3. just and favourable conditions of work
4. non-discrimination
5. the right to form and join trade unions.

There is international consensus on 'core labour standards', which relate to a range of fundamental principles and rights at work. The International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work commits states to promoting these rights regardless of whether they have ratified the relevant conventions.

These principles and rights are embodied in eight fundamental ILO conventions, covering elimination of all forms of forced or compulsory labour; abolishment of child labour; elimination of discrimination in employment and occupation; and ensuring the freedom of association and the right to collective bargaining. New Zealand has ratified six of the eight fundamental conventions, but has yet to ratify the conventions on freedom of association and protection of the right to organise (C87) and minimum age (C138).

The Government's position in relation to C87 is that the Employment Relations Act 2000 provides for the right to organise, to bargain collectively and to strike (in certain circumstances). It also recognises the role of trade unions. Similarly, in relation to C138, the Education Act 1989, the Health and Safety in Employment Act 1992 and the Health and Safety in Employment Regulations 1995 provide effective age thresholds for entry to work in general and for safe work.[5] C138 stipulates that the minimum age for admission to employment or work shall not generally be less than 15 years.[6]

The Commission considers that if New Zealand law and practice is in line with the principles of ILO138 and ILO87, then these conventions should be ratified. The Human Rights Act 1993 (HRA) provides little protection for those aged 16 years and under. The Commission has argued for the age of cover in the HRA to be extended in relation to employment protection.

The ILO sets international labour standards and assists countries to implement 'decent work' agendas at national level. New Zealand's tripartite approach brings together the Government, workers (represented by unions) and employers in dealing with New Zealand's own decent work programme and ILO matters.

Some argue that the right to work has been neglected in both the development and human rights discourse. Economists have been slow to frame their policy choices in terms of the human rights obligations of states, but this is beginning to change.[7] Equally, additional consideration needs to be given to promoting the private sector's potential to provide additional jobs and decent work opportunities.[8]

In addition to decent work programmes and other widely accepted international instruments, the ILO suggests that national specialised bodies be set up to assist individuals with the right to work, and that specific legal provision on non-discrimination and equality in the workplace be implemented. It also suggests that governments establish new approaches – for example, active labour market policies – to closing the gender pay gap.

5 Ministry of Foreign Affairs and Trade (2003), *New Zealand handbook on international human right*s (Wellington: MFAT).

6 The convention provides for persons aged over 13 years to engage in specified categories of 'light work'.

7 'Working out of crisis: aligning finance with decent work and a fair globalisation', background paper for workshop organised by NGLS. ILO and Realising Rights on 1 December 2008 as part of the UN Conference on Financing for Development, Doha

8 Business New Zealand (2010), in a submission to the Commission on the draft chapter

OTHER INTERNATIONAL INSTRUMENTS

Other principal international instruments recognise the importance of the right to work. The Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (UNCROC), the Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Convention on the Elimination of All forms of Racial Discrimination (CERD) set out the employment rights specific to each of these constituent groups.

The New Zealand Government ratified the CRPD in 2008. This is the most modern application of the right to work, and outlines a number of key areas governing employment for disabled people. The CRPD recognises the right of disabled people to work on an equal basis with others. It affirms that state parties have the responsibility to safeguard and promote the realisation of the right to work by taking appropriate steps, for example through legislation.

The CRPD states that disabled people should be employed in the public sector; that the private sector should actively promote the employment of disabled people through affirmative action programmes, incentives and other measures; and that reasonable accommodation should be provided to disabled people in the workplace. Article 27 of the CRPD states that disabled people have "the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to people with disabilities". These and other employment considerations are explained further in the chapter on the rights of disabled people.

CEDAW states that women have the right to equal pay for work of equal value, the same employment opportunities as men, and protection from dismissal because of pregnancy. In 2007, the CEDAW Committee recommended that New Zealand enact comprehensive laws guaranteeing women's substantive equality at work with men in both the public and private sectors. The Committee further recommended that New Zealand include adequate sanctions for any acts of discrimination against women, and ensure that effective remedies are available to women whose rights have been violated. Concerns about private sector practices relating to gender equality were also raised by the committee. Currently, there is no compulsion such as the "good employer" obligation for the public sector imposed on the private sector. The chapter on human rights and women examines this area more fully.

UNCROC ensures that children have the right to a minimum working age, regulation of hours of employment, and protection from workplace exploitation. New Zealand has ratified UNCROC but with reservations, one of which is reserving the right not to legislate further or take additional measures as may be envisaged by Article 32(2), which relates to child employment.

UNDRIP was adopted by the General Assembly of the United Nations in 2007. Though New Zealand initially voted against the Declaration, in 2010 the Government revised its position and now supports it. Article 17 specifically states that governments shall protect indigenous children from economic exploitation and from dangerous or harmful work; and that indigenous People have the right not to be discriminated against in matters connected with employment. The declaration also points out that indigenous peoples have rights under international labour law and under national laws.

Article 5 of CERD mirrors the general principles of other international instruments in relation to non-discrimination in employment.

New Zealand context
Kaupapa o Aotearoa

Elements of the right to work in New Zealand are expressed in a range of domestic statutes. The rights of employees have progressed in a number of ways since the last review of human rights in 2004.

The principal piece of legislation governing industrial relations is the Employment Relations Act 2000 (ERA). This aims to build productive employment relationships founded on the principle of 'good faith', address the inequality of power in employment relationships, support collective bargaining, ensure individual choice in employment, and promote mediation while reducing the need for judicial intervention. The ERA also contains protections against unjustifiable dismissal or disadvantage.

In 2009, provisions for trial periods were introduced into the ERA, allowing employers with fewer than 20 employees to agree to a trial period with new employees of up to 90 days. During this period, the employer can provide notice of dismissal and the employee may not raise a personal grievance on the grounds of unjustified dismissal. Parties are still able to access mediation services, but the employee cannot take the matter further to the Employment Relations Authority or the Employment Court. [9] In 2010, the Government announced its intention to extend the 90-day trial period to include all employers. The Commission argues that the proposed legislation's 'fire without redress' measures offend against natural justice, diminish procedural fairness and undermine a 'fair go' for employees. This provision was introduced in part as a response to employers' complaints about the cost of fighting personal grievances. Disability advocates are concerned that disabled people will be disadvantaged by the 90-day trial period, as many employers will not be patient enough to wait for suitable accommodations to be put in place.

The Employment Relations (Flexible Working Arrangements) Amendment Act 2007 came into force in July 2008. Its purpose was to give eligible employees with caring responsibilities the right to request a variation to their hours of work, days of work or place of work. The effect and operation of the amendment will be reviewed in 2010. The review will also include recommendations in relation to whether the statutory right to request flexible work should be extended to all employees.

The Employment Relations (Rest Breaks, Infant Feeding and Other Matters) Amendment Act 2008 has created minimum standards for a modern workforce, in respect of the provision of rest and meal breaks and promotion and protection of infant feeding through breastfeeding. Further changes announced in 2010 propose to offer greater flexibility around when breaks can be taken. Disability advocates argue that the proposed changes will undermine the right to decent breaks and that for many disabled people, the ability to have scheduled breaks at regular intervals is an essential component for them to be able to work effectively.

In 2010, the Code of Employment Practice on Infant Feeding under the Employment Relations Act 2000 was launched. This provides guidance for employers on how to fulfil their obligations concerning the provision of breastfeeding breaks and/or facilities.

From 1 April 2007, the minimum entitlement for annual holidays was increased from three to four weeks. In 2009, a five-member ministerial advisory group reviewed the Holidays Act 2003 and recommended options to make it easier to understand, less costly and more flexible, but without reducing current entitlements. The Commission's submission to the review concluded that: "in regard to trading the fourth week of annual leave for cash at the employee's request, the Commission strongly supports the retention of four weeks' annual leave. While the proposal offers individual choice, the Commission is concerned that because of New Zealand's low-wage economy and long working hours ethic, many New Zealanders will trade away the fourth week of annual leave to the detriment of rest and recreation. This violates the spirit of decent work, as outlined in domestic law and international conventions." [10]

In 2007, the Disabled Persons Employment Promotion Act 1960 was repealed, thereby removing the blanket exemptions from the Minimum Wage Act that formerly applied to sheltered employment. Workers in sheltered employment must now receive at least the minimum wage – unless they have an individual minimum wage exemption permit – and have access to holiday and sick leave entitlements.

In 2010, the Government indicated that it would not include men or seasonal workers in paid parental-leave provisions, even though the Commission, the National Advisory Council for the Employment of Women (NACEW), the Families Commission and others have consistently urged successive governments to do so. Under the Parental Leave and Employment Protection

9 Although the employee can not raise a personal grievance in relation to unfair dismissal if notice to dismiss is given within the 90-day trial period, a personal grievance may be raised on the grounds of discrimination, harassment or unjustified action.

10 Human Rights Commission (2009), Submission on Review of the Holidays Act 2003 (Questions 3 and 6), Ministerial Advisory Group, 21 August

(Paid Parental Leave for Self-Employed Persons) Amendment Act 2006, entitlement has been extended to self-employed mothers working an average of 10 hours a week, and self-employed people who assume the care of a child with a view to adoption. A more detailed analysis of paid parental leave is contained in the chapter on human rights and women.

In 2010, the ILO agreed to begin work on a new standard to protect the rights of domestic workers. While a majority of countries favoured development of a convention, New Zealand did not, and received strong criticism from the Commission and unions as a result. [11] While domestic workers in New Zealand are covered by basic employment provisions, they have traditionally had limited coverage in employment and discrimination law, because they work in private homes and not in offices, factories or other workplaces.

The Government's proposed employment changes announced in 2010 include extending the 90-day trial period to all employers; allowing employees to trade a maximum of one week of their minimum annual holiday entitlement a year for cash and transfer public holidays; limiting union access to workplaces; and requiring workers to provide proof of illness when they take sick days. The Council of Trade Unions (CTU) argue that the proposed changes amount to "an accumulation of attacks on workers' rights" and are "a massive attack on the job security of every New Zealander". [12] By contrast, Business New Zealand believes that planned changes to employment law are likely to be very positive: "These changes are a practical and 'good practice' approach to employment relations that should help achieve more productive workplaces." [13]

The Commission is concerned that the proposed changes alter the 'decent work' framework and could undermine workers' rights.

11 *Domestic Workers Under ILO Spotlight* (2010), Heathrose Research accessed October 2010, http://www.heathrose.co.nz/index.php/news/117-ilo-to-look-at-domestic-workers-rights

12 'Employment changes unfair, unions say', July 18, One News, http://tvnz.co.nz/national-news/employment-changes-unfair-unions-say-3650760

13 Phil O'Reilly (9 Aug 2010), 'Employment law becomes simpler, more practical', Commentary posted at http://www.businessnz.org.nz/issues/205

THE 'GOOD EMPLOYER'

Several statutes refer to the promotion of equal employment opportunities (EEO) through the good-employer concept. The State Sector Act 1988 (section 56(2)), the Crown Entities Act 2004 (section 118) and the Local Government Act 2002 (section 36(7)) address responsibilities and accountabilities for equality throughout the wider state sector.

Under these statutes, a good employer is an employer who operates policies containing provisions necessary for the fair and proper treatment of employees in all aspects of their employment, including:

- **good and safe working conditions**
- **an equal employment opportunities programme**
- **the impartial selection of suitably qualified personnel for appointment**
- **recognition of the aims and aspirations of Māori, their employment requirements, and their need for involvement of Māori as employees of the entity**
- **opportunities for the enhancement of the abilities of individual employees**
- **recognition of the aims, aspirations, employment requirements, and cultural differences of ethnic or minority groups**
- **recognition of the employment requirements of women**
- **recognition of the employment requirements of persons with disabilities.**

The positive duty to be a good employer is limited to the state sector, and there is no legislative equivalent in the private sector. However, both the Employment Relations Act's good faith provisions, and the Human Rights Act's anti-discrimination provisions and common-law obligation of mutual trust and confidence apply generally.

New Zealand today
Aotearoa i tēnei rā

International standards and domestic legislation are given meaning by factors specific to the New Zealand employment environment. This section provides a description of some key features shaping the world of work in New Zealand, including the Commission's role.

THE HUMAN RIGHTS COMMISSION

The role of the Commission is to:

- advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society
- encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society.

Promoting equal employment opportunities (EEO) is a core responsibility of the EEO Commissioner. Under section 17 of the HRA, the EEO Commissioner provides leadership and advice on EEO, develops guidelines, monitors and analyses progress in EEO and works with others promoting equal employment.

There is a specific statutory reference to pay equity in the HRA at section 17(a). [14] A June 2004 cabinet minute [15] gives the EEO Commissioner the authority to provide guidance to departments and Crown entities, to help ensure state-sector consistency and good EEO practice, including 'how to be a good employer'.

Examples of some of the most recent and current activities related to the Commission's EEO functions include distribution of thousands of copies of plain English pre-employment guidelines related to the Human Rights Act 1993; publication of a regular census report every two years, monitoring women's progress in governance, management and public life in New Zealand; tool kits for businesses around employment of older workers; and a monitoring tool for employers and employees in the public and private sectors to assess progress on pay equity.

From 2008 to 2010, the Commission undertook a major qualitative enquiry into work in New Zealand, the National Conversation about Work. [16] This is discussed further in this chapter.

COMPLAINTS AND ENQUIRIES

Individuals and groups can resolve complaints of employment discrimination through the Commission's enquiries and complaints service and the Office of Human Rights Proceedings. Complainants also have the option of taking their concerns to the mediation service of the Department of Labour or to the Employment Relations Authority.

The HRA sets out 13 prohibited grounds of discrimination and outlines what constitutes discrimination in employment. The grounds are age (from 16 years), colour, disability, employment status (unemployed or a recipient of a benefit or compensation), ethical belief (lack of religious belief), ethnic or national origins, family status, marital status, political opinion (including having none), race, religious belief, sex (including childbirth and pregnancy) and sexual orientation.

In 2009, the Commission received 688 employment and pre-employment complaints in relation to non-discrimination. Areas of complaint included, but were not limited to, age, race, pregnancy and breastfeeding, English-only policies and job advertisements. There were 167 complaints and enquiries on the ground of disability. Over the past five years, employment and pre-employment complaints have accounted for 45 per cent of all complaints to the Commission annually. The majority of employment complaints in New Zealand are dealt with by the Employment Relations Authority.

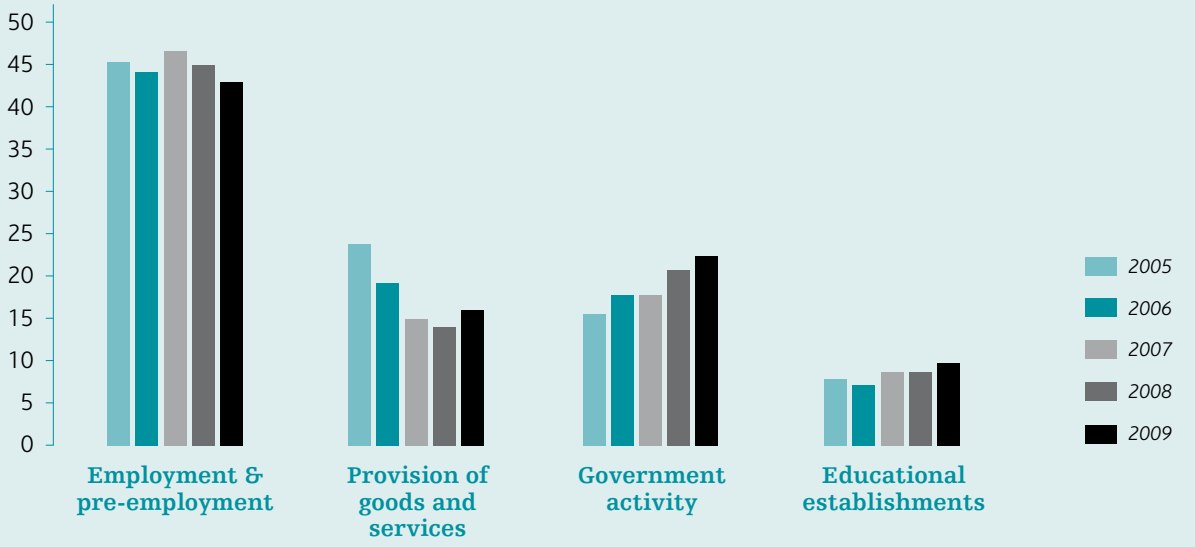
Pregnancy or breastfeeding featured in complaints and enquiries to the Commission in 2009. The most common issue related to women who were made redundant or faced the threat of their employment being terminated after they had advised their employer of their pregnancy, or while on parental leave. A woman was advised by her manager not to apply for the position of team leader after

14 One of the functions of the Equal Employment Opportunities Commissioner is to lead discussions of the Commission about equal-employment opportunities (including pay equity).

15 Cabinet minute June 2004, see http://www.neon.org.nz/Crownentitiesadvice/cabinetminute/

16 Human Rights Commission (2010), *What next: National Conversation about Work* (Auckland: HRC), http://www.neon.org.nz/nationalconversationaboutwork/

TOTAL COMPLAINTS TO THE HUMAN RIGHTS COMMISSION BY AREA



she had told her manager she was pregnant. The woman argued that she was being treated differently because of her pregnancy. She received a written and verbal apology for any hurt caused and $3000 compensation for injury to her feelings.

In 2009, several instances of 'English-only' workplace policies received national media attention. One complaint to the Commission involved a Mandarin-speaking Chinese migrant who worked in a fast-food franchise and lost her job because customers complained about staff speaking in Asian languages in their presence. She was told not to speak Mandarin at work and was dismissed when she was caught doing so. After mediation, the employer recognised that it was in their interest to develop practical guidelines on the use of language in the workplace. The franchise agreed to compensate the worker and offered her another job.

Twenty-four people approached the Commission in 2009 with complaints or enquiries about the legality of certain job advertisements. In one instance, a complainant noticed an online job advertisement that said, "No Asians need apply". She complained to the Commission and the advertisements were removed.

Case law

New Zealand case law is important in establishing legal precedents as a means by which employment practice is regulated and people are kept safe. Since 2007, the Commission has been involved in litigation in high-profile cases of sexual harassment, age discrimination and pay equity.

In 2010, a South Island baker was ordered to pay $19,000 in damages and lost wages to a female employee. The baker sexually harassed the woman over a period of four months, with frequent unwanted touching and sexual innuendo. The case is being appealed. Over the years, the Commission has continuously stated that "sexual harassment causes huge distress to victims, triggers reputational damage to business and employers, and is completely unacceptable behaviour".

An age discrimination case was brought by Air New Zealand pilot Captain McAlister in 2009. He claimed that he had been demoted on turning 60 years of age, because he could no longer fly Boeing 747 aircraft to certain countries. The court found that Air New Zealand had discriminated against him. It concluded that his demotion was discriminatory, but that age was a genuine occupational qualification. The case was remitted to the Employment Court to decide whether Air New Zealand could establish that it could not reasonably accommodate McAlister by adjusting its activities, given that he could not fly Boeing 747s to certain countries.

In 2007, the Commission won a landmark pay-equity case (described in the chapter on human rights and women),

which established that employers should not segregate work on the basis of gender, and that substantially similar jobs should be paid the same. The ruling showed that the complainant suffered disadvantage by receiving less money for similar work because she was a woman. [17]

National Conversation about Work

The National Conversation about Work project is about fairness at work. Between 2008 and 2010, the Commission held a nationwide series of engagements, to listen to employers, employees, organisations, businesses and community groups about what would make a difference to them in order to achieve equality and fairness at work, and how this might impact on families. [18]

The National Conversation is the Commission's largest ever work-related enquiry. It represents the views of more than 3000 New Zealanders, working in a variety of industry sectors in cities, provinces and rural communities from all 16 regions of the country.

By the end of the project, the Commission had gathered some clear, effective ideas for moving forward on EEO and helping employers with EEO advice and guidance. Now it is ready to propose new solutions to workplace inequality.

The Commission learned that some issues of fairness at work are common to every workplace, while others vary from region to region, depending on its age, profile and labour market economics. The employment of young people, for example, differs between industries and may be less critical in Wellington than in South Auckland, where there is a higher proportion of young Māori and Pacific people. In rural areas, access to childcare is more difficult, making that an important issue for families.

In each region, the Commission met employees and employers from key industries. Participants in the National Conversation included population groups identified as EEO target groups in legislation, because of their well-documented disadvantage at work. These groups included people with disabilities, Māori, other ethnic groups and women.

Meetings with employers as part of the National Conversation reflected favourably on them. Many of the employers we spoke to were responsive to their employees' needs, such as family responsibilities, emergencies and other life events, and were devastated by the emotional trauma of redundancies when they had to lay off staff.

A new national framework for EEO in New Zealand will be developed from the findings of the National Conversation. These findings provide an evidential base about labour participation by diverse groups, and the impact of the recession in New Zealand. The conversation began just prior to the recession and ended as the economy was said to be in a fragile recovery.

Impact of the recession

The 2009 global recession is the largest and longest since the Great Depression of the 1930s. Not since 1981 has real gross domestic product (GDP) fallen in consecutive quarters across the whole of the OECD. [19]

The recession has had a profound effect on the labour market across New Zealand. Over the course of the National Conversation, the Commission heard about the emotion and pain associated with redundancy and unemployment, as well as the resilience of employers and communities in facing new market challenges.

In the last quarter of 2009, New Zealand's official unemployment rate rose to 7.3 per cent. In real terms, 168,000 people were unemployed in the last quarter of 2009, the highest level in 16 years. [20] In recessionary times, unemployment is a lagging indicator typified first by mass layoffs and later by delays in rehiring.

In the first quarter of 2010, the unemployment rate had dropped to 6.0 per cent. The Department of Labour

17 A report of this case is accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/15-Jun-2007_13-26-56_Talleys_June_07.pdf

18 Human Rights Commission (2010), *What next: National Conversation about Work* (Auckland: HRC), http://www.neon.org.nz/nationalconversationaboutwork/

19 The Treasury New Zealand (2010), *Special Topic: Recession and recovery in the OECD*, http://www.treasury.govt.nz/economy/mei/jan10/03.htm

20 Statistics New Zealand (2010), *Household Labour Force Survey December 2009,* http://www.stats.govt.nz/browse_for_stats/work_income_and_spending/employment_and_unemployment/HouseholdLabourForceSurvey_MRDec09qtr.aspx

cautioned against the long-term sustainability of these results. The number of unemployed grew by 19,000 to 6.8 per cent by the end of the June quarter. Commentators in New Zealand and abroad predicted a 'jobless recovery', illustrated by the continued climb in unemployment figures and the continued loss of hundreds of jobs. [21]

During the course of regional engagements, the Commission found the recessionary impact has been greater on some groups and in some regions of New Zealand. The term 'Mancession' has been coined to illustrate the perception that men are taking a 'bigger hit' than women in the recession. Between the December 2007 and September 2009 quarters, 34,000 fewer people were employed, and 80 per cent of those were men. In fact, in New Zealand, both men and women are experiencing unemployment at approximately the same rate, but age disparities exist by gender. For example, the biggest increase has been in unemployed males aged 20-24; this group rose by 6500 over the past year, from 11,500 in June 2009 to 18,100 as at June 2010. [22]

Throughout the recession, employers have been caught between ensuring that essential skills are retained, and keeping their businesses economically viable. The Commission heard many employers express their reluctance to take a chance on new staff. One employer told us, "Small and medium enterprises have gone through cutbacks and layoffs, and employers are now scared to take on new people."

The Commission observed that many employers were less willing to give people a go, because they were particularly keen to operate a lean labour force. This appears to have impacted more heavily on marginalised groups, such as younger people and those with disabilities, who struggle to gain unskilled or semi-skilled employment.

During the National Conversation, the Commission was struck by the vulnerability of provincial New Zealand to layoffs in dominant industries. The loss of several hundred jobs from one company or one industry in smaller centres has a much more significant impact on the whole community than is the case in urban New Zealand. In the former Rodney District, for example, Irwin's Tools, a major employer, first shed 105 jobs and then closed entirely. An estimated $8 million was lost from the local economy, which had a ripple effect throughout the community as other service industries and businesses were affected too.

Despite stories like this throughout New Zealand, the optimism and resilience of regions, businesses and individuals was also evident. In some places, the Commission was told: "We don't have a recession here." In others, employers and employees were taking innovative steps to ride out economic uncertainty.

The Commission was struck by employers' efforts to minimise staff layoffs. Across the country, employers and their staff have worked hard together to reduce hours, redesign tasks and provide more flexible work practices to help save jobs and livelihoods.

The impact of public sector restructuring and job shedding, including in Auckland's local government sector, has yet to be fully assessed. Disability advocates are concerned that disabled workers may be more likely to lose their jobs in a restructure, or that new roles offered to them may be inappropriate and fail to take into account reasonable accommodations.

Unpaid work

Unpaid work is not widely recognised in human rights instruments. For example, many international conventions and relevant domestic-employment legislation exclude unpaid household production, reproduction and services from consideration. This is despite the essential nature of unpaid work, the considerable amount of time spent carrying it out, its significant economic value, and its vital role in underpinning and facilitating paid work.

The majority of New Zealand adults participate in some form of unpaid work. Census data shows that women have higher participation rates than men in all forms of unpaid work. [23] Some people have made a deliberate choice not to undertake paid work while caring for their children, seeing this as their priority.

21 Michael Coote (2009), 'Don't expect jobs from the coming recovery', National Business Review, 20 July 2009. Accessed online at http://www.nbr.co.nz/opinion/michael-coote/dont-expect-jobs-coming-recovery

22 Statistics New Zealand (2010), 'Household Labour Force Survey', June 2010 quarter

23 Statistics New Zealand (2006), *Quickstats about unpaid work,* http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/quickstats-about-a-subject/unpaid-work.aspx

Women taking part in the National Conversation overwhelmingly referred to three key issues related to work. The first two, flexible work options and access to childcare, relate directly to women's unpaid work roles within the family. The third, often linked with the first two, relates to equality at work. These issues are discussed in more detail below, in relation to women and work.

Voluntary work is an important part of unpaid work, and volunteers contribute to the diversity of New Zealand's communities. Many Māori, Pacific and other peoples contribute to their wider family and community life in ways they may not consider to be volunteering, but which demonstrate a commitment to their cultures and communities.

During the course of the National Conversation, the Commission heard that the voluntary sector in New Zealand was under pressure. Older volunteers in New Plymouth told the Commission: "Social services that rely on volunteers are feeling the pinch. Funding is drying up and the cost of volunteering is becoming too expensive." The costs for those on fixed budgets, especially transport costs, meant people were losing the ability to contribute. Volunteers felt the community would lose social capital and cohesion as a consequence.

In Southland, frequent reference was made to the community/voluntary sector's support for the cultural, sporting and social life of the Southland community. One participant observed: "For a politically conservative region, the strength of the community is almost socialist."

Labour participation by diverse groups

New Zealand's labour force is becoming increasingly diverse. The challenges faced by an ageing population, a young 'brown' (Māori and Pacific) population critical to the future job market and increasing numbers of migrants from ethnically diverse backgrounds call for targeted solutions. Agencies such as the Office of Ethnic Affairs are responding to these challenges through the provision of diversity management advice and intercultural awareness training. A greater understanding of the specific needs of New Zealand's diverse labour force follows.

Disabled people

The New Zealand labour force participation rate for disabled people in 2006 was 45 per cent, compared with 77 per cent for non-disabled people. This indicates the barriers faced by disabled people in accessing work. Disincentives to participation often reported by disabled people include high benefit-abatement rates and secondary tax, both of which reduce the value of earnings.

The Commission, along with many disability advocates, considers people with disabilities to be one of the most disadvantaged groups in the current New Zealand labour force, which has probably suffered disproportionately in the recession. People with disabilities face considerable difficulties securing employment and also face problems of underemployment. The right to work for people with disabilities is comprehensively addressed in Article 27 of CRPD.

Disability advocates have expressed frustration with the reasonable accommodation provisions of the HRA. In particular, they object to the exception in section 29(1a), which suggests that different treatment is not illegal where it is not reasonable to expect an employer to provide special services or facilities that would allow a disabled person to perform the job satisfactorily.

Disabled people and their advocates indicated that gaining employment or job interviews are a major barrier to participation in the labour force. In the National Conversation, a group of deaf people in Hawke's Bay talked about the multiple barriers inherent in the recruitment process.

Disabled people also face barriers in the workplace. A Southland participant in the National Conversation said: "You have to work harder to prove your worth". A disabled person from Auckland talked about "the feeling that you need never to be a burden, always reasonable, as good as everyone else but better". A deaf job seeker in Hawke's Bay said: "All they look at is what we can't do, not what we can do."

The Commission observed that employers were much more likely to be supportive and accommodate a person's needs if that person had acquired their disability after being employed, because the employer and co-workers already have a relationship with the person and want to make it work. In one case, a 40-year-old who had a stroke took 18 months to return to work. When he then

approached his employer about returning to work, he was welcomed back and a job with new boundaries, reflecting the genuine skills of the employee, was created. By contrast, Auckland Disability Law reports a number of cases each year of people who have been laid off after acquiring an impairment, with no effort made on the part of the employer to make reasonable accommodations. In addition, disabled people have reported that their job descriptions may be unilaterally changed by their employers, incorporating additional duties that they are not able to perform due to impairment issues.

Employers with a disabled family member are also more likely to be open to employing a disabled person. Disabled people want the state sector to do more to model good practice in providing equal employment opportunities to disabled people, in line with the state's CRPD obligations.

Employer attitudes are changing only slowly, with increased societal awareness of the rights of disabled people. Suggestions for change include promotion of positive experiences, such as greater recognition of employers that employ disabled people; testimonials from employers who have found disabled people to be great workers; encouragement of other employers to take on disabled staff, including through active EEO programmes; and better public education and awareness-raising in relation to people with disabilities. The newly established Employers' Disability Network supports employers' understanding of people with disabilities, helps more people into work and improves services to disabled customers.[24] Similarly, the establishment of Work 4Us Employment Advocacy Service helps disabled people negotiate employment contracts or minimum wage exemptions.

Flexible working hours are also important to the participation of disabled people, as shown by the 2006 Disability Survey, where the most requested form of workplace support was modified hours.

In 2010, the Government announced that it would invest $2.34 million over three years to help promote, protect and monitor the rights of people with disabilities, in line with the CRPD. The Government also committed $3 million for a public awareness campaign to change attitudes and behaviours that limit opportunities of disabled people. Government assistance programmes for disabled workers include the Mainstream programme, designed to support disabled workers in the public sector, supported employment, transition services, and business enterprises formerly known as sheltered employment workshops.

Women

Women's economic empowerment is "arguably the biggest social change of our time".[25] In the late 1990s, Statistics New Zealand reported that "the increased participation of women in the labour force has been one of the most significant employment trends of the post-World War II period". This has been attributed to a number of factors, including delayed childbearing and declining fertility; changes to social expectations; and the changing structure of the economy.[26] Another reason for women's increased labour force participation has been the increase in service-sector jobs, which has tended to favour women. The employment rate for New Zealand women is now higher than that of the UK, the USA and Australia, but not as high as that of Canada.

The labour-force participation rate for women was 62 per cent in the June 2010 quarter, compared with 74.4 per cent for men. Employment growth rates for females have been high, at 2.24 per cent per annum on average since 1999, leading to greater expansion in female employment over the 10-year period.

This growth has not necessarily translated to greater equality. The gender pay gap has persisted at around 12 per cent over the past decade. Pay and employment equity reviews in the public sector found gender pay gaps in full-time equivalent (FTE) median annual salaries that ranged from 3 to 35 per cent. The representation of women in senior management and governance roles lags behind that of men. Recent statistics are included in the

24 See Vision and Mission Employers Disability Network website, http://www.edn.org.nz/about-us/vision-and-mission as at September 2010

25 'We did it!', *The Economist* (Dec 30, 2009), accessible online at http://www.economist.com/node/15174489

26 'Women in New Zealand: Women's Labour force participation grows' (1996), Statistics New Zealand (Wellington: StatsNZ), http://www2.stats.govt.nz/domino/external/web/nzstories.nsf/092edeb76ed5aa6bcc256afe0081d84e/4b6f098f1a2bbc1acc256b180009282c?OpenDocument

chapter on human rights and women, and in the Commission's biennial census of women's participation.[27]

As noted above in relation to unpaid work, the three key issues referred to by women taking part in the National Conversation about Work were flexible work options, access to childcare, and equality at work – specifically pay and employment equity.

Currently, the uptake of working arrangements developed to meet the needs of working families is highly gendered and emphasises the cultural norm that responsibility for caring for children is primarily borne by women. A number of female employees the Commission talked to expressed their appreciation of flexible work practices that met their needs. One woman reported: "Flexibility is huge for me. I've been home with sick children and am fully resourced to do my job when at home." Research by the Ministry of Women's affairs showed that women working part-time in the accounting sector felt they might be excluded from promotional opportunities available to full-time employees.

Many working mothers are unable to realise full employment, because there are no or too few early childhood-education (ECE) centres in their area. The situation in rural communities is especially acute. For example, in the Maniototo area in the South Island, a group of women are trying to establish an ECE centre, which will enable them to return to work, work longer hours, contribute more financially to their households and better integrate migrant children into the community.

The Commission was also told the cost of childcare is prohibitive. People on low incomes, such as cleaners in the Hutt Valley and bank workers in Taranaki, said the cost of ECE meant parents had to use informal arrangements or choose not to participate in the labour force. The New Zealand Childcare Survey 2009 found that 14.4 per cent of parents who had worked or wanted to work in the previous 12 months reported that they had experienced childcare-related difficulties.

In terms of the third key issue raised by women taking part in the National Conversation, they expressed frustration at the lack of progress in achieving gender equality at work, particularly in the area of pay and employment equity. A group of Canterbury women lawyers told the Commission they had to work twice as hard to be seen as equal, and that women who asked to be paid at the same rate as men were seen as "greedy, unreasonable and ungrateful". Another said: "Nice girls don't get the corner office (i.e. made partner). You have to be ballsy, push your position and ask."

Men

Men we spoke to in the course of the National Conversation raised with us the unfairness of the lack of entitlement to PPL in their own right. While mothers can transfer all or part of their 14 weeks to their partners, men want a primary entitlement to paid parental leave. One father in the Bay of Plenty said that two weeks' paid parental leave for fathers on the birth of a child would be ideal. He also proposed six months' PPL for mothers, followed by six months PPL for fathers. This would enable mothers to return to work and fathers to be primary caregivers early in a child's life.

Employment in non-traditional roles is an issue for men, particularly in ECE. The male kindergarten teachers the Commission spoke to challenged the notion of gender roles in relation to young children. "Men need to be invited and made welcome in early childhood centres. They need to know how fantastic the job is," they said.

The Commission supports strong affirmative action to get more men into ECE. In 2008, there were 16,861 early childhood teachers in New Zealand, only 219 (1.3 per cent) of whom were men. Overseas experience shows that men do not apply to become ECE teachers, because they assume the jobs are for women – what is needed is to create male-friendly environments, with male mentors, and make active recruiting of men a goal to improve men's participation rates.

Manufacturing and construction are typically prone to changes in economic conditions and employ a high proportion of men. Just under one third of men are employed in the manufacturing and construction industries, and over half of all job losses in New Zealand came from these two industries in 2009.[28]

27 Human Rights Commission (2008), *New Zealand Census of Women's Participation* (Auckland HRC), http://www.neon.org.nz/eeoissues/census2008/

28 Department of Labour (2009), *Why are men more affected by labour market downturns?* Accessed online at http://www.dol.govt.nz/publications/lmr/hlfs-investigation-reports/men-labour-market-downturns-2009dec/index.asp

In Northland, social service providers who participated in the National Conversation said support for men during tough times was seen as a vital social need. One person said: "We have to help our men adapt to new situations as a consequence of job loss and redundancies."

The increased labour market participation of women has partly driven flexible work legislation, and men increasingly want flexible work too. A female participant in the conversation said: "More men are taking the chance to work flexibly in a different way, maybe for family or for something they are passionate about. My company is great but my husband experienced something different when he wanted to share parenting by working four days per week. His company pushed back and said no. He was gutted. They just said it wasn't possible."

Youth

Youth employment is a major issue in New Zealand. The unemployment rate for youth was 17.6 per cent for the year to June 2010, well above the overall annual average rate of 6.64 per cent. [29]

The Department of Labour reported that youth are one of the most affected groups during labour market downturns. There is particular concern for the long-term labour market outcomes of youth who are not able to enter the labour market easily. [30]

Youth have experienced substantial job losses during the recession, with some continuing to look for work, many leaving the labour market altogether and others returning to study. In the June 2010 quarter, there were 37,800 unemployed young people aged 15–19, 30,400 aged 20–24 and 20,100 aged 25–29.

As at June 2010, in the 15–19 years age group, just over one in ten (10.2 per cent) of males were not in education, employment or training (NEET), compared with 8.9 per cent of females. Among those aged 20–24, 13.4 per cent of men and 10.4 per cent of young women were NEET. Young Māori have the highest NEET rates, at 18.3 per cent, followed by Pacific youth at 14.5 per cent and European youth at 9.1 per cent. An OECD youth jobs report in 2006 showed that New Zealand had a hard core of youth who were at high risk of poor labour-market outcomes and social exclusion. [31]

Māori youth unemployment figures are among the highest of any group in New Zealand, standing at 30.3 per cent in June 2010. A solution to addressing ongoing issues for Māori youth requires a stronger focus on Māori perspectives in policy development by public agencies, according to Te Puni Kokiri (TPK). In 2009, TPK invested heavily in training and employment opportunities for young Māori, creating 1550 training and 252 employment outcomes. However, as with other agencies, funding is limited and funding constraints have resulted in investment in these initiatives ending.

In most regions the Commission visited during the National Conversation, youth employment was raised as a serious concern. In some areas, tertiary qualified young people were struggling to gain employment. In many areas, however, the most disadvantaged youth were those who had low levels of educational attainment.

Youth Transition Services were introduced in 2004 in New Zealand, with the objective of reducing the share of youth who were NEET. The Mayors Taskforce for Jobs – a nationwide network of mayors working on the issues of youth work and livelihood in their communities – was created in 2000 and has played a key role in the organisation of Youth Transition Services. Disengagement of youth while still at school is one of the root causes affecting youth employment issues, according to Youth Transition workers the Commission met around the country.

Various youth-to-work initiatives operate in many of the regions the Commission visited, and are outstanding examples of regional good practice. The Incubator Programme in Hawke's Bay, for example, targeted low-decile schools, and the Wonderful Wahine programme in Nelson targeted young Māori women. In Otorohanga, the Trade Training Centre had successfully kept youth employment at zero per cent and apprenticeship completion rates above 90 per cent, compared with a

29 Department of Labour (2010), *Youth Labour Market Factsheet,* http://www.dol.govt.nz/publications/lmr/quick-facts/youth.asp

30 Department of Labour (2009), *The impact of the recession on young people, New Zealand 2008–09*, http://www.dol.govt.nz/publications/lmr/hlfs-investigation-reports/recession-impact/index.asp

31 OECD (2006), *Jobs for Youth – New Zealand,* 2006 (Paris: OECD)

national average of less than 20 per cent completion rate. A similar scheme in Dunedin alleviated the cost and administrative burden of trade training for employers and is also very successful. In addition a great deal of work is at present going on to try to improve literacy and numeracy.

Many of these schemes have been developed by local government and supported by central government funding streams. It is apparent that funding for youth-to-work initiatives is both variable and precarious, and there is little certainty about their viability from year to year. This problem is particularly acute in rural areas. Many of the successful, independent regional initiatives lack national visibility.

During the course of the National Conversation about Work, the Commission heard of a strong bias by some employers against young people, because of their perceived attitudes to work and stereotypes about the youth work ethic. In some centres, employers openly admitted to preferring mature workers over the young. Some employers believe they have to make a much greater investment in younger people to get them up to speed.

Some employers recognised that young people have different employment needs. One said: "We have to accommodate the different values of the younger generation." Youth career workers thought job redesign may be a way to accommodate the needs and expectations of youth. Others agreed that the way work is organised today does not suit the young. Young workers pointed out that development and pastoral care was important to engagement. One said: "Here we are encouraged to learn."

Older workers

New Zealand, like many other Western countries, has an ageing population. Internationally, New Zealand has one of the highest rates of participation of older workers in the OECD. The participation rate of older people (aged 55 and over) was 44.1 per cent for the year to June 2010. The unemployment rate was 2.9 per cent. Over the past five years, the employment rate of older people has increased from 38.5 per cent in March 2005 to 42.8 per cent in June 2010.

New Zealand research [32] shows that a majority of 65-year-olds are still in paid work. They believe there are more important non-financial motivators for work, such as keeping busy, liking their work, feeling they still have something to contribute and enjoying the contact with other people. Nevertheless, financial considerations were still a strong motivator for many 65-year-olds, particularly for those who lost retirement savings in the global economic crisis. There is concern about the additional strain this has placed on older people, who must now remain in employment to maintain an adequate standard of living.

Almost every industry sector that participated in the National Conversation identified the ageing workforce as a looming issue. However, the Commission has seen little evidence of systemic approaches being taken in response. A manager at a Feilding meat processing plant said: "We're very aware of the issue and there is increasing understanding that it is a problem, but we've had less success in the industry in deciding what to do about it."

Generally, businesses have a positive attitude towards older workers, although pockets of bias towards older workers exist. Innovative work practices that meet the needs of both the business and the employees are enabling organisations to retain older workers longer. Some strategies to retain ageing workers were being considered, such as flexible work arrangements and mentoring schemes using retired or semi-retired business people, for example the scheme brokered by the Tauranga Chamber of Commerce and the New Zealand Refining Company.

Participants in the National Conversation observed that many older people were still actively engaged in the workforce well past traditional notions of retirement age. In Hawke's Bay, the Commission met a supervisor of a gang of older seasonal workers (called grey gypsies) who was in his eighties.

Internationally, research shows that many people prefer to transition out of work, rather than to abruptly end work in favour of retirement, at the age of eligibility.

32 Ministry of Social Development (2009), *To work or not to work: Findings from a survey of 65-year-old New Zealanders* (Wellington: Centre for Social Research and Evaluation).

Businesses are responding by introducing phased retirement. A union secretary said the real question about older workers was "how to let people step down and maintain dignity. Some of the older guys are struggling but they don't want to be seen as weak…It's a man thing."

Māori

The labour force participation rate for Māori has increased steadily over the past five years, with a positive shift by Māori towards sustainable, higher-paid forms of employment. Despite this positive trend, Māori unemployment has increased sharply, and in the year to June 2010 was 13.9 per cent, an increase of 3.9 per cent from the previous year. This equates to 26,400 unemployed Māori. Nationally, Māori accounted for 34 per cent (21,116) of all unemployment beneficiaries.

The recession has had a severe detrimental effect on Māori, particularly in Auckland, Northland and on the East Coast. Reports show that by December 2009, the Māori unemployment rate from Ruatoria to Wairoa had increased from 8.0 per cent to 19.2 per cent. By June 2010, 60.5 per cent of unemployment beneficiaries on the East Coast from Gisborne to Hawke's Bay were Māori.[33] Similarly, in Northland, 62.3 per cent of all unemployment beneficiaries were Māori,[34] and 25.9 per cent in Auckland.[35] Unemployment was hitting young Māori and those in the top half of the North Island the hardest, reports showed.

A Māori social service provider explained the recession's impact: "It makes things harder for those on the poverty line…Māori workers are more likely to be supporting two or three families and a loss of income for these people would affect many households." Additional strain was being placed on rural communities as urban Māori who had lost their jobs returned home. This had a particular impact on kaumatua and social services.

During the course of the National Conversation, the Commission heard about many examples of innovative work practices and positive Māori work environments. Work practices based on whanaungatanga (family orientation) and manaakitanga (caring) were viewed by many as crucial parts of their work environment and a help in sustaining workers. Participants said, "One of the good things of working in a Māori organisation is that you are carried by the tikanga, which is infused in your work. We move as one, as a collective together." Another Māori employer in the shearing industry referred to their "secret weapon" as being the Māori values that underpin staff practices:

> **Employment has become very structured, almost sterile. We've looked at what makes us special and that is that our staff are our whānau. Through whanaungatanga, the expectation is that we treat each other like family. You work to help us; we work to help you. There is, however, a "double-edged sword" taking people on as whānau, whereby the employment relationship is not strictly employer and employee related. Any risk from this is mitigated by the fact that people feel more valued at work, leading to increased satisfaction and performance.**

The Commission observed that one feature of Māori business was the commitment to providing career opportunities, such as support for further education. The aim is not just to build capacity in the company, but to build capacity in the wider community, at a whānau (family), hapū (sub-tribe) and iwi (tribe) level. The staff development practices at Māori companies such as Whale Watch Kaikoura are a strong example of how internal staff practices can benefit communities.[36]

33 Department of Labour (2010), Quarterly regional labour market update – Gisborne/Hawkes Bay, June 2010. http://www.dol.govt.nz/publications/lmr/regional/joint/lmr-regional-gis.asp

34 Department of Labour (2010), Quarterly regional labour market update – Northland, June 2010. http://www.dol.govt.nz/publications/lmr/regional/joint/lmr-regional-nth.asp

35 Department of Labour (2010), Quarterly regional labour market update – Auckland, June 2010. http://www.dol.govt.nz/publications/lmr/regional/joint/lmr-regional-akl.asp

36 Human Rights Commission (2010), *What next: National Conversation about Work* (Auckland: HRC). http://www.neon.org.nz/nationalconversationaboutwork/

Māori have shown a steady increase in educational attainment in recent years and are more likely to be employed as a result. The employment rate was significantly higher for Māori with tertiary qualifications than for those with fewer or no qualifications. [37]

Pacific peoples

The unemployment rate for Pacific peoples was 14.1 per cent for the year to June 2010 3.8 per cent above its level 12 months earlier. Compared with the overall unemployment rate (6.6 per cent in June 2010), the Pacific rate has increased sharply. The recession has had a major impact on Pacific people, as a significantly high proportion are employed in unskilled and lower-skilled jobs and are at higher risk of unemployment.

In the year to June 2010, the leading industries in which Pacific peoples worked were manufacturing (20,500 workers) and wholesale and retail (12,200 workers). Over the past year, education and training had the largest gain in Pacific employment (up to 34 per cent). Over the past four years, public administration and safety showed the largest gain (up 73 per cent). [38]

A report by the Department of Labour in 2009 found that Pacific women were twice as likely to work as labourers compared with New Zealand women generally. Pacific women are most likely to work in healthcare and social assistance and manufacturing industries. [39]

Pacific people spoken to in Auckland during the National Conversation felt that their skills were not fully recognised and valued. "At work, you take your Pacific ethnicity with you. It's not something that's specific in your remuneration package. It's part of who you are and it's positive for employers."

Several participants said they did not feel that Pacific peoples were promoted according to merit and skill. One worker said: "I can think of a very good nurse in one organisation. The employer allowed her flexibility because he valued her, but she should have progressed upwards. Her skills didn't translate into greater remuneration. She could have gone higher in the organisation than she did."

The value of employees with Pacific languages was a strong theme with participants. Participants felt that there is a great need for services, including information, advice and support, to be delivered in their own languages. One participant said: "I love coming back here (to work) so I can use my language." The desire for Pacific people to learn and use their Pacific languages was strong.

The traditional attitude of older Pacific people to career and vocational choices for Pacific youth, such as trades training opportunities, was seen as a barrier.

The impact of an increasing number of Pacific youth will play an important role in the future New Zealand labour market. In contrast with an ageing, mainly European, New Zealand population, the Pacific population is young, with 38 per cent of Pacific peoples (100,344) under 15 at the 2006 census. The attainment of skills, education and training is vital to ensure that Pacific peoples move increasingly into middle-to-high income brackets and participate on an equal basis with other New Zealanders in employment. [40]

Migrant workers

Work is arguably the single most important element in the integration of immigrants to New Zealand. Despite this, many migrants find it hard to access decent employment, despite years of experience and qualifications recognised elsewhere. A particular problem for some migrant workers is the recognition of qualifications by gatekeeping bodies, particularly in some professions.

In 2009, the Department of Labour released its Employers of Migrants survey. Overall, 87 per cent of respondents rated their migrant employees as good or very good. Employers said the positive attitude displayed by migrants and their skills and experience were driving factors behind the high ratings. The Minister of Immigration at the time stated: "Migrant workers play a major role in

37 Te Puni Kokiri (2010), *Parongo fact sheet – benefits of education for Māori* (Wellington: TPK)

38 Department of Labour (2010), *Pacific peoples' labour market factsheet*. June 2010 Human Rights Commission (2010), What next: National Conversation about Work (Auckland: HRC). http://www.neon.org.nz/nationalconversationaboutwork/

39 Department of Labour (2009), *Pacific women's work*. http://www.dol.govt.nz/publications/lmr/lmr-pacific-womens-work.asp

40 Colin Tukuitonga (2009), *Recession paradox for Pacific workforce*. Accessible online at http://www.mpia.govt.nz/assets/documents/news-archive/2009/FINAL-Oped-recession-colin.pdf

the economy and this survey reinforces the value they provide to employers." [41]

Despite these positive results, the plight of migrants and their employment situation has been covered extensively in the mainstream media – stories of discrimination, exploitation and battles over work and entry visas. Migrant workers the Commission met with over the course of the National Conversation said there were a number of ways that discrimination was expressed when they sought work.

Chinese Aucklanders said some migrants "anglicise" their names to increase the chance of being interviewed for a job – "repackaging yourself for the New Zealand market". One participant said, "As long as I know who I am and what I am, then it shouldn't worry me."

Participants also said employers sought "Kiwi experience" and English as a first language. The Commission's widely circulated pre-employment guidelines for employees and employers have been helpful for migrant employment, establishing what is permissible under the Human Rights Act. [42]

Outside the major centres, the Commission was told that inherent conservatism in business, together with parochial attitudes, meant that some employers have difficulty with employing migrants. Typical complaints by migrant employees to the Queenstown Citizen's Advice Bureau included not being paid holiday pay, being told they had lesser rights because they were on working holiday visas, and being told they were not entitled to annual leave. Migrant worker advocates thought this was just the "tip of the iceberg". The Commission was told, "Migrants were less likely to complain, because they were in the area for a short period of time or would simply find another job elsewhere."

Support services for migrants are not as readily available in small towns as in urban centres. The importance of settlement support infrastructure was emphasised by migrants as well as other community workers. In Marlborough, the influx of migrant seasonal labourers meant a greater demand for immigration support services. For example, the absence of a regional office in Blenheim, where demand is the highest, meant that Department of Labour officers had to travel from Nelson to address issues of apparent exploitation of migrant workers in the wine industry.

Employers in a number of areas – including the Marlborough wine industry, the Southland dairy industry and Bay of Plenty fruit growers – talked about rogue operators who harmed the reputation of their sector. In the Waikato, one advocate for decent working rights in the rural sector wrote: "I was reminded that our community has a duty of care towards its workers".

Conclusion
Whakamutunga

New Zealand's legislative framework and mechanisms generally comply with international standards on the right to work, with a few reservations. The Commission believes that a plan of action to ratify ILO Conventions 87 and 138 and the lifting of any convention reservations related to employment is needed. The Commission believes that the Government should support ILO standard-setting for decent work in New Zealand and internationally.

In recent years a number of workplace reforms have advanced workers' rights, including legislation dealing with flexible work, paid parental leave, holidays, rest breaks, and breastfeeding. However, proposed changes to employment legislation, such as those concerning trial periods, are of concern to the Commission in its promotion of the right to work, a 'decent work' agenda and equal-employment opportunities.

A number of groups continue to experience disadvantage in the New Zealand labour market. Disabled people are among the most disadvantaged. Māori, Pacific peoples and youth are also vulnerable groups, as shown by escalating unemployment rates during the recession. The Commission would like to see strategies to increase access to work for Māori, Pacific and disabled people, and a youth-to-work programme for every young New Zealander.

41 Jonathan Coleman (2010) press release, 'Survey recognises migrant worker contribution', http://www.beehive.govt.nz/release/survey+recognises+migrant+worker+contribution

42 Human Rights Commission (2008), *Getting a job: An A to Z for employers and employees, Pre-employment guidelines* (HRC Auckland)

Women continue to experience pay and employment inequities, and the Commission believes there is a strong case for securing pay and employment equity across both the public and private sectors.

Disadvantaged groups, often low-paid, seasonal and casual workers, have low bargaining strength in the labour market and are most likely to be disadvantaged by changes that strengthen employers' rights and power. Greater assistance is needed for these workers and others who are in transition.

It is the Commission's view that mechanisms to address systemic discrimination and disadvantage should be strengthened. State-sector legislation requiring employers to be 'good employers', including having an equal-employment opportunities programme, should also apply in the private sector.

Changes to employment occurring at a time of global economic uncertainty require a renewed commitment to equal-employment opportunities and revision of mechanisms to ensure fairness at work. The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance the right to work:

Equal Employment Opportunity framework
Developing a new framework for equal employment opportunities that specifically addresses access to decent work for disadvantaged groups, such as Māori, Pacific youth, and disabled people, and that covers pay and employment equity issues for men, women and families.

International Labour Organisation conventions
Ratifying ILO Conventions 87 and 138 and lifting any convention reservations related to employment and the advancing of EEO.

Domestic workers
Supporting ILO standard-setting for domestic workers in New Zealand and internationally.

14. Right to Housing

Tika ki te Whai Whare Rawaka

"Everyone has the right to live in security, peace and dignity."

Everyone has the right to live in security, peace and dignity.

United Nations Committee on Economic Social and Cultural Rights, general comment 4 (edited)

Introduction
Tīmatatanga

In New Zealand, the inability to obtain decent, affordable housing is one of the major barriers to an adequate standard of living. At a family level, housing represents the most significant single budget item for many New Zealanders. Additionally, the quality of housing directly affects people's health, particularly in the case of children and old people. For children, security and adequacy of housing have far-reaching effects on their health, achievements in education and general development. Improved data and research are required in order to identify and address significant barriers that disabled people face trying to access affordable and appropriate housing.[1]

International context
Kaupapa ā taiao

There remains a disturbingly large gap between the standards set in Article 11 (1) of the covenant and the situation prevailing in many parts of the world … the committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies.

United Nations Committee on Economic Social and Cultural Rights, general comment 4

Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides the most significant legal source on the right to adequate housing. The most authoritative legal interpretation of this right was set out in a 1991 general comment by the United Nations Committee on Economic, Cultural and Social Rights (CECSR) which considers countries' compliance with ICESCR.[2] This general comment spells out that the right to housing includes:

- security of tenure, for example legal protection from arbitrary eviction
- availability of services, for example sustainable access to potable water, sanitation and emergency services
- affordability, for example housing costs as a ratio of income
- habitability, for example the soundness of physical structure and the absence of dampness and crowding
- accessibility, for example by all ethnic, racial, national minority and other social groups
- location, for example in relation to employment and schools
- cultural adequacy, for example taking into account traditional housing patterns.

The right to housing for women, children and disabled people, respectively, is specifically mentioned in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (UNCROC) and the Convention on the Rights of Persons with Disabilities (CRPD). The latter convention also sets out disabled people's right to live independently and have the opportunity to choose their place of residence.

The right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head … Rather it should be seen as the right to live somewhere in security, peace and dignity. [3]

The indispensable and indivisible significance of adequate housing to the enjoyment of other human rights is reflected in other international statements of law and policy, including the:

1 McKinlay Douglas Limited and Etain Associates (2006), Housing Needs for People with Disabilities in the Bay of Plenty and Lakes Region. Final report prepared for HNZC, the Bay of Plenty and Lakes District Health Boards and the Tauranga Community Housing Trust/McKinlay Douglas Limited

2 United Nations Committee on Economic, Social and Cultural Rights (1991), The right to adequate housing: Article 11(1) CESCR general comment No. 4. Geneva: United Nations

3 ibid

◀ Nikki Mandow, journalist, Geoff Godden, painter, and their sons Sam (left) and Ben at the front gate of their house.

- International covenant on Civil and Political Rights (Article 17)
- International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(e)(iii))
- International Convention relating to the Status of Refugees (Article 21)
- International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (Article 43(1)(d).

New Zealand has ratified all but the last of these conventions. The right to housing is also reflected in Article 21 of the United Nations Declaration on the Rights of Indigenous Peoples.

NEW ZEALAND'S OBLIGATIONS

As New Zealand has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), it has a duty to respect, protect and fulfil the right to housing. Specifically, full realisation of these rights should be progressively implemented, to the maximum of a country's available resources. The United Nations recommends action plans, targets, monitoring and other strategies to ensure that the most vulnerable and disadvantaged receive assistance as a priority.

New Zealand context
Kaupapa o Aotearoa

THE NEW ZEALAND LEGISLATIVE AND REGULATORY FRAMEWORK

The right to housing is not specifically provided for in any New Zealand legislation.[4] However, a range of central government policies, laws and regulations provide certain rights and protections related to housing. These include the:

- Building Act 2004 (which repealed the Building Act 1991)[5]
- Building Amendment Act 2009[6]
- Housing Improvements Regulations 1947 (under the Health Act 1956)[7]
- Housing Restructuring and Tenancy Matters Act 1992
- Residential Tenancies Act 1986[8]
- Residential Tenancies Amendment Act 2010
- Local Government Act 1974 (where still in force)
- Local Government Act 2002
- Resource Management Act 1991[9]
- Resource Management (Simplifying and Streamlining) Amendment Act 2009
- Fire Service Act 1975
- Watertight Homes Resolution Services Act 2006.

The New Zealand Bill of Rights Act 1990 (BoRA), the Human Rights Act 1993 (HRA) and the Residential Tenancies Act 1986 also provide protection from discrimination in housing. The Residential Tenancies Amendment Act 2010 extended that protection to boarding house residents, although the protection is weaker than that afforded to other tenancies. Long-term camping ground residents remain unprotected by this legislation.

New Zealand today
Aotearoa i tēnei rā

While there is no express right to housing in New Zealand law, by ratifying ICESCR and other covenants and conventions, the Government has accepted an undertaking to comply with these international human rights standards. Complaints and enquiries to the

4 Community Housing Aotearoa conducted an online survey of its members to provide comments on the draft version of this chapter. Almost all (91%) of the more than 50 respondents were concerned that there is no express right to housing in New Zealand legislation.

5 A broad review of the Building Act and Code was prompted by the 'leaky building' issue

6 In August 2010 the Building and Construction Minister announced further planned amendments to the Building Act 2004. Accessed 30 September 2010 from http://www.beehive.govt.nz/release/next+generation+building+laws+way

7 The Health Act contains a range of provisions relating to housing standards

8 The rights of both state-sector and private-sector tenants are protected within this legislation. Provisions include a Ministry of Housing service that assists the resolution of disputes between landlords and tenants

9 The Resource Management Act 1991 and the Local Government Act 2002 cover the zoning of residential areas and the environmental impacts of housing

Commission, and consultation on this chapter, have identified three main issues of concern about the right to housing:

- accessibility (state and social housing provision, and homelessness)
- affordability (as renters and as homeowners)
- habitability (cold, dampness and crowding).

In addition, this chapter touches briefly on two other components of the right to housing: location and security of tenure.

The other two factors identified by the CESCR are cultural adequacy and availability of services. In New Zealand, cultural adequacy issues have arisen around the size and design of state-housing stock, including the need for low-cost communal housing. Typically, sustainable access to potable water, sanitation and emergency services has not been as significant an issue.

The Commission receives, on average, one hundred complaints or enquiries a year about housing discrimination, and about twice as many approaches from people with other housing difficulties. Accessibility is compromised when there is a shortage of social housing, making some people vulnerable to homelessness. This may result in people being forced to sleep rough or in transient, insecure or substandard accommodation.

Levels of home ownership have fallen faster in New Zealand in the last 20 years than in any other OECD country. The reinstatement of income-related rents for those in state housing has improved rental affordability. [10] However, housing shortages in some regions, particularly Auckland, have placed pressure on rental affordability. Crowding remains a significant issue in main cities and in some rural and provincial areas, particularly those with large Māori, Pacific or refugee communities.

Since publication of the *New Zealand Action Plan for Human Rights* in 2005, the Housing New Zealand Corporation (HNZC) has included some analysis of the right to healthy and affordable shelter in three key documents. The 2005 New Zealand Housing Strategy acknowledged that housing inequality is a significant contributor to social and economic inequality. The strategy set out the Government's 10-year 'Programme of Action for Housing' to:

- work with industry and local government to bring about sustainable housing supply
- improve housing assistance and affordability
- improve access to home ownership
- develop the private rental sector
- improve housing quality
- strengthen housing-sector capability
- meet diverse needs.

However, it did not comprehensively analyse all key international housing indicators or the extent to which they are incorporated in housing-related legislation, policies and practices. A 'Māori Strategic Plan' [11] was published in 2007, followed by a 'Housing Strategy for Pacific Peoples' in 2009. [12] Both recognised specific barriers faced by these population groups when trying to access housing.

Objective 8 of the disability strategy prioritises the provision of opportunities for disabled people to have their own homes and live in the community. For older people, both the New Zealand Positive Ageing Strategy and the Health of Older People Strategy emphasise ageing in place.

> **Elderly people, including those in need of care and support should, wherever possible, be enabled to continue living in their own homes, and where this is not possible, they should be enabled to live in a sheltered and supportive environment which is as close to their community as possible, in both the social and geographical sense.** [13]

10 Income-related rent paid by a state-house tenant is set at a maximum of 25 per cent of a tenant's net income up to the NZ National Superannuation threshold. Thereafter, 50 cents of every dollar is paid until the market rent of the tenant's dwelling is reached.

11 Housing New Zealand Corporation (2007), *The Healthy Housing Programme Outcomes Evaluation* (Wellington: HNZC)

12 Housing New Zealand Corporation (2009), *Orama Nui: Housing Strategy for Pacific Peoples* (Wellington: HNZC)

13 OECD (1994), *Caring for Frail Elderly People: New Directions in Care* (Paris: OECD), p 3

COMPLAINTS AND ENQUIRIES TO THE COMMISSION

Between 2005 and 2009, the Human Rights Commission received 526 complaints and enquiries about housing discrimination, with 249 (47 per cent) accepted for further action. [14] The most common grounds of complaint were race-related discrimination (30 per cent), followed by discrimination based on a person's disability (23 per cent), age (13 per cent) and family status (12 per cent).

Disability complaints have included instances where restrictive covenants have been placed on property in some residential areas to prevent the provision of supported accommodation for disabled people. Individuals with experience of mental health issues have complained about conditions in boarding houses.

Between 2005 and 2009, the Commission received a further 904 complaints and enquiries about the broader right to housing. These came from landlords and others seeking advice about human rights obligations, as well as from tenants. Key overall themes were the lack of affordable housing (including difficulties accumulating a rental bond payment); the poor standard of housing (particularly in rural areas); evictions; declined tenancies; and concerns about accommodation conditions. In addition, people complained about general treatment by their landlord.

Restrictive covenants

Restrictive covenants can work against the interests of vulnerable and disadvantaged groups. These have been placed on properties in residential areas and can have the effect of excluding supported accommodation for disabled people. Housing New Zealand views them as a small but growing obstacle to the integration of social housing within communities.

The growing use of restrictive covenants has a negative impact on the ability of Housing New Zealand and other social housing providers, such as IHC New Zealand Incorporated and Women's Refuge, to buy or lease properties. Under the Affordable Housing Enabling Territorial Authorities Act 2008 (AHETA), a covenant over land was void if one of its purposes was to stop the provision of affordable or social housing.

The Commission noted its concerns when the AHETA was repealed in 2010. Modified provisions relating to restrictive covenants have been retained by inserting s277A into the Property Law Act 2007. This amendment renders covenants void if a principal purpose is to stop the land being used for housing for people on low incomes or with special housing needs, or to provide supported accommodation for disabled people. [15]

The Commission's submission noted that the threshold in the new provisions is higher and may allow covenants which do not explicitly exclude the provision of such housing, but still have that effect. [16] For example, stipulating that only family homes or domestic dwellings can be built in a particular area could impact adversely on group homes for people with intellectual disabilities. As it is unclear whether this would be rendered void under the s277A provisions, the Commission recommended retaining the AHETA threshold. Furthermore the Commission recommended clarifying that restrictive covenants which undercut the provision of either rental housing or home-ownership options for people on low to moderate incomes are covered by the new provisions.

ACCESSIBILITY

State and social housing [17]

New Zealand was one of the first countries to provide state housing for low-income workers unable to purchase through the open market, and with less bargaining power in the private rental market. Over time, the remit of social housing has changed to prioritise people with special housing needs who cannot otherwise access adequate

14 The Commission is unlikely to be the first organisation approached about housing complaints. This is because specific bodies exist to deal with housing complaints, and the Commission's main focus is more tightly drawn around complaints of unlawful discrimination

15 Some submitters to this chapter remain concerned that restrictions in district plans can still exclude disabled people from access to housing.

16 Human Rights Commission (September 2009) Submission to the Transport and Industrial Relations Committee on the Infrastructure Bill. Accessed 20 October 2010 from http://www.hrc.co.nz/home/hrc/resources/resources.php#Human_Rights_Submissions_

17 'Social housing' is the overarching term for rental housing which may be owned and managed by central or local government and/or non-profit organisations, with the aim of providing affordable housing. Where that housing is fully funded, owned and administered by the government, it is referred to as 'state housing' or 'public housing'. The term 'community housing' spans non-profit and co-operative housing, including supportive housing

housing. The most recent Census data shows that the proportion of rental housing which is publicly owned fell by more than half between 1986 and 2006, from 37.8 per cent to 18.2 per cent. While the right to housing is not limited to the most disadvantaged, government funding for state- or social-housing services is primarily targeted to these groups. Being subjected to discrimination is one of the key factors taken into account by HNZC when assessing an applicant's need for state housing. Limited availability of state houses and tight eligibility based on need mean that many low-income working families are very unlikely to gain a state tenancy.

As at 30 June 2010, there were 10,434 people on HNZC's waiting list, with 386 (3.7 per cent) deemed to be in severe housing need, 4289 (41.1 per cent) in significant housing need and 3182 (30.5 per cent) in moderate housing need. Less than a quarter (2577 or 24.7 per cent) had lower-level housing need.[18] In June 2010, 27 per cent of applicants on HNZC's waiting list were current state tenants awaiting a transfer. [19] People whose applications for state housing are declined may apply to the State Housing Appeals Authority.

In its April 2009 Universal Periodic Review report, the New Zealand Government noted that more than $100 million was planned to be spent on upgrading existing state homes, and $20 million on building new homes. "This will help ease pressure on HNZC's waiting list for state rental accommodation and will improve the habitability of more than 18,000 homes." [20]

In February 2009, the Government provided the HNZC with a one-off $124.5 million economic-stimulus package to build and upgrade state homes. Combined with its regular appropriations, this enabled the corporation to spend a total of approximately $331 million on upgrades and acquisitions in 2009–10. When the package ended in June 2010, the corporation returned to its normal upgrade and acquisition programme. In 2010–11, the corporation anticipates spending more than $207 million on upgrades and acquisitions. [21]

Most third-sector social-housing providers are small-scale, with the exception of local bodies such as the Christchurch and Wellington City Councils and community housing providers such as IHC, which owns 643 homes and assists with the rental of a further 248 homes.

The Christchurch City Council provides safe, accessible and affordable social housing to people on low incomes, including the elderly and people with disabilities. Operating under the name City Housing, the council has a rental accommodation portfolio of more than 2640 units spread throughout most Christchurch suburbs. This is second in size only to the social housing provided by HNZC. [22]

Wellington City Council provides 2300 social housing units for people who meet the council-set criteria relating to income, age, housing need, disability and refugee status. In 2007 the Crown entered into an agreement to invest $220 million over 20 years to upgrade the council's social housing stock. The council will also make a significant investment into the portfolio and is committed to providing social housing in the long term.

In February 2010, the Housing Shareholders Advisory Group (HSAG) was established by the Ministers of Finance and Housing to provide advice on state and social housing. In its first report, released in August 2010, the HSAG commented that it was "struck by the severity of the affordable housing shortage and the negative future trends". [23] The HSAG's recommendations focus on four areas:

- empowering HNZC to focus on the 'high needs' sector
- developing third-party participation (including through greater support for community housing initiatives)

18 Accessed 7 July 2010 from http://www.hnzc.co.nz/hnzc/web/rent-buy-or-own/rent-from-housing-new-zealand/waiting-list.htm

19 Information supplied by Housing New Zealand Corporation

20 Human Rights Council (2009), National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/: New Zealand, para 87, p 16, fifth session, A/HRC/WG.6/5/NZL/1. Accessed 19 October 2010 from http://www.mfat.govt.nz/downloads/humanrights/final-upr-report-apr09.pdf

21 Information supplied by Housing New Zealand Corporation

22 Accessed 6 October 2010 from: http://www.ccc.govt.nz/homeliving/socialhousing/index.aspx

23 Housing Shareholders Advisory Group (2010), *Home and Housed: A Vision for Social Housing in New Zealand* (Wellington: HSAG)

- instigating initiatives across the broader housing spectrum (for example, reviewing accommodation subsidies)
- clarifying sector responsibilities.

Homelessness

Homelessness is a symptom of unaffordable housing and inadequate supports for people in need, including those requiring mental health support or assistance on exiting prison. In July 2009, Statistics New Zealand published the New Zealand Definition of Homelessness. It moves beyond a focus on those 'living rough' to include all people living in situations unacceptable for permanent habitation, by New Zealand norms, who have no other options to acquire safe and secure housing.

There are four types of living situations considered unacceptable for permanent habitation in this definition:

- without shelter (living rough or in an improvised dwelling such as a car)
- temporary accommodation (provided by non-profit organisations, boarding houses, camping grounds, or marae)
- sharing accommodation with friends or family
- uninhabitable housing (owned or rented housing without basic amenities) .

University of Otago Wellington, Statistics New Zealand and HNZC are currently applying this definition to administrative and Census data to determine the size and characteristics of the homeless population. Improved measurement of homelessness in New Zealand is likely to require developments in specialised surveys, administrative data collection, and Census classifications.[24] Until this research is published, few reliable measures of the homeless population exist. As in other developed nations, only a small proportion are likely to be living on the street, with homelessness largely manifesting as sharing accommodation with friends or family, which, in many situations, leads to or exacerbates crowding.

An annual one-night count of people living rough or in improvised dwellings within a 3km radius of Auckland's Sky Tower has occurred since 2004. In 2010, 53 people were counted. Counts of this part of the homeless population are not conducted elsewhere in New Zealand.

Non-profit temporary accommodation targeted to homeless people falls into three categories: night shelters (where residents cannot access the accommodation during the day); accommodation for the homeless (where residents have 24-hour access to the accommodation); and women's refuges (targeted specifically to women and children who are victims of domestic violence). Preliminary results from the University of Otago project suggest that this sector comprises approximately 120 providers nationally, with the collective capacity to accommodate at least 850 households per night.[25] The availability of these types of accommodation varies significantly by region and household type. There is little government funding to comprehensively address the support needs of residents in many of these accommodation services.

Research published in 2008 estimated that approximately 12,000 (30.4 per cent) of 'at-risk' and 'vulnerable' young people aged 17–24 years were in unsafe or insecure housing. Within this group, 2.5 per cent were living rough; 12.6 per cent lived in unaffordable, crowded or dilapidated housing; and 13.8 per cent lived in dwellings where they were exposed to criminality, sexual or physical abuse, gangs or drug-making.[26] Some of these young people would be considered homeless, others at high risk of homelessness.

International research shows that the long-term personal and economic costs of homelessness are significant. Although no formal cost-benefit analyses of homeless populations have been conducted in New Zealand, the Committee for Auckland estimated that providing income support, health and detention services to Auckland's chronically homeless population cost in excess of $75 million in the last decade. The report suggested that

24 Dr Kate Amore, Housing and Health Research Programme, University of Otago, Wellington, personal communication, August 2009

25 ibid

26 Saville-Smith K, James B, Warren J and Fraser R (2008), *Access to Safe and Secure Housing for At Risk and Vulnerable Young People* (Wellington: Centre for Housing Research Aotearoa New Zealand)

these root causes of homelessness could be tackled for a significantly smaller amount. [27]

There is no homelessness policy at the central government level. This contrasts with the Australian Federal Government's December 2008 White Paper, *The Road Home*, which sets two goals: halving homelessness by 2020 and offering accommodation to all rough sleepers who seek it. This has been supported by considerable investment to fund the required social support and build new specialist housing. [28]

At the local government level, Wellington City Council and the former Auckland City Council are the only councils known to have homelessness policies. [29] Wellington is implementing a monitoring and evaluation system among its funded providers of services for homeless people, with the aim of improving the council's response to homelessness. In 2007, the Committee for Auckland started to facilitate a taskforce of government and NGOs.

In terms of advocacy, the New Zealand Coalition to End Homelessness promotes the Homelessness Strategy Toolkit, identifying seven key areas for addressing homelessness. Its 2008 discussion paper spells out 38 recommendations for addressing homelessness across New Zealand, including the need to move towards a 'housing first' approach, where permanent rather than emergency housing is the immediate priority, coupled with appropriate, often intensive support to sustain tenancies.

Statistics New Zealand's 2009 Review of Housing Statistics [30] has recommended further joint work by government agencies to:

- investigate and develop housing affordability measures
- improve existing data sources on the physical quality of the national housing stock
- continue research into measures and statistics on crowding and homelessness.

In early 2009, ministers agreed to a work programme to address issues around crisis, transitional and long-term housing for those in most need, including disabled people and those fleeing violence at home. This work aims to ensure that people are not forced into unsuitable private accommodation and are able to avoid homelessness. Phase two is currently under way. It is looking at ways to improve housing and support services for released offenders, and for youth leaving care and protection and youth justice services.

Community housing providers who submitted on this chapter raised concerns that this work programme seems to be progressing very slowly. They stressed that the results of this work need to be published and action plans created to address gaps and failures. Pressing issues highlighted by submitters include:

- lack of accommodation options to address chronic homelessness
- very limited specialist accommodation for people who find it hard to sustain an independent tenancy, due to issues associated with their alcohol and/or drug dependence
- homelessness among those released from prison, including trans women
- short-term emergency housing facilities becoming long-term providers for people who fall through the cracks
- homelessness among queer and trans youth
- a significant and rapidly growing group of single people living alone who are experiencing a crisis in accessing affordable housing.

AFFORDABILITY

Affordability is one of the primary indicators of the right to housing. In New Zealand the inability to obtain decent,

27 Committee for Auckland (November 2008), *Auckland's Million Dollar Murray: Quantifying the Cost of Homelessness* (Auckland: Committee for Auckland); Lang S (2007), 'Enough Already: quantifying the cost of homelessness in Auckland', Parity, October, pp 27–28. Accessed 19 October 2010 from http://nzceh.wikispaces.com/file/view/Parity+Vol20-09+8-11-07.pdf

28 Department of Families, Housing, Community Services and Indigenous Affairs (2008), *The Road Home: the Australian Government White Paper on Homelessness* (Canberra: Commonwealth of Australia). Accessed 30 September 2010 from http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/whitepaper/Pages/default.aspx

29 Wellington City Council has had a Homelessness Strategy since 2004 and the former Auckland City Council has had a Homeless Action Plan since 2005

30 Statistics New Zealand (2009), R*eview of Housing Statistics Report 2009* (Wellington: StatsNZ). Accessed 7 July 2010 from http://www.stats.govt.nz/browse_for_stats/work_income_and_spending/income/review-of-housing-statistics-2009.aspx

affordable housing is one of the most significant barriers to an adequate standard of living. Having to spend more on housing costs relative to income has significantly reduced living standards and increased poverty levels over the last two decades.

Living standards tend to be compromised when people on low incomes spend more than 30 per cent of their income on housing costs. Using this measure, between 1988 and 1997 there was a substantial decline in housing affordability.[31] The proportion of households spending more than 30 per cent of their income on housing costs more than doubled, from 11 per cent to 25 per cent. This proportion levelled off between 1998 and 2001, then fell to 21 per cent by 2004. This improvement can be attributed mainly to the reinstatement of income-related rents for state housing tenants in 2001. Rising accommodation costs increased this proportion to 27 per cent by 2009.[32]

Unaffordable housing is even more pronounced for low-income households, those with children or those where there is a Pacific adult. In 2009, 33 per cent of households on low incomes or that included a Pacific adult were spending more than 30 per cent of their income on housing costs.[33] More than one-third, 37 per cent, of all children aged under 18 years lived in households with such high housing costs relative to household income.

High rates of unemployment and under-employment among disabled people have significant impacts on disabled people's ability to afford to buy or rent decent housing.[34]

Low affordability, whether of owned or rented housing, leaves households with less money for other items essential to good health, including a nutritious diet, primary health services and winter heating.[35] It can lead to living in crowded, substandard or unhealthy temporary accommodation.

Rental affordability

Almost a third of households do not own the dwellings they occupy, with the private sector dominating the rental market. Māori, Pacific, low-income, sole-parent, single-person and extended-family households are over-represented in rental housing tenure. The 2009 General Social Survey reiterates the link between low incomes and reliance on rented accommodation. People who lived in rented dwellings were more than twice as likely as people who lived in owner-occupied dwellings to report that they did not have enough money to meet everyday needs.[36]

One measure of rental affordability is the number of hours a low-paid worker in the service sector would have to work in order to rent a typical two-bedroom house. Using this measure, the affordability of rental accommodation for those in low-paid employment has not changed significantly over the last five years.[37] Rental affordability is particularly acute for households on benefits, as housing rents tend to rise in line with movements in wages, while benefits are not adjusted to maintain relativity with wages. By improving rental affordability, the reinstatement of income-related rents in 2001 resulted in fewer HNZC applications to the Tenancy Tribunal for rent arrears.

The Accommodation Supplement (AS) is a benefit paid to lower-income private-sector and social-housing tenants to help them pay their rent. Changes to the supplement settings in 2004 and 2005 helped to reduce net housing expenditure for some low-income households.

However, submitters to this chapter echoed concerns raised by the HSAG about discrepancies in eligibility between the supplement and the income-related rent

31 Data in this section on housing costs relative to income is derived from Statistics New Zealand's Household Economic Survey (1988–2008) by the Ministry of Social Development, and published in Ministry of Social Development (2009), 'The Social Report' (Wellington: MSD)

32 Perry B (2010), *Household incomes in New Zealand: trends in indicators of inequality and hardship 1982–2009* (Wellington: MSD)

33 Perry B (2010)

34 Statistics New Zealand (2008), *Disability and the Labour Market in New Zealand in 2006* (Wellington: StatsNZ)

35 Auckland Regional Public Health Services (2005), *Housing and Health – A summary of selected research for Auckland Regional Public Health Services* (Auckland: Auckland Regional Public Health Services)

36 Ministry of Social Development (2009)

37 Johnson A (2010), *A Road To Recovery: A State of the Nation report from The Salvation Army* (Manukau City: The Salvation Army Social Policy and Parliamentary Unit)

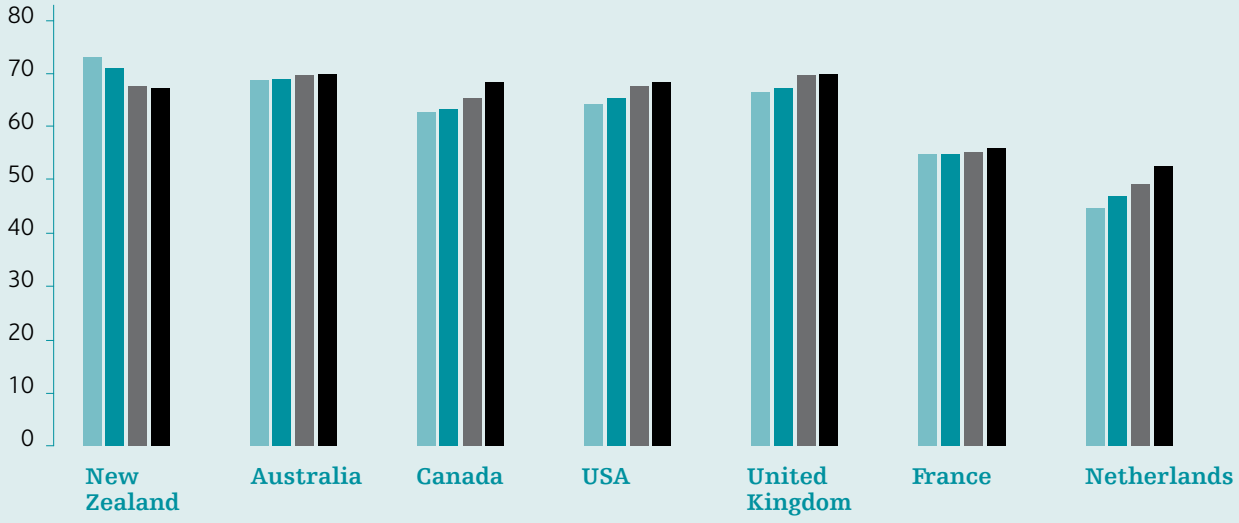
subsidy, and the differing levels of subsidy. Only those in state housing are eligible for the subsidy. People in community or private-sector housing are ineligible for the subsidy and can receive only the much lower supplement. The HSAG has recommended reviewing and aligning both payments to provide fair and equitable support for people's actual housing needs.

While the AS payment rate is higher in parts of the country where rents are more expensive, social housing providers described it as insufficient to meet high city rents. In the former Auckland, Manukau and North Shore cities, many tenants are paying more than 50 per cent of their income for private rental accommodation. Submitters suggested that the $1.2 billion expenditure on the AS in 2009 could be better spent in directly providing state or social housing than in subsidising private rents. [38] Others suggested that the supplement should be available only if the rental property had been granted a 'warrant of fitness' showing, for example, that the premises were healthy, safe and insulated and the rental agreement was fair. Other measures submitters suggested to improve rental affordability included making it illegal to charge letting fees for new tenants.

Recent New Zealand research has shown that refugee and some new migrant communities are particularly dependent on state housing or rental accommodation and are vulnerable to discrimination in the private rental market. [39] Some from non-English speaking backgrounds face significant barriers accessing material about housing support, including state housing and the Accommodation Supplement. The 2009 National Refugee Resettlement Forum identified the lack of suitable housing for refugee families as an ongoing issue. [40]

While refugees accepted under New Zealand's annual quota are automatically eligible for HNZC's social housing, this is not the case for those who arrive in New Zealand and apply for asylum under the Refugee Convention.

NEW ZEALAND'S HOME-OWNERSHIP DECLINE IS UNUSUAL AMONG WESTERN NATIONS



Source: National statistics based on 1991, 1996, 2001 and 2005 Censes in each country

38 HNZC data, cited in Housing Shareholders Advisory Group (2010)

39 Butcher A, Spoonley P and Trlin A (2006), *Being Accepted: The Experience of Discrimination and Social Exclusion by Immigrants and Refugees in New Zealand*, New Settlers Programme Occasional Publication No. 13 (Palmerston North: New Settlers Programme, Massey University); Ravenscroft, V (2008), A survey on the living conditions including housing, neighbourhood and social support of the Christchurch Refugee Community. unpublished Master of Health Sciences thesis, University of Canterbury; Halango, A M (2007), 'The Housing Experiences of the Auckland Somali Population and their Impact on the Resettlement Process'. unpublished MA thesis, Auckland University of Technology

40 Human Rights Commission (2010), *Tūi Tūi Tuituia – Race Relations in 2009* (Auckland: HRC), p 62

Refugee communities have advocated for settlement support to apply equally to convention refugees, quota refugees and family reunification members.

Home ownership affordability

Home ownership affordability has emerged as a significant issue in New Zealand. As the graph on the previous page shows, no other OECD country has experienced a fall in home ownership as big as New Zealand's since 1991. This in part reflects that New Zealand previously had higher levels of home ownership than other comparable Western countries. [41]

House prices and mortgage rates still have a long way to fall relative to earnings before the affordability of a newly built home returns to 1990s levels. In particular, an 'intermediate' group of low- and middle-income working households has emerged, which is earning too much to qualify for state housing but not enough to buy their own home without some assistance. [42] A comprehensive analysis of house price inflation and affordability issues was prepared by an expert group assembled by the Department of the Prime Minister and Cabinet in the last quarter of 2007. It concluded that "no one factor can account for the increases in house prices since 2001", and therefore "mitigating the future effects of declining affordability will require a mix of new policy settings". [43]

One home ownership affordability measure is the number of years of work earning the average weekly wage required to purchase a median-priced house. On this measure, home ownership affordability worsened in the housing boom from the early 2000s until its peak in mid-2007, before the recession. The subsequent fall in interest rates has improved housing affordability for those with a mortgage. Reserve Bank estimates show that mortgage-related payments on an 80 per cent mortgage for a median-priced house were 33 per cent of an average household's disposal income in late 2009, compared with 45 per cent in September 2008 and 48 per cent a year earlier. However, house price inflation over the last five years has been most pronounced for lower-priced houses. [44]

Home ownership is not always secure. [45] Rising unemployment has placed significant financial pressure on home owners with a mortgage. Total mortgagee sales for 2009 reached a record of 3024, over three times the number in 2008 and more than double the highest earlier number in 2002. The February 2010 figures showed the first sign of easing mortgagee sales since November 2007. However, the absolute level of mortgagee sales continues to remain high. In April 2010, there were 246 registered mortgagee sales, a 25 per cent increase since March, after adjusting for seasonal factors. [46]

Despite low and declining home ownership rates, research shows that both Māori [47] and Pacific peoples [48] have a strong desire to own their own homes, but face significant financial barriers. The inability to raise housing finance against multiple-titled owned land has restricted Māori aspirations to home ownership. However, papakainga housing and the Low Deposit Rural Lending programmes have been positive for Māori. In February 2010, the Government announced a new home-loan scheme for Māori who want to build on ancestral lands. This guarantees a no-deposit loan of $200,000 and up to $350,000 in some high-value areas.

Two recent Community Housing Aotearoa forums have focussed on affordable home ownership models in urban

41 Housing Shareholders Advisory Group (2010), p 28. This graph shows home ownership as a percentage of all occupied dwellings

42 Badcock B (2009), Government policies for increasing the supply of affordable housing. Paper by the Chief Advisor, Housing Sector Policy, Housing New Zealand Corporation

43 Department of the Prime Minister and Cabinet (2008), Final Report of the House Prices Unit: House Price Increases and Housing in New Zealand, pp. 23–24

44 Johnson A (2010)

45 Home ownership ia also not always a sustainably affordable or appropriate option for those with particularly low or insecure incomes

46 Terralink Mortgagee Sales report. Accessed 7 July 2010 from http://www.zoodle.co.nz/cms/terralink-mortgagee-sales-report

47 Waldegrave C, King P, Walker T and Fitzgerald E (2006), *Māori Housing Experiences: Developing Trends and Issues* (Wellington: Centre for Housing Research Aotearoa New Zealand)

48 Koloto A, Duncan I, de Raad J, Wang A and Gray A (2007), *Pacific Housing Experiences: Developing Trends and Issues* (Wellington: Centre for Housing Research Aotearoa New Zealand)

environments and increasing housing affordability for Māori.[49] A number of submitters proposed developing inclusionary zoning policies in areas with relatively high accommodation costs. This would mean that all developments over a certain size would be required to include a quota of affordable housing, or pay a levy towards an affordable housing fund.

HABITABILITY

Key factors that can affect the habitability of both state and private-sector housing are coldness, dampness and crowding, which can have debilitating health implications. A major British cohort study has shown that the effects of poor housing conditions are cumulative.[50] The longer people live in poor housing, the more it affects their mental and physical health, with children being particularly vulnerable.

Often disabled people face additional barriers when trying to obtain appropriate housing. A 2007 report confirmed that disabled people of all ages with moderate to severe disability affecting their mobility have significant unmet needs for accessible, safe, warm, comfortable housing. Particularly vulnerable were disabled young people in transition to adult life, and those dependent on health sector funding, renting, on low incomes and/or without family support.

Disabled people and the Government spend considerable amounts on basic housing modifications. The report concluded: "If basic house designs were more accessible, specialised home alterations tailored to an individual would be more affordable and better targeted".[51] This reflects the principles of universal design – creating products and environments that anyone can use, to the greatest extent possible, without the need for adaptation or specialised design. Universal design would enhance the habitability, accessibility and safety of housing for disabled people. Budget 2009 allocated $1.5 million towards promoting accessible housing for disabled people, through the Lifetime Design Standard.

Submitters emphasised the wider benefits of universal or lifetime design, for instance enabling older people to remain in their current home as they age. A number said consideration would need to be given as to where any universal design standards would sit within the Building Act and Code, and whether they would be compulsory or mandatory.

While legislation provides minimum standards that houses must reach for people to be able to live in them, there is no clear definition of what constitutes an acceptable quality house. In contrast, Scotland has set a Housing Quality Standard and targets for bringing houses in the social rented sector up to this level.[52] Similar standards exist in England.[53] A quality standard or rating scheme for rental properties would allow prospective tenants to better assess a property before they committed to a tenancy.

Cold and damp houses

Almost a third of New Zealand homes fall below the World Health Organisation (WHO) recommended indoor temperature of 18°C. The recommended temperature for young, elderly or disabled people is 21°C. Indoor temperatures below 16 °C significantly increase the risk of respiratory infections.[54]

More than a quarter of New Zealand homes have unflued gas heaters, which result in high levels of condensation inside houses. Pacific households are more likely to report cold and damp in their homes and to have higher rates of

49 Community Housing Aotearoa (2010), *A Call to Action from the 2010 National Māori Housing Conference* (Wellington: Community Housing Aotearoa); Community Housing Aotearoa (2010), Forum Report: Affordable home ownership models in urban environments (Wellington: Community Housing Aotearoa)

50 Marsh G et al (1999), *Home Sweet Home? The impact of poor housing on health* (London: Policy Press). Cited in Howden-Chapman P et al (2004), Retrofitting houses with insulation to reduce health inequalities: a community-based randomised trial. Paper presented at Second WHO Conference on Housing and Health, Vilnius, Lithuania

51 Saville-Smith K and Fraser R (2007), *Housing and Disability: Future Proofing New Zealand's Housing Stock for an Inclusive Society* (Wellington: Centre for Housing Research Aotearoa New Zealand)

52 Accessed 6 October 2010 from: http://www.scotland.gov.uk/Topics/Built-Environment/Housing/16342/shqs

53 Accessed 6 October 2010 from: http://www.statistics.gov.uk/ssd/surveys/english_house_condition_survey.asp

54 Auckland Regional Public Health Services (2005)

respiratory illnesses than Pākehā households.[55] A 2008 survey identified cold houses and lack of insulation as an issue of concern for Christchurch refugee communities.[56]

Between 1996 and 2009, 57,000 people have received state funding for insulation. Initially this was targeted to low- and middle-income households. The $323 million of Warm Up New Zealand: Heat Smart funding introduced on 1 July 2009 extended insulation to all homeowners regardless of their income level. Over four years, the initiative aims to insulate more than 188,500 New Zealand homes built before 2000. This equates to around a fifth of the 900,000 homes estimated to have substandard insulation.[57] However, a backlog of houses with substandard insulation remains. Low-income households may not be able to afford to top up the partial subsidy, and traditionally there has been slow uptake of similar schemes by landlords. In November 2009, an additional $24 million was announced to insulate the homes of low-income households and provide some iwi-specific initiatives.

HNZC's energy-efficiency retrofit programme has upgraded 17,300 of its less well-insulated houses. In the 2008 Budget, funding was allocated to retrofit the remaining 21,000 state houses requiring insulation, by 2013.

The recently released NZ Energy Efficiency and Conservation Strategy includes an objective to have "warm, dry and energy efficient homes with improved air quality to avoid ill-health and lost productivity". The cross-government Housing Energy Affordability Project led by the Ministry of Social Development seeks to find out more about the nature of energy affordability issues in New Zealand in order to inform future policies and programmes.

Homeowners in some areas have been faced with significant repair bills to remedy the negative effects of inferior building materials and poor construction quality-assurance measures. Those in residential rental accommodation can seek redress for dampness by making a complaint about the adequacy and quality of their accommodation under the Residential Tenancies Act. However, if the landlord does not wish to make such improvements, there is anecdotal evidence that tenants are unlikely to complain to the Tenancy Tribunal.

The prevalence of 'leaky buildings' prompted a review of the Building Act. In March 2010, the Court of Appeal found the former North Shore City Council liable for leaky buildings, because they have a duty of care to owners (including investors as well as owner-occupiers). In the decision, Justice Arnold stated: "The leaky-home problem is the result of what can fairly be described as systemic failure, occurring at all levels within the building industry, in both the public and private sectors."[58] This decision is being appealed to the Supreme Court. Nationally, an estimated $11.5 billion is required to repair approximately 42,000 affected homes.[59]

Crowding

The Ministry of Social Development's Social Report uses the Canadian Crowding Index as a proxy measure to monitor the incidence of crowding in the population. This defines crowding as those households requiring one or more additional bedrooms, based on specific criteria in the index.[60] In 2006, 389,600 people (10 per cent of the New Zealand resident population) lived in households requiring one or more additional bedrooms. Of these, 131,000 (3.5 per cent) needed two or more rooms.[61] Particular concerns are likely to arise when households exceed these criteria by significant amounts and/or for substantial periods of time.

55 Howden-Chapman P and Carroll P (eds) (2004), *Housing and health: Research, policy and innovations* (Wellington: Steele Roberts)

56 Ravenscroft V (2008)

57 Accessed 7 July 2010 from http://www.eeca.govt.nz/node/3107

58 North Shore City Council v Body Corporate 188529 [2010] NZCA 64 at [208], [2010] ANZ ConvR 10-020

59 Accessed 7 July 2010 from http://www.stuff.co.nz/national/3490763/Council-fails-in-fight-over-liability-for-leaky-homes

60 The Canadian Crowding Index defines a house as overcrowded if it has insufficient bedrooms according to the Canadian National Occupancy Standard, which states that no more than two people should share a room. Those who may share a room are couples, children under the age of 18 of the same gender, and children under the age of five. A child aged between six and 17 should not share with a child under the age of five. This can be perceived as Eurocentric, assuming a nuclear family rather than an extended family who may, culturally, want to utilise space in a different way.

61 Ministry of Social Development (2009), p 66

While total crowding levels have fallen slightly since 1986, Pacific, Māori, low income and young people remain more likely to live in crowded households. A projected rise in numbers of kaumatua by 2021 may place pressure on substandard housing in rural tribal areas, thus increasing the number of Māori who are marginally housed. [62]

Crowding remains a significant issue for Pacific people, with 43 per cent living in households requiring extra rooms in 2006, compared with 23 per cent of both Māori and Other ethnic groups and 20 per cent of Asian people. Crowding has emerged as an issue for refugee communities, due to relatively large family sizes and low incomes. [64]

Children are more likely to experience crowding than older people. Crowded houses correlate closely with poor health, poor educational achievement by children and young people, and psychological stress. [65]

The former Manukau City has the highest level of household crowding, at 25 per cent of people, followed by Opotiki (19 per cent), Kawerau District (18 per cent) and Porirua and the former Auckland cities (17 per cent). At the 2006 Census, an estimated 15.7 per cent of the Auckland regional population was living in housing that required one or more additional bedrooms – a total of 190,017 people, of which a third were children aged under 14 years. [67]

There is also a clear correlation between levels of income and home ownership and levels of crowding. Households in rental accommodation were more likely to be crowded (10 per cent) than those in dwellings owned with a mortgage (4 per cent) or mortgage-free (2 per cent).

Combining geographical and ethnicity data, more than 60 per cent of Pacific children and young people, and more than 40 per cent of those who are Māori, in the most deprived areas lived in overcrowded housing in 2006. [68]

Since 2001, HNZC and some district health boards have collaborated to implement the Healthy Housing Programme for HNZC tenants. It focusses on reducing diseases associated with crowding or poor insulation, ventilation or heating. A December 2007 evaluation found that healthier home environments resulted in increased household well-being and reduced hospitalisations. [69]

LOCATION

Housing location can play a significant role in building and maintaining a sense of community.

For some Māori, this includes the importance of being close to whānau and whānau land. Māori returning home to rural areas often have limited rental options and accept properties in poor condition. Those with traditional roots in coastal areas face high rental costs unless they move inland away from whānau land. [70]

Pacific communities have largely developed in industrialised urban areas, such as Auckland and Wellington, which have become higher-cost housing areas. Pacific peoples face challenges finding large enough houses in these areas within their income levels. [71]

62 Housing New Zealand Corporation (2007)

63 Ministry of Social Development (2009)

64 Ravenscroft V (2008); Halango A M (2007)

65 Baker M, Das D, Venugopal K, Howden-Chapman, P (2008), Tuberculosis associated with household crowding in a developed country, *Journal of Epidemiol Community Health* 62, pp.715–721; Action for Children and Youth Aotearoa (2003); Manukau City Council (2003).

66 Ministry of Social Development (2009)

67 Customised Statistics New Zealand data. Accessed 7 July 2010 from http://monitorauckland.arc.govt.nz/our-community/households-and-families/household-crowding.cfm

68 Craig E, Jackson C and Han D Y (2007), *Monitoring the health of New Zealand children and young people* (Auckland: Paediatric Society of New Zealand, New Zealand Child and Youth Epidemiology Service)

69 Housing New Zealand Corporation (2007)

70 Waldegrave C, King P, Walker T and Fitzgerald E (2006)

71 Koloto A et al (2007)

Refugee groups have prioritised the need for housing close to employment and social services, particularly those provided by a refugee's cultural community. [72]

Access to public transport, shopping, healthcare, recreation and work are all important considerations for housing location that impact on disabled people's ability to participate in their communities.

SECURITY OF TENURE

Figures from the Residential Tenancies Act Review show that the average duration of a tenancy is 15 months or less. However, a half of all tenancies end within 10 months and a third within six months. [73]

For families in rental accommodation, the social dislocation caused by multiple changes of address has particularly wide consequences. These include negative impacts on children's access to education; continuity of immunisation and other health checks; access to employment; and social cohesion.

New Zealand has legal protection from arbitrary eviction. Rent arrears are the most common reason for landlords' complaints to the Tenancy Tribunal. It is not possible to identify the number of tenants evicted for rent arrears, as the Department of Building and Housing does not collate the outcomes of Tenancy Tribunal applications. Submitters have raised concerns about whether, as the proportion of tenants increases, there is a need to review tenancy laws to improve security of tenure. While some improvements were introduced through the recent Residential Tenancy Amendment Act, its provisions set a lower level of security for people in boarding houses.

RECENT DEVELOPMENTS

In its April 2009 Universal Periodic Review report, the New Zealand Government acknowledged:

> **The provision of adequate housing remains a challenge for New Zealand, especially in terms of affordability and habitability. Vulnerable groups, such as Māori and Pacific peoples, are over-represented in rental and crowded housing. This over-representation correlates closely with low income, poor health and lower educational achievement by children and young people.** [74]

Other vulnerable groups include people with mental illness; young people with disabilities who are living in aged-care institutions; sole parents; families of refugees; new migrants; prisoners when released; and people coming out of hospital into inadequate housing, including those who have just given birth. To date, poverty levels among elderly people have been very low; however, this is partially attributable to high levels of home ownership. In the future it is likely that fewer older people will enter retirement owning their homes.

In February 2010, the Salvation Army published its third annual report tracking social progress across five key areas. It concluded that recent improvements to home ownership affordability had stalled, there is no likely improvement in rental affordability, and there is a growing housing shortage, particularly in Auckland. On a more positive note, housing debt had increased only slightly compared with previous years.

The balance between directing public taxpayer money towards improving home ownership, but possibly away from the needs of the most disadvantaged, goes to the heart of the right to housing. At the same time there is the need, and the potential, for evolving other models of social housing.

The Housing Shareholders Advisory Group's first report recommended: "HNZC, Department of Building and Treasury must share the task (and potentially key performance indicators too) of creating more homes and helping more families". [75] If investing in social housing is recognised as an investment in health, education and social development, then a wider range of government agencies, including population ministries, have critical roles to play.

72 Ravenscroft V (2008); Halango A M (2007)

73 Accessed 10 September 2010 from: http://www.dbh.govt.nz/rta-long-form-rental-housing-market. Average duration figures also cited in the Hansard record of the first reading of the Residential Tenancies Amendment Bill, Volume 654, p 3827. Accessed 6 October 2010 from: http://www.parliament.nz/en-NZ/PB/Debates/Debates/0/e/4/49HansD_20090526_00001208-Residential-Tenancies-Amendment-Bill-First.htm

74 Accessed 7 July 2010 from http://www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/Human rights/Universal-Periodic-Review/Final-Report/index.php

Conclusion
Whakamutunga

Prioritising the right to healthy, affordable housing has a demonstrably positive impact on health, educational development, and social and psychological wellbeing. This is particularly important for vulnerable groups, including children and young people, disabled people and the elderly. One of the challenges in making progress and furthering full realisation of this right is the siloed nature of New Zealand's system of government and public accounting. This makes it impossible to offset investment in one area against direct, measurable benefits in another. Yet a whole of government approach is required to address the housing issues outlined in this chapter.

With respect to the right to housing, New Zealand is taking progressive steps towards meeting or surpassing human rights standards in a number of key areas:

- There has been continued effort to improve the habitability of New Zealand homes, though there continues to be a backlog of houses with substandard insulation.
- There is growing awareness of the different forms of homelessness in New Zealand, and collaboration between local government and community housing providers to address these issues, but progress is slow.
- There are relatively strong legislative provisions to address housing-related forms of discrimination.
- Income-related rents have improved rental affordability for those in state housing and demonstrated how a co-ordinated approach to housing and welfare policies can improve living standards.

In other areas, however, New Zealand is falling well short of international human rights standards around the right to housing:

- The universal right to adequate housing set out in the ICESCR is not explicitly manifest in any New Zealand legislation.
- The extent to which housing-related legislation, policies and practices incorporate key housing indicators is not systematically monitored.
- Current levels of commitment to social housing provision by the New Zealand state, local-government and community-housing providers do not adequately meet the range of identified needs.
- Living standards are compromised for households paying more than 30 per cent of their income on housing – and many pay well in excess of those levels.
- There are high levels of household crowding, particularly in South Auckland, and among Pacific communities.
- The measures of affordability, accessibility and habitability that underpin the right to housing show that Māori, Pacific peoples and disabled people continue to be disadvantaged.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following priority areas to advance the right to housing:

Homelessness

Develop and implement regional and national strategies to reduce homelessness, including the collection and monitoring of official data on homelessness.

Social housing provision

Increase the supply and diversity of social housing provision, through enhanced direct provision by central and local government and support for community-housing providers.

Housing affordability

Enhance housing affordability by extending measures to support first-home ownership and improve rental affordability.

Housing design

Develop and implement universal design standards to improve housing habitability, accessibility, cultural adequacy and safety.

75 Housing Shareholders Advisory Group (2010), p 6

15. Right to Social Security

Tika ki te Hapori Haumaru

Everyone has the right to a standard of living adequate for their health and well-being.

Universal Declaration of Human Rights, Article 25 (plain text)

Introduction
Tīmatatanga

The right to an adequate standard of living is about "the human person's rights to certain fundamental freedoms, including freedoms to avoid hunger, disease and illiteracy". [1] It includes specific rights to adequate food, clothing and housing, and to social security and work. This right is essential in order to achieve other economic, social and cultural rights, such as the rights to health and education.

The right to an adequate standard of living provides a benchmark for assessing how well New Zealand provides both a safety net for groups vulnerable to poverty and opportunities for people to participate to their full potential. New Zealand does not have the same levels of abject or absolute poverty as some parts of the world. However, there are households that experience significant material disadvantage and hardship when compared with what the population as a whole would consider a minimum acceptable way of life. This is the concept of relative poverty.

This chapter has two aims. The first is to highlight how international human rights standards require countries such as New Zealand to consider the overall impact that laws, policies and practices have on those vulnerable to poverty. Through this lens, the right to an adequate standard of living brings together a range of rights that "have a direct and immediate bearing upon the eradication of poverty". [2]

Secondly, this chapter focusses specifically on one component of the right to an adequate standard of living – the right to social security. This follows the approach adopted in the Commission's 2004 report *Human Rights in New Zealand Today*, which highlighted the impact of housing shortages, costs and conditions on the living standards of New Zealanders. That material is updated in the chapter on the right to housing.

In the New Zealand context, a critical component of the right to an adequate standard of living is the right to social security. This chapter outlines how well New Zealand fulfils this right and what should be done better. These issues are increasingly important internationally as countries emerge from a global economic recession. Both the Organisation of Economic and Cultural Development (OECD) and the International Labour Organisation (ILO) have stressed the critical role social-security systems play as a means to stimulate economic growth and support social cohesion. [3]

International context
Kaupapa ā taiao

THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was the first to recognise the right to an adequate standard of living, which it defined in Article 11 as:

> **The right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and continuous improvement in living conditions.**

It has been said that the right to an adequate standard of living is the most central right in ICESCR, in the way that the rights to life, privacy and freedom of expression are central rights in the International Covenant on Civil and Political Rights (ICCPR). "Without some realisation of the right to an adequate standard of living, other economic

1 United Nations Economic and Social Council (2003), *Economic, social and cultural rights: Implementation of existing human rights norms and standards in the context of the fight against extreme poverty* (Geneva: United Nations), p 7

2 Committee on Economic, Social and Cultural Rights (2001), Poverty and the International Covenant on Economic, Social and Cultural Rights (25th session; E/C.12/2001/10). Accessed 25 June 2010 from http://www.unhchr.ch/tbs/doc.nsf/0/518e88bfb89822c9c1256a4e004df048?Opendocument

3 International Labour Office (2009), "Social security: responding to the crisis". *World of Work: the magazine of the ILO*, no. 67, December 2009, pp 13–16

Rohani Alexander and baby daughter Elsie at a regular checkup with midwife Lorraine.

and social, as well as civil and political, rights would have little meaning." [4]

New Zealand has ratified other international human rights conventions that reinforce the right to an adequate standard of living. These include the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), particularly Articles 10, 11 and 14; Articles 26 and 27 in the Convention on the Rights of the Child (UNCROC); and Articles 27 and 28 in the Convention on the Rights of Persons with Disabilities (CRPD). These conventions highlight specific obligations to ensure that the right to an adequate standard of living is realised for women, children and disabled people.

United Nations member states debated whether ICESCR should spell out detailed components of the right to an adequate standard of living, or phrase it in abstract terms. The final compromise decision was to specify some elements alongside a broader, general objective. Accordingly, the right to an adequate standard of living includes the rights to:

- adequate food, clothing and housing (Article 11)
- social security, including social insurance (Article 9)
- work and equal employment opportunity (Articles 6 and 7).

As the Committee on Economic, Social and Cultural Rights (CESCR) observed in a 1999 general comment:

> **… malnutrition, under-nutrition and other problems which relate to the right to adequate food and the right to freedom from hunger also exist in some of the most economically developed countries. Fundamentally, the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, inter alia because of poverty, by large segments of the world's population.** [5]

Similarly, while there is no overall shortage of food supply in New Zealand, there are households that do not have sufficient income to feed themselves and pay for other basics, such as accommodation, heating and clothing.

This chapter focusses primarily on the right to social security as a prerequisite for an adequate standard of living and thus freedom from poverty. The right to housing and the right to work are covered in separate chapters.

Standards of living vary within any community, and people have the right to make choices about how they wish to live. However, everyone should have equal access to education and employment opportunities, and to a safety net of social security provisions that enable them to participate in their community.

The CESCR has not defined an adequate standard of living, but has clarified that universal minimum core obligations (for example around the right to social security) are necessary but not sufficient. In addition, each state party must progressively take steps to fully realise the right to an adequate standard of living, making the maximum use of its available resources.

THE RIGHT TO SOCIAL SECURITY

> **Everyone, as a member of society, has the right to social security.**
>
> **Everyone has the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.**
>
> Articles 22 and 25(1) of the Universal Declaration of Human Rights (UDHR)

The right to social security, including the requirement to address the specific needs of women, children and young people, and disabled people, is detailed in:

- Articles 9 and 10 of ICESCR
- Article 14 of CEDAW
- Articles 26 of UNCROC
- Article 28 of CRPD.

New Zealand has ratified each of these covenants and conventions.

The right to social security is of central importance in

4 Bailey, P (1997), 'The Right to an Adequate Standard of Living: New Issues for Australian Law', *Australian Journal of Human Rights*, vol 22. Accessed 25 June 2010 from http://www.austlii.edu.au/au/journals/AJHR/1997/14.html#fn4#fn4

5 Committee on Economic, Social and Cultural Rights (2009), general comment 12: The right to adequate food. UN Doc. E/C. 12/1999/5, para 5. Accessed 25 June 2010 from http://www.unhchr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9

guaranteeing human dignity for people when circumstances deprive them of the capacity to fully realise their economic, social and cultural rights. [6] Social security, and its interface with the tax system, redistributes resources and thus plays an essential role in reducing and alleviating poverty and promoting social inclusion. However, social security is regarded as being a social good in and of itself, and not merely an instrument of economic or social policy. [7]

CESCR has identified five essential elements of the right to social security:

- Availability of a sustainable social security system – established under domestic law and administered and supervised by public authorities
- Coverage of social risks and contingencies – specifically to provide health-care and benefits due to sickness, old age, unemployment, employment injury, maternity or disability, and family and child support, including to survivors and orphans
- Adequacy – of amount and duration, respecting the principles of human dignity and non-discrimination
- Accessibility – coverage for all, especially those who are marginalised; eligibility criteria must be reasonable, proportionate and transparent; any contributory social security scheme must be affordable; beneficiaries must have information and be able to participate in the scheme's administration and have physical access to its services
- Relationship to other rights – other measures are necessary to complement the right to social security, including rehabilitation, childcare and welfare, and measures to combat poverty and social exclusion.

CESCR also highlights the importance of non-discrimination, particularly for groups who traditionally face difficulties in exercising the right to social security. These include women and children; disabled people; older people; the unemployed; sick; injured; domestic or informal workers; refugees; non-nationals; and prisoners.

The CESCR's 2008 general comment spells out the minimum core obligations required by all state parties. The minimum essential level of social security benefits must be sufficient to enable all individuals and families to acquire at least essential healthcare, basic shelter and housing, water and sanitation, foodstuffs, and education. In addition, each state must respect existing social security schemes and protect them from unreasonable interference; adopt and implement a national plan of action; and monitor the realisation of the right to social security. [8] Each country must also demonstrate that every effort has been made to use all resources at its disposal to satisfy these minimum obligations. [9]

FREEDOM FROM POVERTY

In 2001, CESCR adopted a statement on poverty. [10] It noted that while the term is not explicitly used in the ICESCR, the Preamble emphasises the importance of "freedom from want". Furthermore, the rights to work, an adequate standard of living, housing, food, health and education, which lie at the heart of the covenant, are essential immediate steps required to combat poverty. The statement goes on to emphasise the scale of poverty and the disproportionate burden borne by women and girls. It emphasises the importance of a human rights approach to poverty-eradication polices and action plans.

In 2003, during New Zealand's second periodic report on ICESCR, the concluding observations from the committee specifically recommended that New Zealand adopt a national plan to combat poverty. [11] In its 2008 Universal

6 Committee on Economic, Social and Cultural Rights (2008), general comment 19. The right to social security, para 1. 39th session: E/C.12/GC/19. Accessed 25 June 2010 from http://www.unhcr.org/refworld/docid/47b17b5b39c.html

7 ibid, para 10

8 ibid, paras 59 and 60

9 ibid, para 42

10 Committee on Economic, Social and Cultural Rights (2001)

11 Committee on Economic, Social and Cultural Rights (2003), Concluding Observations / Comments: New Zealand. 30th session: E/C.12/1/Add. 88. Accessed 25 June 2010 from http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.88.En?Opendocument

Periodic Review (UPR) submission, the Human Rights Commission emphasised this as a top priority, stressing that such a national plan required targets. These were reinforced in recommendations from other countries, such as Canada, during the review process and by the Human Rights Council's UPR Working Group.

In richer nations there is growing use of the term 'poverty', and a range of poverty indicators have been developed and are in widespread use. Income poverty measures adjust household income to take into account the number of adults and children living in a household, in order to calculate how much disposable income each household would need to be in an equivalent financial position. Poverty rates measure the percentage of people whose equivalised disposable household income falls below a given level or poverty line. Commonly, that poverty line is either 50 or 60 per cent of the median income of all households. [12] These measures are based on the notion that poverty is 'relative' and must be defined in comparison with the incomes of others.

Poverty and material hardship can also be measured using non-income measures. The fewer household goods, food, housing, education and health costs that people can afford, and the more they have to economise because of limited financial resources, the higher will be their measured level of hardship. These are relative measures, assessing actual living conditions relative to what most people experience or what most consider to be necessities in their society.

Across Europe, there are comprehensive poverty and inequality indicators that sit within national action plans aimed at eradicating poverty and social exclusion. In the United Kingdom, the Equality Act received Royal Assent on 8 April 2010. [13] Part 1 introduces a requirement that key public bodies have due regard to the desirability of reducing socio-economic inequalities when making strategic decisions. [14] It complements a Child Poverty Act and Child Poverty Duty, which set out clear targets and measures, require accountability from specified ministers, and ensure that local authorities create local strategies to reduce child poverty. [15]

In December 2008, the Ontario Government released 'Breaking the Cycle: Ontario's Poverty Reduction Strategy'. [16] The strategy's target is to reduce the number of children living in poverty by 25 per cent over five years. In May 2009, the Poverty Reduction Act 2009 was passed with unanimous consent from all parties. It will require successive governments to:

- report annually on their initiatives to reduce poverty and on key indicators of opportunity, such as income levels, education, health and housing
- develop a new strategy at least every five years
- consult before developing these strategies, including consultation with those living in poverty
- set a specific poverty-reduction target at least every five years.

NEW ZEALAND'S OBLIGATIONS

In the case of economic, social and cultural rights, once a State party ratifies the relevant convention, there is a requirement that minimum subsistence rights are provided immediately. In addition, it is expected that full realisation of these rights will be progressively implemented, to the maximum of a country's available resources. In general, the United Nations recommends action plans, targets, monitoring and other strategies to ensure that the most vulnerable and disadvantaged receive assistance as a priority.

CESCR has provided guidance about the nature of state parties' obligations, as set out in Article 2, paragraph 1 of

12 Fletcher M and Dwyer M (2008), *A Fair Go for all Children: Actions to address child poverty in New Zealand. A report for the Children's Commissioner and Barnardo's* (Wellington: Children's Commissioner), p 21

13 Equality Act 2010. Accessed 25 June 2010 from http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100015_en.pdf

14 Some provisions in the Equality Act come into force on 1 October 2010. The socio-economic duty is one of a range of provisions that 'Ministers are considering how to implement'. Accessed 28 September 2010 from http://www.equalities.gov.uk/equality_bill.aspx

15 Child Poverty Act 2010. Accessed 25 June 2010 from http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100009_en.pdf

16 Cabinet Committee on Poverty Reduction (2008), Breaking the Cycle: Ontario's Poverty Reduction Strategy. Ontario: Ontario Government. Accessed 19 October 2010 from http://www.children.gov.on.ca/htdocs/English/documents/growingstronger/Poverty_Report_EN.pdf

ICESCR. These are outlined in its general comment 3 [17] and in a 2007 statement. [18] In particular, the committee has reinforced that these objectives apply even in times of severe resource constraints. In addition, if a state party fails to take steps or adopts regressive measures, the burden of proof rests on its shoulders to show that careful consideration has been given to all relevant rights and that full use is being made of available resources.

As a state party to ICESCR, New Zealand has a duty to respect, protect and fulfil the right to an adequate standard of living, including the right to social security.

New Zealand context
Kaupapa o Aotearoa

THE NEW ZEALAND LEGISLATIVE AND REGULATORY FRAMEWORK

The Ministry of Social Development (MSD) is the lead government agency charged with setting priorities across the social sector, co-ordinating the actions of other agencies and tracking changes in the social well-being of New Zealanders. It has a responsibility to provide policy advice and deliver social services and assistance to children and young people; working age people; older people; and families, whānau and communities. [19]

MSD administers a number of significant statutes governing administration of income-support programmes that are relevant to the right to social security, particularly the:

- Social Security Act 1964
- New Zealand Superannuation and Retirement Income Act 2001
- Employment Services and Income Support (Integrated Administration) Act 1998.

The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 provide protection from discrimination when accessing social services, including those provided by government agencies.

New Zealand today
Aotearoa i tēnei rā

> **There can be no difference of opinion as to the tyranny of privation and want. There is no dictator more terrible than hunger. And we have found in New Zealand that only with social security in its widest sense can the individual reach his full stature.**
>
> New Zealand delegate to the UN's Paris Assembly's debate on the UDHR, 1948

The following assessment of the right to social security focusses on social security benefits and superannuation. Other forms of social security not discussed (relevant to the chapters on the rights to work, health and education and the rights of disabled people) include:

- employment subsidies
- family assistance, including paid parental leave and subsidies for early childhood education, and care or out-of-school care
- subsidised residential and long-term assistance for the elderly, disability support services, and reduced prescription and doctors' fees to those with a Community Services Card and some with a SuperGold Card
- student allowances and student loans
- Accident Compensation.

After summarising relevant complaints and enquiries received by the Commission, this section looks at four of the five essential elements of the right to social security: availability of a sustainable social-security system;

17 Committee on Economic, Social and Cultural Rights (1990), general comment 3: The nature of states parties' obligations (art 2, para 1 of the covenant), 5th session, E/1991/23. Accessed 25 June 2010 from http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument

18 Committee on Economic, Social and Cultural Rights (2007), An evaluation of the obligation to take steps to the 'Maximum of available resources' under an optional protocol to the covenant, 38th session, E/C.12/2007/1. Accessed 25 June 2010 from http://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf

19 Ministry of Social Development (2008), briefing to incoming minister (Wellington: MSD)

coverage of social risks and contingencies; accessibility; and adequacy of assistance. The fifth component – other necessary complementary measures – is implicit in later discussions about policy changes that have influenced the level of relative poverty in New Zealand.

COMPLAINTS AND ENQUIRIES TO THE COMMISSION

In the eight years from January 2002 to December 2009, the Commission received 1038 complaints or enquiries about social security issues, with between 99 and 169 approaches each year.

The majority of these approaches (59 per cent) involved policy issues. Over a third of all policy issues (229, 37 per cent) were about entitlement to assistance. In addition 68 (11 per cent) were related concerns when someone's actual or perceived relationship status impacted on their benefit eligibility. The other policy issue consistently raised has been about the low level of benefit payments (54 approaches).[20]

In 2001, the Child Poverty Action Group (CPAG) complained to the Human Rights Commission that the Child Tax Credit (subsequently renamed the In Work Tax Credit) amounted to discrimination based on employment status. The credit was in the form of means-tested payments to families with children. One of its purposes was said to be to alleviate child poverty. However, it excluded children in the poorest families – those receiving a benefit.

When this complaint was not settled by mediation, the Office of Human Rights Proceedings provided CPAG with legal representation before the Human Rights Review Tribunal. In 2008, the Tribunal found that the tax credit was discriminatory, but that such discrimination could be "justified in a free and democratic society", and therefore did not breach the Human Rights Act. In September 2010, as this chapter was being finalised, this decision was being appealed to the High Court.

Between 2005 and 2009, approximately 40 approaches have been made to the Human Rights Commission relating to tax issues. Almost a third of these (13) were in response to tax cuts announced in 2008 that excluded beneficiaries, whose benefits are set at net (after-tax) rates. While benefits are adjusted annually in line with changes to the Consumer Price Index, given historical cuts, concerns remain as to the adequacy of benefit levels.

AVAILABILITY AND COVERAGE

Social security is available in New Zealand, based on legislation and regulations administered by relevant government agencies, predominantly the Ministry of Social Development. Its comprehensive coverage includes all social risks and contingencies identified in international human rights standards.

Those standards require a social security system to be sustainable. Concerns about the financial sustainability of provisions have centred in particular on the costs of universal superannuation, introduced in 1976.[21] In addition, debates have highlighted the social costs and exclusion arising from intergenerational dependency on benefits. The relationship between the tax and benefit systems is crucial in enabling social mobility, including movement into paid work and off benefits. This is discussed in the concluding section of this chapter.

ACCESSIBILITY

Social security benefits are available for people who are: unemployed and actively seeking work; unavailable for paid work due to sickness or chronic health conditions; sole parents; young people who have no financial support from their family; and widows. All these benefits have eligibility criteria, including a minimum period of residence, and are not available to those who have a partner in paid employment.

In contrast, New Zealand Superannuation is paid as a universal benefit, to any citizen or permanent resident aged 65 or over who has lived in New Zealand long enough to meet the eligibility criteria. It is paid as of right, whether or not the person is retired or has a partner who is in paid employment, and is not means-tested or dependent on marital status. The level of payment is set at a fixed portion of the average wage, but is reduced

20 The remaining 41 per cent of approaches to the Commission related to treatment by government agencies providing these services. In most cases, service-related matters do not involve discrimination under a ground covered in the Human Rights Act, and the Commission refers people to government agencies' review processes or to the Office of the Ombudsmen

21 Preston D (1999), *Retirement Income in New Zealand: the historical context* (Wellington: Office of the Retirement Commissioner) (updated 2001 and 2004)

for those with a partner and for single people living with others. It is also affected by any overseas pensions or benefits.[22] Concerns have been raised about inequities and anomalies resulting from section 70 of the Social Security Act, which deducts any overseas state pension from any individual's (or their partner's) New Zealand Superannuation entitlement.[23]

The benefit system in New Zealand has two tiers, with core benefits supplemented by discretionary hardship, special or temporary allowances, some of which must be repaid. A 'disability allowance' is available to cover regular expenses due to a disability. Additional hardship assistance is available either as a one-off payment (the 'special needs grant' to meet the costs of food, bedding and emergency dental or medical treatment), a weekly payment for a short period of time ('temporary additional support'), or a loan which must be repaid. Past concerns by beneficiary advocacy groups about lack of transparency around granting of second-tier benefits resulted in MSD establishing a formal process for consulting with beneficiary groups around operational policy issues.

ADEQUACY

The 1972 Royal Commission on Social Security recommended that the welfare system ensure beneficiaries had a standard of living at least similar to that of other New Zealanders, so that they were able to participate in and feel they belonged to the community at large.[24] The 1988 Royal Commission on Social Policy concluded that people required "access to a sufficient share of income and other resources to allow them to participate in society with genuine opportunity to achieve their potential and to live lives they find fulfilling".[25]

This implies that core benefits need to be regularly adjusted to reflect changes in actual living costs, and to maintain relativity with standards of living across the wider community. The Child Poverty Action Group has recommended, for example, setting net income for those on benefits at the 60 per cent poverty line.[26]

The Social Security Amendment Act 2007 introduced sections 1(a) and 1(b) to the Social Security Act 1964, specifying its purpose and general principles. These do not contain any reference to social inclusion. The rationale for providing financial support is more narrowly defined as "to help alleviate hardship". This raises a question around whether benefit adequacy is solely to address absolute deprivation, or whether the financial position of those on benefits relative to others is also deemed relevant.

In terms of adequacy, the real value of core benefits, including family tax credits, remains well below levels prior to cuts in the 1991 Budget.[27] Even when accommodation and special benefit/temporary assistance supplements are taken into account, the level of financial support to beneficiaries has fallen in real terms since 1991.[28]

Working for Families

Since 2000, the two most significant policy interventions in addressing relative poverty rates have been reinstatement of income-related rents in 2000, and the progressive introduction of the 'Working for Families' package from 2004 to 2007.[29]

Working for Families changed the tax credits available to families with dependent children in three fundamental ways. It increased both the total amount of assistance available and the number of families entitled to receive it.

22 Other changes to living situations can affect eligibility, including overseas travel and admission to a rest home. A veteran who has reached the qualifying age for New Zealand Superannuation may qualify for a veteran's pension. This is paid at the same rate as New Zealand Superannuation. It is taxed but not asset-tested and, unlike superannuation, veteran's pension payments are not reduced should a veteran require long-term hospital care.

23 St John S and Dale C (2010), 'Pension rules causing stress and ill health', *New Zealand Herald*, 17 August. Accessed 24 September 2010 from http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10666540

24 Krishnan V (1995), 'Modest but adequate: an appraisal of changing household income circumstances in New Zealand', *Social Policy Journal of New Zealand* 1, 4, pp 76–97

25 Royal Commission on Social Policy (1988), *The April Report – Report of the Royal Commission on Social Policy,* volume 1, (Wellington: RCSP), p 731

26 St John S and Wynd D (Eds) (2008), *Left behind: How social and income inequalities damage New Zealand childre*n (Auckland: CPAG).

27 Fletcher M and Dwyer M (2008), p 28

28 ibid; p 37

29 Perry B (2009), Household incomes in New Zealand: trends in indicators of inequality and hardship 1982–2008 (Wellington: MSD), p 104

In 2004 and 2005, Working for Families included changes to the Accommodation Supplement, which helped reduce outgoings relative to incomes for low-income working families and those beneficiaries with children who earned income. [30]

From 2004 to 2008, household incomes below the median grew more quickly than those above it, for the first time in 25 years. However, by 2009, rising housing costs had cancelled out final gains from the Working for Families package that were rolled out in 2007. [31]

Working for Families also tilted provisions in favour of non-beneficiary families, as those on benefits did not receive the In Work Tax Credit, and the child component of some benefit rates was removed. Initial MSD analysis in 2006 showed that after paying for housing, beneficiary families' income remained below recognised poverty lines. [32] For those families dependent solely on a benefit, household income after housing costs was less than 40 per cent of the median household income. At those income levels, there is nothing in reserve. [33]

For some families with children where the unemployment or domestic-purposes benefit was their sole source of income, financial hardship was acute. For example, those living in accommodation supplement areas 2 or 3 (most towns or cities, excluding central Auckland or the North Shore) had household incomes of between 30 per cent and 35 per cent of median disposable incomes. [34]

New Zealand Superannuation

Hardship rates among older New Zealanders are very low by international standards. This reflects both public provision of universal superannuation and levels of private savings and home ownership among the current elderly population. [35] Eligibility for New Zealand Superannuation is universal, though the age of eligibility has risen over time to 65. New Zealand Superannuation payment rates are adjusted annually, using a mix of wage and price changes.

The 2009 General Social Survey confirmed that those aged 65 or older were between two and two-and-a-half times less likely to report inadequate income than any other younger age groups. It has been argued that "a similar approach to setting and adjusting working-age benefits would better maintain levels over time and could help reduce child poverty". [36]

FREEDOM FROM POVERTY

In New Zealand, an official commitment to eliminate poverty emerged in the context of the Agenda for Children (launched in June 2002). In 2005, Working for Families was explicitly framed as an "offensive on child poverty". [37]

However, New Zealand, like many other countries, does not have an official measure of poverty. [38] Given its complex nature, poverty cannot be captured by a single indicator. Each measure shows a different aspect of relative poverty or material hardship.

MSD's analysis of trends in inequality and hardship combines both income poverty measures and living standards research. [39] It defines poverty as "exclusion

30 Further discussion about the accommodation supplement and housing affordability appears in the chapter on the right to housing.

31 Perry B (2010), *Household Incomes in New Zealand: trends in indicators of inequality and hardship 1982-2009* (Wellington: MSD)

32 Ministry of Social Development (2007), *Pockets of significant hardship and poverty* (Wellington: Centre for Social Research and Evaluation, MSD)

33 ibid, p 1

34 ibid, p 1

35 Perry, B. (2009b), Non-income measures of material wellbeing and hardship: first results from the 2008 New Zealand Living Standards Survey, with international comparisons. Working Paper 01/09 (Wellington: MSD), p 53

36 Fletcher M and Dwyer M (2008), p 38

37 Clark H (2005), 'Speech from the throne', delivered by the Governor General Dame Silvia Cartwright at the State Opening of Parliament, 8 November. Accessed 25 June 2010 from http://www.beehive.govt.nz/node/24330

38 Perry B (2008), *Household incomes in New Zealand: trends in indicators of inequality and hardship 1982-2007* (Wellington: MSD), p 57

39 Similarly the OECD notes that "measures of material deprivation point to the importance of looking at factors that go beyond the income and earnings capacity of people, to other constituents of an acceptable standard of living". Organisation for Economic Co-operation and Development (2008), *Growing unequal? Income distribution and poverty in OECD countries* (Paris: OECD) p 194. Accessed 6 October 2010 from http://www.oecdbookshop.org/oecd/display.asp?sf1=identifiers&st1=9264044183

from the minimum acceptable way of life in one's own society because of inadequate resources". [40] The section of this chapter analysing child poverty draws heavily on this MSD data.

Since 2001, MSD has produced its annual Social Report, which analyses and comments on New Zealand's social progress and helps the Government set its areas for action. Economic standards of living are measured by five indicators, monitoring market income per person, income inequality, the population with low incomes, housing affordability and household crowding.

The Ministry of Health's Atlas of Socio-Economic Deprivation enables policy-makers to visualise socio-economic divisions within New Zealand society. [41] Māori and Pacific peoples and children are disproportionately represented in the most deprived areas of the country. [42]

Data from Statistics New Zealand's first General Social Survey, released in November 2009, provides further indications of material hardship among some in New Zealand. Around one in seven people said they did not have enough money to meet their everyday needs. Almost a third of those without enough money were Pacific peoples (31.3 per cent), a quarter were Māori, and 20 per cent were Asian. Inadequate benefit and income levels within refugee communities were also raised as issues at the National Refugee Resettlement Forum and the Refugee Health and Wellbeing conference in 2009. [43]

The General Social Survey does not provide disaggregated data for disabled people. However, the New Zealand Household Disability Survey indicates high levels of unemployment and underemployment among disabled people. [44] This significantly reduces the income available to disabled people. At the same time, many have high direct and opportunity costs resulting from their disability. Together these factors make disabled people particularly vulnerable to poverty. The absence of sufficient data compounds the invisibility of these issues.

Child poverty

Children are dependent on adults for food, clothing and housing. When parents do not have sufficient income, there is a direct impact on their children. Redistribution through the tax-welfare system plays a particularly critical role in mitigating child poverty generated by the market distribution of incomes. [45]

Before Working for Families, New Zealand's expenditure on financial support for children was among the lowest in the OECD. [46] Working for Families improved child poverty outcomes among the employed poor. [47] Child poverty rates fell from 26 per cent to 22 per cent, reversing the strong rise from 1998 to 2004. [48]

Yet these gains have not reached the poorest children in New Zealand. The graph below shows the impact that policy decisions around benefit rates, Working for Families and income-related rents have had on child poverty rates. It compares the experiences of 'workless households' with other households where at least one adult is in paid employment.

Children in sole-parent families are more than three times more likely to be at risk of hardship (46 per cent) than

40 Perry B (2008), p 59

41 See White P, Gunston J, Salmond C, Atkinson J and Crampton P (2008), *Atlas of Socioeconomic Deprivation in New Zealand NZDep2006* (Wellington: Ministry of Health). The atlas is based on the New Zealand Index of Deprivation developed by the Wellington School of Medicine, Otago University, and ranks all areas of New Zealand from 1 (least deprived) to 10 (most deprived). Accessed 25 June 2010 from http://www.moh.govt.nz/moh.nsf/pagesmh/3357?Open

42 White et al (2008)

43 Human Rights Commission (2010), *Tūi Tūi Tuituia – Race Relations in 2009* (Auckland: HRC), p 62

44 Statistics New Zealand (2008), *Disability and the Labour Market in New Zealand in 2006* (Wellington: SNZ)

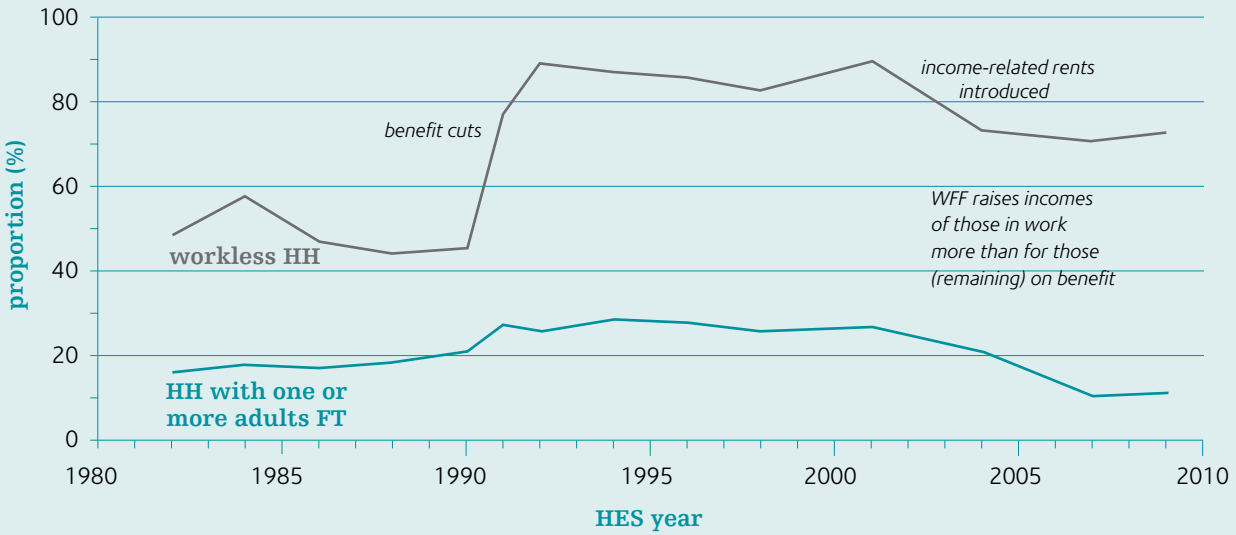
45 Fletcher M and Dwyer M (2008), p 37

46 Stephens R (2003), 'The level of financial assistance to families with dependent children: a comparative analysis', *Social Policy Journal of New Zealand*, issue 20, June, pp 173–196

47 Perry B (2009)

48 Using incomes before housing costs (BHC) and a moving-line poverty measure.

POVERTY RATES FOR CHILDREN IN 'WORKLESS' AND 'WORKING' HOUSEHOLDS [49]



those in two-parent families (14 per cent). [50] Beneficiary families with dependent children have a hardship rate of 51 per cent, around five times that for working families with children (11 per cent). Māori and Pacific peoples have hardship rates two to three times those in the European or Other ethnicity groups. [51]

Analysis of 2003–04 data identified that while 23 per cent of all children lived in poor households, this was most prevalent for the combined category of Pacific and Other children (40 per cent), and for Māori children (27 per cent). Ethnicity breakdowns of child poverty data are no longer reported because low sample sizes raise concerns about data quality. [52] This severely limits the ability to monitor the number and proportion of Māori or Pacific children living in poverty.

Children with disabilities appear to be significantly over-represented in beneficiary families, and are therefore vulnerable to poverty. In 2007, two out of every five children with a disability severe enough for their carers to receive the child disability allowance were living in families dependent on a core benefit or New Zealand Superannuation. [53]

A comprehensive 2008 report on child poverty prepared for the Office of the Children's Commissioner recommended actions needed in the health, education, employment, housing, social security and tax sectors. Even more fundamentally, it called for a cross-government commitment to eliminating child poverty, with intermediate milestones and clear measurable targets for key indicators in the areas of education, housing and health. [54]

In November 2009, the first data from the Children's Social Health Monitor were released. This set of both economic and health/well-being indicators was designed by health professionals to monitor the impact of the recession on child well-being. It concluded:

49 This graph is based on a poverty measure set at 60 per cent of median household incomes, after housing costs have been deducted. It uses a fixed-line approach which is adjusted in line with the Consumer Price Index.

50 Perry B (2010)

51 Perry B (2009b)

52 Fletcher M and Dwyer M (2008), p 25

53 Fletcher M and Dwyer M (2008), p 27

54 Fletcher M and Dwyer M (2008)

[T]he available evidence would suggest that one in five New Zealand children are already exposed to low family incomes as a result of their parents' benefit status.
… Further, the Living Standards surveys suggest that New Zealand's current benefit provisions will be unable to protect these children from severe or significant hardship, and that some of the adaptations families make in response to their inadequate resources may have detrimental health consequences for their children. [55]

New Zealand's child poverty rates are above average for the OECD. In 2009, the OECD's first ever report on outcomes for children concluded that "New Zealand needs to take a stronger policy position on child poverty and child health, especially during the early years when it is easier to make a long-term difference". [56] It identified New Zealand Government spending on children as being considerably below the OECD average, particularly for young children (where New Zealand spends less than half the OECD average).

THE RIGHT TO FOOD

In New Zealand, the right to food is compromised when people do not have sufficient income to feed themselves and their families adequately. Food security is an internationally recognised term that encompasses assured access to sufficient food that is nutritious, of good quality and safe; meets cultural needs; and has been acquired in socially acceptable ways. [57] Large families, sole parents and the unemployed are particularly vulnerable to food insecurity. [58] In 2002, over half of households with Pacific children and more than a third of those with Māori children reported that "food runs out because of lack of money" either often or sometimes. [59]

Poverty and food insecurity have a detrimental impact on health outcomes. [60] Food choices are likely to be compromised for families on the minimum wage or receiving benefits, who would need to spend between 42 per cent and 75 per cent of their net income, after fixed housing costs, to purchase a diet that meets Ministry of Health nutrition guidelines. [61] For these reasons, there has been debate in New Zealand as to whether healthy food should be exempt from the Goods and Services Tax (GST) or from increases to GST. [62] Australian research has recommended that benefit rates need to be calculated to meet actual costs associated with leading a healthy life. [63] A 2009 New Zealand report has also recommended a 'Smart Card' that provides discounts on healthy food. [64]

55 The Children's Social Health Monitor (2009), Introduction to the Children's Social Health Monitor. Accessed 25 June 2010 from http://www.nzchildren.co.nz/documents/introduction.pdf

56 Organisation for Economic Co-operation and Development (2009), *Doing Better for Children* (Paris: OECD). Accessed 25 June 2010 from www.oecd.org/els/social/childwellbeing

57 Food security is measured in the New Zealand Nutrition Surveys. All indicators of food insecurity were higher in the 2002 Children's Nutrition Survey, compared with the 1997 Adult Nutrition Study. Both reports are accessible at http://www.moh.govt.nz/moh.nsf/indexmh/dataandstatistics-survey-nutrition. Key results from the 2008/09 Adult Nutrition Survey are due to be released in 2011

58 Carter K, Crohn M, Blakely T, Heyward M and Richardson K (2009), Cohort Profile: Survey of Families, Income and Employment (SoFIE) and Health Extension (SoFIE-health). *International Journal of Epidemiology* 39(3), pp 653–9

59 Ministry of Health (2003), *NZ Food NZ Children: Key Results of the 2002 National Children's Nutrition Survey* (Wellington: MoH), p 110

60 NZ Network Against Food Poverty (2000), *Hidden Hunger – Food and Low Income in New Zealand* (Wellington: NZNAFP); Parnell W and Bethell S (2000), Nutritional consequences of poverty in developed countries. In Mann J and Truswell S (eds.), *Essentials of Human Nutrition* (New York: Oxford University Press), pp 581–588

61 Robinson V (2010), *Food Costs for Families: analysis of the proportion of the minimum wage and income support benefit entitlements that families need to purchase a healthy diet* (Wellington: Regional Public Health)

62 The Goods and Services Tax (Exemption of Healthy Food) Amendment Bill. Accessed on 25 September 2010 from http://www.legislation.govt.nz/bill/member/2010/0140/latest/whole.html

63 Kettings C and Sinclair A (2009), 'A healthy diet consistent with Australian health recommendations is too expensive for welfare-dependent families'. *Australian and New Zealand Journal of Public Health,* 33(6), pp 566–572

64 Bowers S et al. (2009), *Enhancing food security and physical activity for Māori, Pacific and low-income peoples* (Wellington: Clinical Trials Research Unit, University of Auckland; GeoHealth Laboratory, University of Canterbury; Health Promotion and Policy Research Unit, University of Otago; Te Hotu Manawa Māori)

Use of food banks is one indicator of food insecurity. Comprehensive statistics are available about larger food bank operations co-ordinated by churches and community organisations. In addition, there are many small-scale, local, informal food banks throughout New Zealand.

The Salvation Army has a food bank network involving 48 community ministry centres and 106 churches. In the year to 30 December 2009, nearly 47,000 food parcels were provided to more than 25,000 families. This was the second year in a row that the Salvation Army experienced a large increase in demand, with 29 per cent growth in the year to December 2008 and 39 per cent growth in the following 12 months.[65] This rise has occurred across all parts of the country.

Figures collated by the New Zealand Council of Christian Social Services[66] for the year to September 2009 show an average increase of almost 30 per cent in the use of all other large food banks around New Zealand. For some urban food banks in Hamilton and South Auckland, demand has more than doubled.

RECENT DEVELOPMENTS

In February 2010, the Salvation Army published its third annual report tracking social progress across five key areas. It found that the impact of the recession on vulnerable groups had accelerated in 2009, and children and young people had been the most affected. The increased demand for its services led the Salvation Army to describe food banks as the unsustainable third tier of benefit provision. It concluded that there are big decisions to be made if the benefits of an economic recovery are to be fairly distributed.[67]

Others have stressed the need for the Government to play a role in addressing food insecurity and other symptoms of socio-economic inequality:

> **One lesson of history (we might take the latter half of the 19th century as a prime example) is that, for all its merits, voluntary charitable provision cannot guarantee a standard of living adequate for the health and well-being of all, and therefore some degree of government intervention will be required if this is to be achieved.**[68]

Income support is one of the most effective and practicable policy instruments for poverty alleviation and achieving improved living standards.[69] There is no doubt that Working for Families diminished child poverty among the working poor. However, the recession has highlighted concerns about its relative effectiveness for some of the poorest children whose parents are not in paid work, and so cannot receive the 'in work tax credit':

> **The policy is too blunt to take account of the difficulties faced by parents who cannot work because of sickness, redundancy or disability (their own or that of family members). It also does nothing to prevent child poverty in a group that is at risk of being poor for a relatively long time – sole parent families with very young children.**[70]

New Zealand's after-tax distribution ranks poorly compared with other OECD countries. A low Gini coefficient indicates a more equal income distribution, and New Zealand ranks above the OECD median.

UK epidemiologists Richard Wilkinson and Kate Pickett list New Zealand as the sixth most unequal country among 23 developed OECD countries.[71] This poor ranking is also noted in a 2009 UN Development

65 Johnson A (2010), *A Road To Recovery: A State of the Nation report from the Salvation Army (Manukau City:* The Salvation Army Social Policy and Parliamentary Unit)

66 New Zealand Council of Christian Social Services (2009), *Vulnerability Report*, Issue 3 (Wellington: NZCCSS)

67 Johnson A (2010)

68 Bradstock A (2009), Tackling economic inequality. Paper presented to the Ethical Foundations of Public Policy conference, Wellington, 10–11 December

69 Perry B (2004), 'Working for Families: The Impact on Child Poverty', *Social Policy Journal of New Zealand*, 22, July, pp 9–54

70 Fletcher M and Dwyer M (2008), p 40

71 Wilkinson R and Pickett K (2009), *The Spirit Level: Why More Equal Societies Almost Always Do Better* (London: Allen Lane)

INCOME INEQUALITY ACROSS THE OECD: GINI COEFFICIENTS (X100) FOR AROUND 2004

Source: OECD (2008), Table 1.A2.4, cited in Perry B (2010), p 148 [72]

72 Data for most countries is from around 2004. Where that was not available, data is from around 2000.

Programme report. [73] Wilkinson and Pickett's analysis shows that on almost every index of quality of life, health or deprivation, a correlation exists between a country's level of economic inequality and its social outcomes. These outcomes are worse not only for the poorest groups within a country, but also for the population overall. [74]

In March 2010, the Government introduced the Social Assistance (Future Focus) Bill. This establishes work-test requirements for people on the domestic purposes benefit or sickness benefit. It requires people on the unemployment benefit to reapply and undertake a work assessment every 12 months, and introduces a graduated sanction regime and increased abatement thresholds. These measures do not address concerns about the adequacy of benefit levels, apart from a slight increase to the amount some beneficiaries can earn before their benefit is reduced.

The Human Rights Commission's submission on the bill acknowledged the importance of access to decent and meaningful work, but questioned the efficacy of the policy, given high levels of unemployment. Typically, employment levels are slow to recover after a recession, making it harder to find jobs for those currently on benefits. [75] In that context, concerted attempts to reduce benefit numbers may be seen as retrogressive measures that undermine the right to an adequate standard of living.

Submissions to this chapter have highlighted that benefit reforms have increased the stigma felt by sole parents and heightened the pressures they face balancing paid work and caring for their children. These can be particularly acute for parents whose children have disabilities. In addition, as the Attorney-General noted, the targeted nature of the work test was discriminatory. [76]

High effective marginal tax rates also significantly reduce the proportion of income from paid work that someone receiving a benefit is able to retain, and create poverty traps. [77] In New Zealand, the January 2010 report of the Victoria University of Wellington Tax Working Group (TWG) recommended a comprehensive review of welfare policy and how it interacts with the tax system. [78] The working group did not have the time, resources or mandate to consider this tax/welfare interface. [79]

In April 2010, the Government announced the establishment of a Welfare Working Group. It will provide a report to the Government early in 2011, with a particular focus on "how to reduce long-term benefit receipt, and reduce the growth in numbers and expenditure on benefits". The tax-benefit interface, Working for Families, welfare issues raised by the tax working group and the adequacy of income from welfare are all explicitly outside the scope of this review. [80] Yet adequacy of welfare payments is one of the core ICESCR requirements of the right to social security. In July 2010, church and beneficiary organisations established an Alternative Welfare Working Group

73 United Nations Development Programme (2009), 'Overcoming barriers: Human mobility and development'. Accessed 25 June 2010 from http://hdr.undp.org/en/reports/global/hdr2009/

74 Two recent reports from British economists reiterate that more equal societies almost always do better economically than unequal societies and have lower health inequalities. They also suggest that combining changes to both taxes and benefits is more effective in reducing inequality than relying on just one of these policy settings. See Hills J (2010), *An Anatomy of Economic Inequality in the UK* (London: London School of Economics) and Marmot M (2010), *Fair Societies, Healthy Lives: A Strategic Review of Health Inequalities in England post 2010* (London: University College, London).

75 International Institute for Labour Studies, ILO (2009), 'The financial and economic crisis: A decent work response'. Accessed 25 June 2010 from www.ilo.org/public/libdoc/ilo/2009/109B09_59_engl.pdf

76 New Zealand Attorney-General (2010), Report of the Attorney-General under the Bill of Rights Act 1990 on the Social Assistance (Future Focus) Bill (Wellington: House of Representatives). Accessed 25 June 2010 from http://www.parliament.nz/NR/rdonlyres/6B68F10A-4F92-4321-AB92-7DB9BFAFB034/131877/DBHOH_PAP_19574_AttorneyGeneralReportoftheunderthe.pdf

77 St John S and Wynd D (Eds) (2008)

78 Victoria University of Wellington Tax Working Group (2010), *A Tax System for New Zealand's Future* (Wellington: Centre for Accounting, Governance and Taxation Research, VUW), p 11

79 St John S (2010), 'Lessons from the Tax Working Group', *Children: A newsletter from the Office of the Children's Commissioner*, 72, autumn, pp 9–10

80 Accessed 6 October 2010 from http://ips.ac.nz/WelfareWorkingGroup/Scope.html

to ensure that beneficiaries and community groups were part of the debate on government welfare reforms. [81]

In August 2010, the Welfare Working Group called for submissions on its first report. [82] Echoing legislative measures already implemented, it specifically asked whether there should be more focus on paid work for sole parents and disabled people and others receiving the sickness or invalids' benefit. The Commission's submission noted that the CEDAW Committee has recommended that, in order to raise sole parents' labour-force participation rates, better access to paid parental leave and early childhood education is required. Given that children whose parents receive benefits are particularly vulnerable to poverty, any welfare reform must be committed to achieving the best outcomes for children. [83]

In order to improve employment opportunities for disabled people, it is important to acknowledge and address the specific barriers they face. For example, almost a half of all people with experience of mental illness receive some form of benefit – the highest rate for all disability groups. [84] A 2004 New Zealand study found that 31 per cent of people with experience of mental illness have suffered some kind of discrimination at work, and 34 per cent reported experiencing discrimination when looking for employment. [85]

Conclusion
Whakamutunga

With respect to the right to social security, New Zealand is meeting or surpassing human rights standards in a number of key areas. New Zealand has a welfare system that covers all social risks and contingencies identified in the relevant international covenants and conventions.

Rates of hardship among older people are low. New Zealand Superannuation is a compelling example of what it means to provide accessible, sustainable, and adequate social security for the elderly.

Recent policy initiatives show it is possible to reduce child poverty rates substantially over relatively short periods. Without the Working for Families package, child poverty rates would have risen from 26 per cent to around 30 per cent between 2004 and 2008. Instead, they fell to 22 per cent. [86] However, sustained progress requires continued commitment and specific targeting of the most vulnerable.

There are other areas where New Zealand is falling well short of international human rights standards. The right to social security is compromised if core benefit levels do not enable people to feed and house themselves and their families.

Civil society groups play a significant role in mitigating the effects of inadequate income, particularly through food banks. However, they lack the resources or tools to deal with systemic inequalities, nor is it their prime responsibility.

In New Zealand, people are not dying of starvation, but relative poverty means that some people do not get enough nutritious food to eat. This can be critical at early stages of a child's development, with direct impacts on health and education outcomes. Poor health and reduced educational achievements are felt most harshly by individual children, but are also detrimental to New Zealand's overall economic and social development. As the OECD has advised, New Zealand needs to take a stronger position on child poverty.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following priority areas to advance the right to social security:

81 Accessed 6 October 2010 from http://www.alternativewelfareworkinggroup.org.nz

82 Welfare Working Group (2010), *Long Term Benefit Dependency: The Issues* (Wellington: WWG). Accessed 26 September 2010 from http://ips.ac.nz/WelfareWorkingGroup/Index.html

83 Human Rights Commission (September 2010), Submission to the Welfare Working Group

84 Jensen J, Sathiyandra S, Rochford M, Jones D, Krishnan V and McLeod K (2005), *Disability and Work Participation in New Zealand: Outcomes relating to paid employment and benefit receipt* (Wellington: MSD)

85 Peterson D, Pere L, Sheehan N and Surgenor G (2004), *Respect Costs Nothing: A survey of discrimination faced by people with experience of mental illness in Aotearoa New Zealand* (Auckland: Mental Health Foundation of New Zealand)

Child Poverty Reduction
Reducing child poverty, with specific attention to Māori, Pacific and disabled children by developing a co-ordinated and integrated approach across economic, social and population agencies.

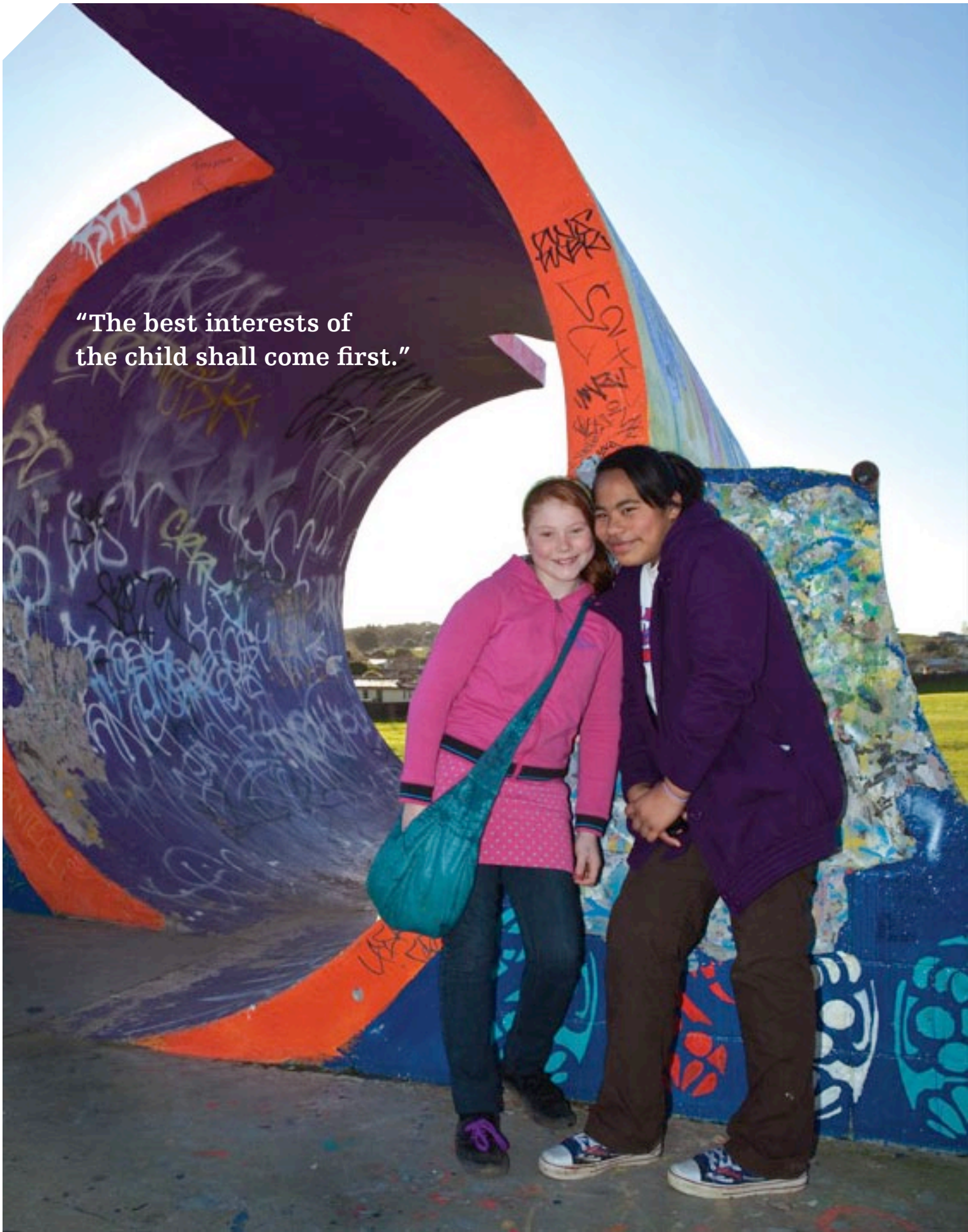
Data needs
Identifying and addressing data needs required to set measurable child poverty targets for specific population groups.

Measurable targets
Adopting measurable targets, and reporting annually on the effectiveness of economic and social policies in meeting these targets.

Adequacy of core benefits
Reviewing and addressing the adequacy of core benefit rates.

16. Rights of Children and Young People

Tikanga Tamariki me te Taiohi



The best interests of the child shall come first.

Convention on the Rights of the Child, Article 3 (edited)

Introduction
Tīmatatanga

This chapter outlines the international and domestic framework for the protection of children's rights, focussing on key issues and developments since 2004. Overall, most children in New Zealand are able to enjoy their rights, but they remain one of the most vulnerable groups in our society. There are still significant numbers of children who experience violence and neglect, poverty and poor health, and barriers to the full enjoyment of their right to education. Entrenched disparities are an enduring feature of the situation of children in New Zealand, and those under 18 are persistently the age group most likely to experience poverty and hardship. Furthermore, children remain relatively invisible – their views are not routinely sought and their rights are often not explicitly or adequately considered in policy and decision-making.

WHAT ARE CHILDREN'S RIGHTS?

Children and young people (all human beings under the age of 18) have the same basic human rights as adults. Children also have specific human rights that recognise their special need for protection.

Children's rights are commonly viewed as falling into three categories: provision rights, protection rights and participation rights. Provision rights include the right to an adequate standard of living, the right to free education, the right to adequate health resources and the right to legal and social services. Protection rights include protection from abuse and neglect, protection from bullying, protection from discrimination, and safety within the justice system. Participation rights include the right to freedom of expression and the right to participate in public life.

Children live, learn and grow, not in isolation but as part of families, whānau and communities. Even though they are autonomous rights-holders, children – particularly younger children – are dependent on others (for example, parents or teachers) to give effect to their rights. As children grow, they are able to exercise their rights in an increasingly independent manner.

Children's rights are enshrined in the United Nations Convention on the Rights of the Child (UNCROC). This is one of the key international human rights treaties and is the most widely accepted of the human rights instruments. It has been ratified by 195 countries, including New Zealand in 1993.

CHILDREN'S RIGHTS IN NEW ZEALAND

The Commission's 2004 review of human rights in New Zealand[1] found that most children are able to enjoy their basic rights. However, it identified poverty and abuse experienced by a significant number of New Zealand children and young people as some of New Zealand's most pressing human rights issues. Other issues of particular concern included inequalities affecting Māori and Pacific peoples; disabled children and children with mental ill health; access to education and a need for human rights education; and the need to strengthen legal protections for children and young people.

There have been significant achievements and improvements since 2004. These include:

- actions to reduce violence against children and young people, including the amendment to section 59 of the Crimes Act (discussed in more detail below)
- changes through the Immigration Act 2009 and funding allocation in Budget 2010, to ensure that undocumented children are able to access education
- increased support, through the Working for Families package, to families with at least one adult in full-time work
- improved access to primary healthcare
- improvements in key social and economic indicators for Māori and Pacific peoples
- introduction of a revised national curriculum for primary and secondary schools and introduction of 20 free hours of early childhood education for three- and four-year-olds.

Despite these developments, many of the pressing issues identified in 2004 still stand. Disparities in outcomes

1 Human Rights Commission (2004), *Human Rights in New Zealand Today – Ngā Tika Tangata o te Motu* (Auckland: HRC). Accessible online at http://www.hrc.co.nz/report/.

Michaela and Tayla hang out with the AMP'd after school programme at Randwick Park, Manurewa. Organised by Manukau Leisure, AMP'd encourages young people to build their sporting skills.

for certain groups, and the levels of poverty and abuse experienced by some children, remain issues of particular concern, especially given recent economic conditions. While there have been a range of improvements for children, they remain one of the most vulnerable groups in our society.

International context
Kaupapa ā taiao

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (UNCROC)

UNCROC sets out the basic human rights all children have, without exception. These include the rights to:

- survive and develop
- be protected from harmful influences, abuse and exploitation
- participate fully in family, cultural and social life.

Children's rights are considered holistically, and the articles in UNCROC are regarded as indivisible and interdependent. UNCROC's four core principles guide the application of all other children's rights: non-discrimination; prioritising the best interests of the child; the right to life, survival and development; and respect for the views of the child.

There are two optional protocols to UNCROC: on the sale of children, child prostitution and child pornography; and on the involvement of children in armed conflict.

UN Committee on the Rights of the Child

State parties' implementation of their obligations under UNCROC is monitored by a United Nations committee of experts, the Committee on the Rights of the Child (UNCROC).

Since 2005, the UNCROC has issued general comments that provide guidance on the implementation and monitoring of children's rights in relation to:

- early childhood education
- protection from corporal punishment
- rights of children with disabilities
- rights in juvenile justice
- rights of indigenous children
- the right to be heard.

UNCROC affirms that everyone under 18 years has the right to:

- **life (Article 6)**
- **a name and nationality (Article 7)**
- **have their best interests considered when decisions are made about them (Article 3)**
- **be with their parents or those who will care for them best (Article 9)**
- **have a say about things that affect them and for adults to listen and take their opinions seriously (Article 12)**
- **have ideas, say what they think and get information they need (Article 13)**
- **meet with other children (Article 15)**
- **privacy (Article 16)**
- **protection of reputation (Article 16)**
- **protection from harm and abuse (Article 19)**
- **special care, education and training, if needed (Article 23)**
- **healthcare, enough food, a place to live and clean water (Article 24)**
- **an adequate standard of living for physical, mental, spiritual, moral and social development (Article 27)**
- **education (Article 28)**
- **learn about and enjoy their own culture, speak their own language and practise their own religion (Article 30)**
- **rest and play (Article 31)**
- **not be hurt, neglected, used as a cheap worker or used as a soldier in war (Articles 32–38)**
- **know about their rights and responsibilities (Articles 29, 42).**

2 See Human Rights in Education, *UNCROC in a Page*, accessible online at http://www.rightsined.org.nz/index.php/resources/human rights/6-treaties-and-other-international-instruments/10-uncroc-in-a-page.html

Complaints process

Unlike other core international human rights treaties, UNCROC does not currently include a communications procedure that enables individuals to complain to the committee about breaches of the convention. The UNCROC has stated that the development of a communications procedure for the convention would significantly contribute to the overall protection of children's rights.

In 2009, the UN Human Rights Council passed a resolution to establish a working group to explore the development of a procedure for individual complaints.[3] The first meeting of the working group was held in December 2009 to discuss issues such as the reasons for and implications of a complaints procedure, and the effectiveness of existing international, regional and national mechanisms. Following those discussions, the Human Rights Council asked the working group to prepare a proposal for a draft optional protocol. The proposal was issued in September 2010.[4]

OTHER HUMAN RIGHTS STANDARDS

The rights of children and young people are also protected under other human rights treaties and conventions. The International Covenant on Economic Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of Persons with Disabilities (CRPD) all contain specific provisions relating to children's rights, as does the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[5]

Two of the eight fundamental International Labour Organisation (ILO) Conventions also relate to children's rights. They are Convention 138, on the Minimum Age for Admission to Employment (1973), and Convention 182, on the Worst Forms of Child Labour (1999).

New Zealand context
Kaupapa o Aotearoa

UNCROC IN NEW ZEALAND

Reservations

New Zealand ratified UNCROC in 1993 with three formal reservations. These related to children unlawfully in New Zealand, the protection of children in employment, and the mixing of juvenile and adult prisoners.

The first is a general reservation, which reserves the right of the Government to provide different benefits and other protections in the convention, "according to the nature of their authority to be in New Zealand". Progress towards removing this reservation was made through changes to immigration legislation allowing undocumented children to be legally enrolled at school.[6]

In relation to the reservation about employment, the Government has maintained the position that existing law and policy provide adequate age thresholds for entry into work and protection for children and young people in employment. Despite this view of New Zealand's basic compliance, removal of the reservation appears unlikely in the near future.[7]

There have been some improvements in relation to the reservation concerning age-mixing in detention, particularly in the context of prisons, at the border, under military law and in mental health facilities. Lack of specialised youth facilities for girls in prison and age mixing in police custody are among the issues that need to be addressed.

Almost 17 years since ratifying UNCROC, New Zealand has still not fully committed to the convention by removing these reservations. While government agencies have undertaken work towards withdrawing the

3 Report of the open-ended working group to explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, A/HRC/13/43, 21 January 2010

4 Proposal for a draft optional protocol prepared by the Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the convention on the rights of the child to provide a communications procedure, A/HRC/WG.7/2/2, 1 September 2010

5 For example: ICESCR, Article 10 (special protection and assistance for children); ICCPR, Article 10(2)(b) and (3) (rights of juvenile offenders) and Article 24 (children's rights to special protection); CRPD, Article 7 (rights of children with disabilities); UNDRIP, Article 22 (rights of indigenous children, including protection from violence and discrimination)

6 Immigration Act 2009. See further discussion below.

7 ILO 138 is discussed further in the chapter on the right to work.

reservations, the UNCROC has expressed concern and disappointment at the slowness of the process and lack of progress.[8]

New Zealand has signed, but not ratified, the optional protocol on the sale of children, child prostitution and child pornography. The Child and Family Protection Bill 2009 was introduced to make the remaining legislative changes necessary for ratification. New Zealand ratified the optional protocol on the involvement of children in armed conflict in 2001.

New Zealand is also a party to the other key international conventions, including ICESCR, ICCPR and CRPD and CAT. In 2007, New Zealand ratified the Optional Protocol to CAT and established a preventive monitoring system covering all places of detention, including child and young persons' residences. New Zealand has ratified ILO Convention 182 but not Convention 138.

International review and reporting

As a state party to UNCROC, the New Zealand Government is obliged to report regularly to the UNCROC on how UNCROC is being implemented in New Zealand.

New Zealand's third and fourth periodic reports were submitted by the Government in November 2008 and will be considered by the UNCROC in January 2011.

The Children's Commissioner submitted separate reports. Among the issues highlighted by the Commissioner were the slow progress in removing the remaining reservations to UNCROC, the lack of a co-ordinated approach to developing law and policy impacting on children, and inequalities of outcomes for various groups of children and young people.[9]

UNCROC expressly provides for civil society to have a role in monitoring its implementation by submitting 'shadow reports' to the committee. Action for Children and Youth Aotearoa (ACYA) co-ordinated and submitted a major report to the committee in July 2010.[10] Save the Children NZ co-ordinated the preparation of a report that conveys the views of children and young people on the convention and its implementation in New Zealand. The report includes digital stories with groups of young people, and the findings of online and school-based surveys.[11]

Children's rights issues have also been raised in the context of the Universal Periodic Review[12] and by other treaty bodies that have examined New Zealand's human-rights performance in recent years.[13] These bodies have made comments and recommendations in relation to:

- the removal of reservations and ratification of outstanding human rights instruments (such as the optional protocol on the sale of children, child prostitution and child pornography)
- full implementation of juvenile justice standards – including raising the age of criminal responsibility; ensuring that juveniles are detained separately from adults; and ensuring that detention of children is used only as a measure of last resort
- ensuring that all children enjoy the right to education – including undocumented children, disabled children, children from low-income families and families living in rural areas
- protection of children against abuse and neglect, and effective co-ordination of efforts to prevent child abuse
- data collection and monitoring on trafficking.

8 United Nations Committee on the Rights of the Child (2003), Concluding Observations: New Zealand, CRC/C/15/Add.216, paras 6–7

9 Office of the Children's Commissioner (2010), *Report of the New Zealand Children's Commissioner to the United Nations Committee on the Rights of the Child* 2010 (Wellington: OCC). Accessible online at http://www.occ.org.nz/__data/assets/pdf_file/0005/7682/CC_UNCROCREPORT_02.09.10.pdf
Office of the Children's Commissioner (2008), *Report on the Implementation of the United Nations Convention on the Rights of the Child in New Zealand* (Wellington: OCC). Accessible online at http://www.occ.org.nz/__data/assets/pdf_file/0009/6894/OCC_UNCtte_211108.pdf

10 ACYA (2010), *Children and Youth in Aotearoa* 2010 (Auckland: ACYA). Accessible online at http://acya.org.nz/site_resources/library/Documents/Reports_to_UN/CYA_2010/Children_and_Youth_Aotearoa_2010.pdf

11 Information on the project is accessible online at http://a12aotearoa.ning.com/

12 The Universal Periodic Review (UPR) mechanism is a comprehensive, regular review of the human rights performance of each UN member state, undertaken by the UN Human Rights Council.

13 Human Rights Council (2009); Committee Against Torture (2009); Committee on the Elimination of Racial Discrimination (2007); Committee on the Elimination of Discrimination Against Women (2007); Human Rights Committee (2010)

The Government's response to the recommendations arising from the Universal Periodic Review included commitments to: [14]

- ratifying the optional protocol to UNCROC relating to the sale of children, child prostitution and child pornography
- addressing discrimination and socio-economic disparities suffered by vulnerable groups and taking action to understand the causes of inequality
- improving resourcing of services for disabled children
- continuing to work towards removal of the reservation to UNCROC relating to age mixing in detention
- reducing violence within families and its impact on children
- recording and documenting cases of trafficking and exploitation of children.

LEGISLATION

Two key pieces of legislation relating to the welfare, care and protection of children and young people are the Children's Commissioner Act 2003 and the Children, Young Persons and Their Families Act 1989 (CYPF Act). These are discussed further in the Commission's 2004 report, along with other significant pieces of legislation that affect children (such as the Education Act 1989, New Zealand Bill of Rights Act 1990 and Crimes Act 1961). [15]

Legislative developments since 2004 that have strengthened legal protections for children's human rights include the Care of Children Act 2004 and the Crimes (Substituted Section 59) Amendment Act 2007.

The Care of Children Act 2004 amended the law relating to guardianship and included some significant changes that brought New Zealand law more closely into line with UNCROC. These include requiring that the welfare and best interests of the child are the paramount consideration when the Family Court makes decisions; and provisions that reflect the UNCROC definition of the child as any person under the age of 18. Subsequently, other pieces of legislation have been amended or updated to reflect this definition. Both the Care of Children Act and the Evidence Act 2006 provide improved recognition and opportunities for children and young people to express their views, and for these to be taken into account in court proceedings.

The Crimes (Substituted Section 59) Amendment Act 2007 deals with corporal punishment of children by parents or guardians. The act removed the justification of the use of force for the purpose of correction as a defence to assault, thus affirming that violence against children was no more permissible than violence against adults. The amendment strengthened the legal framework protecting children from violence.

Another major development has been the Immigration Act 2009, which made changes allowing schools to provide education to children who do not have appropriate immigration status.

The Child and Family Protection Bill 2009, currently before Parliament, will make changes to the Adoption Act to enable New Zealand to ratify the optional protocol on the sale of children, child prostitution and child pornography. [16]

While changes in the bill regarding offences and extradition will bring the law more into line with international protections, New Zealand's adoption legislation has been criticised as out of date and in urgent need of reform. Changes are required to bring the law into line with modern adoption practices and with UNCROC, as noted in the UNCROC's previous recommendations regarding adoption and the application of Article 12. Current shortcomings include:

- Children do not have the opportunity to be heard and have their views given due weight.
- Adopted children have no right to information about, or access to, their biological parents.
- The best interests of the child are not a paramount consideration.
- There is no power for adopted children to preserve at least one of their original names.
- Consent of birth parents is often given without independent advice or counselling.

14 Response of the Government of New Zealand to Recommendations in the Report of 11 May 2009 of the Working Group on the Universal Periodic Review, A/HRC/12/8/Add.1, 7 July 2009

15 Human Rights Commission (2004)

16 The Justice and Electoral Select Committee have reported back recommending that the bill be passed. As at 21 October 2010, the bill is before the Committee of the Whole House.

Proposed changes through the Children, Young Persons and their Families Amendment Bill (No. 6) (2007) would have improved legal protections for children in state care. However, progress of the bill through the legislative process has stalled, despite urging from the UN that the law change be adopted. [17]

Following a review of the CYPF Act, the bill proposed to introduce a range of amendments, including improvements to: complaints processes; participation provisions; recognition of victims' rights; and inter-agency collaboration, information sharing and support for transition from care. Significantly, the bill would extend the protection measures under the CYPF Act to include 17-year-olds, thereby bringing the legislation into line with UNCROC and implementing specific recommendations of the UNCROC [18] and the Committee Against Torture. [19] The bill was introduced into Parliament in 2007 and reported back from the select committee in 2008. Since the change of government, it has not been further progressed.

A further development in contradiction with UNCROC recommendations is the Children, Young Persons and their Families (Youth Court Jurisdiction and Orders) Amendment Act 2010. The act has brought more child offenders within formal court processes, effectively lowering the age of criminal prosecution. This is despite the UNCROC recommending that New Zealand's minimum age for prosecution should be raised "to an internationally acceptable level". This issue is discussed further below.

New Zealand today
Aotearoa i tēnei rā

New Zealand's 1.05 million children (those aged 0-17 years) make up 26 per cent of the population. [20] Around 45 per cent of households have children.

The diversity of children and young people continues to increase, with almost 20 per cent of those aged 15 years and under identifying with more than one ethnic group. The proportion of children identifying as European (72 per cent) has declined since 1996, while those identifying as Pacific (12 per cent), Asian (10 per cent) and other ethnic groups (1 per cent) has risen. The proportion of children identifying as Māori remains at approximately 24 per cent.

In 2006, 90,000 children aged under 15 years (10 per cent) were reported to have a disability. [21] The Disability Survey 2006 reported that an estimated 5 per cent of all children had "special education needs", the most common disability category used in that survey. Chronic conditions or health problems and psychiatric or psychological disabilities were the next most common disability types. More than half of disabled children (52 per cent) had a disability caused by a condition that existed at birth. Almost half, 48 per cent, of disabled children had multiple disabilities.

This section looks at the current status of children's rights, particularly in relation to:

- protection of children's rights in law and policy
- protection from violence and maltreatment
- provision of the rights to health, education and an adequate standard of living
- participation of children and young people.

PROTECTION RIGHTS

Policy for children

Despite being one of the most vulnerable groups in society, and despite obligations to ensure that children's best interests are a primary consideration in actions concerning them, children remain relatively 'invisible' in decision-making and government processes. Their interests are often overlooked or subsumed and their views are seldom sought.

17 UN Committee Against Torture, (2009), *Concluding observations of the Committee against Torture: New Zealand*, CAT/C/NZL/CO/5, 14 May 2009, at para 8

18 United Nations Committee on the Rights of the Child (2003), *Concluding Observations: New Zealand,* UNCROC/C/15/Add.216, 27 October 2003, para 21

19 UN Committee Against Torture, (2009) *Concluding observations of the Committee against Torture: New Zealand*, CAT/C/NZL/CO/5, 14 May 2009

20 Ministry of Youth Development (2008), *Third and Fourth Periodic Reports to the Committee on the Rights of the Child,* UNCROC.C.NZL.3–4, 11 November 2008, p 95. Accessible online at http://www2.ohchr.org/english/bodies/UNCROC/docs/AdvanceVersions/UNCROC.C.NZL.3–4.doc

21 Statistics New Zealand (2007), *2006 Disability Survey: Hot off the press.* Accessible online at http://www.stats.govt.nz/browse_for_stats/health/disabilities/DisabilitySurvey2006_HOTP06.aspx

At national level, there are a range of policies and strategies aimed at ensuring that children's rights are protected. [22] In the absence of a comprehensive strategy or mechanism for incorporating children's rights into policy and legislation, the level of recognition and protection of children's rights can be ad hoc and inconsistent. Lack of co-ordination and a clearly defined focal point for responsibility within the Government for children's rights has been an issue.

In 2003, the UNCROC expressed its concern at the insufficient co-ordination of policies and services for children. It recommended that a permanent mechanism be established to co-ordinate activities and ensure that obligations under UNCROC are implemented in a co-ordinated and effective way. [23]

The Children's Commissioner has recommended that the Government examine how more weight could be given to children in government decision-making processes. [24]

Another issue raised by the UNCROC in 2003 is the lack of available data on budgetary allocations for children. The UNCROC recommended the collection of disaggregated data on budget allocations for children and the systematic assessment of the impact of economic policy on children. [25]

While government agencies collect a large amount of data about children, a lack of overall co-ordination can mean that information is not always easily available or put to best use to inform policy. [26] There is a particular lack of data about disabled children. [27]

Children are citizens. Yet because they do not have the vote, have no form of direct representation and are not organised into any form of political grouping, their voice on specific issues is largely unheard. In short, they are politically marginalised.

As a consequence, it is almost inevitable that the executive and legislators overlook the impact of all but child-specific legislation on children. [28]

A recent report on children's health and well-being has once again highlighted the continued need for a comprehensive, co-ordinated and sustained approach to policies and services for children. [29] The report, by the Public Health Advisory Committee, identified lack of co-ordination and investment in early-childhood services as factors in the poor health status of New Zealand children, compared with children in other nations. The report states that "improving child health requires more than merely fixing any one health 'problem'; it requires a change to organisational systems… Changes must be made to the overall investment in and structure of policies and services for children." The report advocates the need for strong leadership and a whole of government approach, with a cross-party agreement for children, sustained investment and identified work programme and accountabilities.

Other suggested measures in recent years have included a national plan of action for children, comprehensive child-impact reporting, establishment of a Minister for Children, a cross-party caucus and a parliamentary select committee for children. [30]

22 These include the *Agenda for Children* and the *Youth Development Strategy Aotearoa*. The Ministry of Youth Development co-ordinated a five-year UNCROC work programme for implementing the UNCROC's recommendations. Reported online at http://www.msd.govt.nz/what-we-can-do/children-young-people/uncroc/how-uncroc-is-improving-the-rights-of-children-and-young-people-in-nz.html

23 United Nations Committee on the Rights of the Child (2003)

24 Office of the Children's Commissioner (2010)

25 United Nations Committee on the Rights of the Child (2003), at para 14–15

26 Public Health Advisory Committee, (2010), *The Best Start in Life: Achieving effective action on child health and well-being* (Wellington: Ministry of Health)

27 This is discussed further in the chapter on rights of disabled people.

28 'Every Child Counts' (2010), Briefing Sheet for MPs, June

29 Public Health Advisory Committee, (2010)

30 Public Health Advisory Committee, (2010). See also: Mason N and Hanna K (2009), *Undertaking Child Impact Assessments in Aotearoa New Zealand Local Authorities : Evidence, practice, ideas* (Auckland: Office of the Children's Commissioner / UNICEF)

Definition of the child

Article 1 of UNCROC provides that "child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier". Since 2004, the Care of Children Act and several other pieces of subsequent legislation have been enacted which reflect this definition. However, several areas remain where age limits in legislation are inconsistent with UNCROC.

The UNCROC has previously expressed concern and recom-mended that these inconsistencies be addressed.[31] An area specifically highlighted by the UNCROC was the gap in protection for 17-year-olds under the Children, Young Persons and their Families Act. The committee urged New Zealand to extend the act's protections to all those under 18 years of age. Proposed legislation to achieve this (the CYPF Amendment (No. 6) Bill) was introduced to Parliament in 2007, public submissions were made and a select committee report was issued in 2008. Since then, following the change of government, the bill has not been progressed.

A lack of consistency in agencies' definitions of the child, and the resulting variable availability of protections to children and young people, was highlighted by the Ombudsmen in their 2007 investigation into prisoner transport.[32] The investigation stemmed from the tragic death of 17-year-old Liam Ashley in 2006 while being transported in a prison van with adult prisoners. The Ombudsmen's recommendations included the need for alignment of police and department of corrections' definitions of young prisoners, in order to ensure that protections were consistently provided. A revised memorandum of understanding between the two agencies, signed in December 2009, now clarifies the agreed-on standards to be used.[33]

Employment protections

As discussed earlier, the New Zealand Government maintains its exemption to UNCROC and non-acceptance of ILO 138 relating to employment of children. This is on the basis that New Zealand law and policy provides adequate age thresholds for entry into work and protection for children and young people in employment. For example, the Education Act 1989 prohibits employers from employing children under 16 during school hours or when it would interfere with their attendance at school. The Health and Safety in Employment Act 1992 and Regulations 1995 set out health-and-safety obligations and contain restrictions on young people under 15 working in certain dangerous workplaces, working at night or undertaking hazardous work (such as working with machines and heavy lifting).

New Zealand has a strong tradition of children and young people being able to undertake 'light work' for pocket-money, and there is a view that prescribing a minimum working age would undermine this tradition.

However, there are indications that stronger employment protections are required. Increasingly, the available evidence suggests that children are being exposed to more labour-intensive work, for example on farms, and for longer working hours than previously. The Human Rights Commission's National Conversation about Work (2008–10) found a number of situations where young people were working excessive, very early or very late hours, with negative impacts on their schooling. There were also indications of a prevalence of stereotypes and discriminatory attitudes about employing young people. Furthermore, youth unemployment was a serious concern in most regions visited. These issues are also discussed in the chapter on the right to work.

Section 30(2) of the Human Rights Act 1993 provides for an age exemption to the act's employment discrimination provisions. This allows someone under the age of 20 to be paid at a lower rate than another person employed in the same or substantially similar circumstances.

Children under 16 years of age are excluded from the Human Rights Act's age-discrimination provisions.[34] This has attracted criticism from human rights advocates,

31 United Nations Committee on the Rights of the Child (2003), paras 20–21

32 Office of the Ombudsmen (June 2007), *Ombudsmen's Investigation of the Department of Corrections in relation to the Transport of Prisoners,* Wellington: Office of the Ombudsmen

33 Signed in December 2009: http://www.corrections.govt.nz/news-and-publications/magazines-and-newsletters/corrections-news/2011/corrections-news-jan-feb-2010/new-understanding-with-police.html

34 Human Rights Act 1993, s21(1)(i)

and is in contrast to a number of other countries where human rights legislation does not have a lower age limit.[35] While the provision applies only to age discrimination, the exception can lead to the misconception that the act does not apply at all to children.

Minimum age of criminal responsibility

In New Zealand, the minimum age of criminal prosecution is 14 for most offences,[36] 12 for certain serious offences, and 10 for murder and manslaughter.

UNCROC requires that children who are alleged or proved to have offended must be treated in a manner that takes into account their age and the desirability of promoting their rehabilitation.[37] It also requires the establishment of a minimum age of criminal responsibility.[38]

Although relevant international commentary and case law[39] do not stipulate what that age should be, the UNCROC has commented negatively on the age at which a child can be charged with a serious criminal offence in New Zealand. It has recommended that this be raised to "an internationally acceptable level".[40]

The New Zealand Government has reviewed the minimum age of criminal responsibility and prosecution on several occasions but has not implemented the UNCROC's recommendation to raise the age.

Rather than raising the age of criminal responsibility, there have been further erosions of minimum age provisions. While an attempt to lower the minimum age in 2006 was unsuccessful,[41] the Children, Young Persons and their Families (Youth Court Jurisdiction and Orders Amendment Act 2010 effectively lowered the age of criminal prosecution by making 12- and 13-year-olds liable to prosecution in respect of certain serious offences other than murder or manslaughter.

Safety and freedom from violence

The abuse and neglect of children continues to be a major issue of concern, despite wide recognition of the problem and wide-ranging efforts to address it.

In OECD rankings, New Zealand rates poorly in terms of child health and safety,[42] and in the past has had one of the highest rates of child maltreatment deaths.[43]

The most common form of maltreatment of children in New Zealand is emotional abuse and neglect, and the incidence of these has increased since 2004. Rates of physical abuse have declined in recent years, but rose in 2009.

In 2009, 2855 children were physically abused, 1126 were sexually abused, and 15,615 children were subjected to emotional abuse or neglect.[44] As a result of abuse,

35 For example, Canada (Canadian Charter of Rights and Freedoms), Australia (Age Discrimination Act 2004), the United Kingdom (Human Rights Act 1998; Age Discrimination Act 2004) and the European Union (European Convention on Human Rights) do not have youth age specificity within their equivalent human rights legislation.

36 Since the passage of the Children, Young Persons and their Families (Youth Court Jurisdictions and Orders) Amendment Act 2010

37 UNCROC, Article 40(1)

38 UNCROC, Article 40(3)(a)

39 T & V v United Kingdom (2003) 36 EHRR CD 104

40 The Committee has raised such concerns since New Zealand's first report in 1997 (Concluding Observations of the Committee, UNCROC/C/15/ADD.71 24/1/97). In 2003, the Committee recommended that New Zealand "raise the minimum age of criminal responsibility to an internationally acceptable level and ensure that it applies to all criminal offences" (Concluding Observations of the Committee, UNCROC/C/15/ADD.216: para 21(a) 3/1/0/03). This recommendation was reiterated by the Committee Against Torture in 2009.

41 The Serious Crimes (Young Offenders) Bill 2006 would have increased the number of offences for which children and young people aged 10 to 14 could be dealt with in the court system. That bill was not passed, with the select committee noting that the likely result would be that New Zealand would face criticism for breaching its obligations under the UNCROC and the ICCPR: Law and Order Committee (2007), Report on Young Offenders (Serious Crimes) Bill 28–1, pp 3–4.

42 Organisation for Economic Co-operation and Development (2009), *Doing Better for Children*, (Paris: OECD). Accessible online at http://www.oecd.org/document/12/0,3343,en_2649_34819_43545036_1_1_1_37419,00.html

43 While recent international comparisons are not available, a 2003 report on child-maltreatment deaths showed that in the 1990s, New Zealand had the third highest child-maltreatment death rate among the 27 developed nations: UNICEF (2003), *A League Table of Child Maltreatment Deaths in Rich Nations* (Innocenti Report Card, 2003, No. 5)

44 Ministry of Social Development (2009), *Protecting our most vulnerable infants*. Media release, 3 September. Accessed26 October 2010 from http://www.msd.govt.nz/about-msd-and-our-work/newsroom/media-releases/2009/pr-2009-09-03.html

248 children were hospitalised; between 2003 and 2008, 36 children under the age of 15 died as the result of assault.[45]

Reporting of cases to Child, Youth and Family (CYF) has risen markedly since 2004, although this is considered to be largely the result of increased reporting and more police referrals of children found in violent situations. The number of substantiated cases of maltreatment has also increased, almost doubling since 2004.[46]

A 2009 report by the Office of the Children's Commissioner highlighted the high rate of death and serious injury suffered by very young children.[47] The report found that each year, about 45 children under five in New Zealand were seriously injured as a result of assault, and on average about five children under five were killed. The report also found that it is young babies who are most at risk of abuse – their extreme vulnerability means that almost all forms of assault can lead to serious injury and death.

Further research on family violence homicides highlights that the first year of life is the time of highest risk of child death.[48] Most children who are killed (76 per cent) are killed before they turn five, and almost half (44 per cent) are killed in their first year of life. Key factors in child homicides include drug and alcohol use and abuse, parental separation, and assault intended to punish specific behaviours of the child.

There is considerable government funding for and government and civil society emphasis and co-operation on, addressing the issue of child abuse and maltreatment.

A key development has been the establishment of the cross-sector Taskforce for Action on Violence within Families. Activities of the taskforce include a campaign for action on family violence and a programme of action focussed on prevention of child maltreatment and neglect.

In September 2009, the Government announced measures to reduce abuse of babies and young children, including a public awareness campaign to prevent babies being shaken. Other initiatives announced include multi-agency safety plans to provide monitoring and follow-up of children admitted to hospital as a result of abuse; CYF social workers in hospitals; and a first response trial, involving follow-up by community-based services where police have attended family violence incidents.

In 2010, an Independent Experts Forum was established to provide advice to ministers on priority areas for the prevention of child abuse. The forum's recommendations included:

- an integrated and multi-disciplinary approach
- greater data sharing between agencies
- priority mental-health services for parents of small children
- a statutory statement of responsibility to clarify the role of health and education systems in preventing child abuse and to require inter-agency co-operation.

Other positive initiatives include the roll-out by CYF of a 'differential response' approach. This aims to provide a more collaborative and flexible response to families where there is a potential care or protection concern, including linking families with community-based services.

In 2009–10, the Independent Police Conduct Authority carried out a special inquiry into police handling of child-abuse cases. The inquiry arose due to a large backlog of cases in Wairarapa, but was extended to cover police case management of child-abuse investigations across the country. The authority's first report on the inquiry, released in May 2010, recommended that police improve practices, policies and procedures for investigating child

45 Child and Youth Mortality Review Committee (2009), *Fifth Report to the Minister of Health Reporting Mortality 2002–2008* (Wellington: Child and Youth Mortality Review Committee). Accessible online at http://www.cymrc.health.govt.nz/moh.nsf/indexcm/cymrc-resources-publications-annualreport5

46 New Zealand Government response to the list of issues to be taken up in connection with the consideration of The Fifth Periodic Report of New Zealand, CCPR/C/NZL/Q/5/Add.1, 5 January 2010

47 Office of the Children's Commissioner (2009), *Death and serious injury from assault of children under five years in Aotearoa New Zealand: A review of international literature* (Wellington: OCC), June. Accessible online at http://www.occ.org.nz/_data/assets/pdf_file/0016/6343/OCC_Deathand_seriousinjury2009_040609.pdf

48 Martin J and Pritchard R (April 2010), *Learning from Tragedy: Homicide within Families in New Zealand 2002–2006*, working paper prepared for the Centre for Social Research and Development (Wellington: MSD). Accessible online at http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/research/learning-from-tragedy/index.html

abuse. In response, the police – who deal with 700,000 critical incidents and more than 5000 child abuse reports a year – indicated that a number of recommendations were already being implemented and others would be worked through.

Repeal of corporal punishment legislation

In 2007, Parliament enacted the Crimes (Substituted Section 59) Amendment Act 2007. The act repealed section 59 of the Crimes Act 1961, which had allowed a parent or caregiver to use reasonable force to correct or discipline a child. It substituted a new section 59, which justified a parent or caregiver using reasonable force towards a child for certain purposes, but not for correction. To ensure that parents were not criminalised for lightly smacking a child, a further provision was added. This conferred on police a discretion not to prosecute where the use of force was so "inconsequential that there is no public interest in proceeding with a prosecution". [49]

In August 2009, there was a nationwide citizens-initiated referendum that asked "Should a smack as part of good parental correction be a criminal offence in New Zealand?" There were serious concerns about the question, which was criticised as confusing. Despite this, the referendum attracted a response of 56 per cent, of whom 87 per cent answered "no". [50]

Following the referendum, a review was undertaken of police and CYF policies and procedures to identify whether any changes were 'necessary or desirable'. [51] The review found both the police and CYF had effective guidelines for ensuring that good parents were treated as Parliament intended, though more could be done to reassure parents that they would not be criminalised or unduly investigated for a light smack. The review recommendations included establishing a new parent-support helpline in CYF; immediate publication of guidelines for social workers dealing with child abuse reports that involve smacking; a requirement for police and social workers to provide families with specific information on their rights; and a collection of more specific information on the application of section 59 to gain a clearer picture of how the law is working in practice.

The legal framework protecting the rights of children and young people has been strengthened by the 2007 amendment. There are also a range of initiatives promoting positive, non-violent forms of discipline and there are some indications of attitude change. Surveys undertaken by the Children's Commissioner show that attitudes towards child discipline have changed since the office first surveyed people in 1993. At that time, 87 per cent of survey respondents thought there were times when it was acceptable to use physical punishment with children. The 2008 survey showed that this had reduced to 58 per cent of respondents. [52] Research by the Families Commission found that positive parenting strategies, information and support are assisting parents, many of whom are using positive parenting strategies because they think these are the most effective means of discipline. [53]

PROVISION RIGHTS

Adequate standard of living [54]

Numerous initiatives are contributing to improve child health and welfare. However, while there have been improvements in rates of child poverty and hardship since 2004, children remain over-represented in these categories. [55]

49 Crimes (Substituted Section 59) Amendment Act 1961, section 59(4)

50 In August 2009, a private member's bill seeking to repeal the law was introduced to Parliament: the Crimes (Reasonable Parental Control and Correction) Amendment Bill. The bill awaits a first reading.

51 CAB Min (09) 30/23

52 Children's Commissioner (2008), *Omnibus Survey Report – One year on: Public attitudes and New Zealand's child discipline law* (Wellington: OCC), November

53 Lawrence J and Smith A (2009), *Discipline in context: families' disciplinary practices for children aged under five*, Families Commission – Blue Skies Report No. 30/09, September

54 See also the chapters on the right to an adequate standard of living.

55 Perry B (December 2009), *Non-income measures of material well-being and hardship: first results from the 2008 New Zealand Living Standards Survey, with international comparisons* (Wellington: MSD), p 22 The report notes that those aged 0–17 make up 37 per cent of all those in hardship, but only 25 per cent of the population overall. See also Perry B (June, 2009). Household incomes in New Zealand: trends in indicators of inequality and hardship 1982 to 2008 (Wellington: MSD)

Over the past two decades, children have consistently been the age group most likely to live in low-income households, crowded households and households experiencing material hardship or deprivation. [56] [57]

In recent years, child poverty rates [58] have declined, from 26 per cent in 2004 to 22 per cent in 2008. [59] Levels of hardship suffered by children have also improved, falling from 26 per cent in 2004 to 19 per cent in 2008.

The Working for Families package has had a significant effect on poverty rates for families with an adult in paid work. [60] This policy has also enabled some parents and caregivers to move into employment. However, benefit-dependent families not entitled to receive the In Work Tax Credit component of Working for Families have not seen the same gains. Poverty rates are higher for children in benefit-dependent households, [61] and beneficiary families with dependent children have a hardship rate more than five times that of working families with children. [62]

In 2008, the claim brought by the Child Poverty Action Group (CPAG) was heard by the Human Rights Review Tribunal. CPAG argued that the In Work Tax Credit in the Working for Families scheme discriminated against the children of beneficiaries on the grounds of their employment status. The tribunal's decision found a prima facie case of discrimination, but said it was "justified in a free and democratic society". [63]

Child poverty is unevenly distributed across society, particularly affecting sole-parent families, families with no adult in full-time work, Māori and Pacific peoples and disabled children. [64] Disparities between different groups are marked. In 2003–04, 16 per cent of Pākehā children lived in poverty, compared with 27 per cent of Māori children and 40 per cent of Pacific and 'Other' children. Ethnicity breakdowns of child poverty data are no longer reported, because low sample sizes raise concern about data quality. [65] This severely limits the ability to monitor the number and proportion of Māori or Pacific children living in poverty. Māori and Pacific families are also more likely to be living in overcrowded homes (32 per cent and 37 per cent respectively, compared with 10 per cent of the general population). [66] Children in poor families are more likely to be sick and injured, they are at greater risk of abuse and neglect, and their educational achievement and subsequent employment opportunities are affected as a result. [67]

In 2009, the OECD reported that in recent years [68] New Zealand spent less than the OECD average on young children in particular, even though spending more on young children is more likely to generate positive changes and make a difference in the long term. [69] Based on international evidence, the OECD concluded that New Zealand should spend considerably more on younger, disadvantaged children, and should ensure that current rates of spending on older children are more effective in meeting the needs of the disadvantaged among them.

56 Ministry of Social Development (2009), *Social Report 2009* (Wellington: MSD), pp 63–66

57 Perry B (December 2009)

58 Using the measure of 60 per cent of median income, before housing costs.

59 Perry B (December 2009)

60 Perry B (June 2009)

61 ibid. p 98

62 Perry B (December 2009), p 53

63 Child Poverty Action Group v Attorney General [2008] NZHRRT 31

64 Fletcher M and Dwyer M (2001), *A Fair Go for all Children: Actions to address child poverty in New Zealand*, A Report for the Children's Commissioner (Wellington: OCC)

65 ibid. p 25; Ministry of Social Development (2009), *Social Report 2009*, p 161

66 Ministry of Social Development (2009), *Social Report 2009*, p 67

67 Fletcher M and Dwyer M (2001)

68 The OECD report does not fully reflect the impact of the Working For Families package

69 Organisation for Economic Co-operation and Development (2009)

The OECD report highlighted comparatively poor outcomes for New Zealand children in several key areas. It found that material conditions for children are relatively poor. Average family incomes are low by OECD standards, and child poverty rates are above the OECD average. [70] [71] The proportion of New Zealand children who lack a key set of educational possessions is above the OECD median.

A comprehensive 2008 report on child poverty, prepared for the Office of the Children's Commissioner, recommended that actions were needed in the health, education, employment, housing, social security and tax sectors. Even more fundamentally, it called for a cross-government commitment to eliminate child poverty, with intermediate milestones and clear measurable targets for key indicators in the areas of education, housing and health. [72]

A number of similar recommendations were raised at a summit on children and the recession, convened in September 2009 by the group Every Child Counts. This produced 42 recommendations for action.

> **Can't afford school uniform... Lack of books... Left out... Get picked on at school... Stress... Shame... Low self-esteem... Unhappy... Lonely... Sad...**
>
> **Depressed... Angry... Feelings of worthlessness.**
>
> **Poor health... Sick easily... High risk of getting sick or disease... Can't afford doctor's fees... Can't afford to go to the doctor or dentist... Unpaid doctor's fees.**

Long working hours for parents can also impact on children. The Children's Commissioner has noted that children's time with their parents seems to have been significantly reduced, primarily as a result of the increased number of hours worked by their parents. Use of childcare has also substantially increased, with the fastest area of growth being for children under 2 years of age. Feedback from community groups such as churches and recreation centres notes that they are increasingly taking on the role of 'surrogate parent' to children with parents working shift work, long hours or multiple jobs.

The provision of paid parental leave is a means of supporting parents in the early care of their children. This is discussed in the chapter on women's rights. There continues to be debate about eligibility criteria, and also about the duration of leave and level of pay.

Health

The Ministry of Social Development reported in 2008 that there had been improvements in health outcomes for children and young people in a number of areas, such as infant mortality, immunisation and youth smoking rates. [75] The introduction of B4 School Checks and strengthening of the Well Child Programme have been positive developments.

In some areas, however, poor health outcomes remain a concern. New Zealand has high rates of injury morbidity and mortality, youth suicide, sudden unexplained death in infancy and communicable diseases, compared with similar countries. New Zealand also has the highest rate of male youth suicide in the OECD. [76] Overall, child mortality is higher than the OECD average.

There are marked inequalities in outcomes for rich and poor children and young people. Of particular concern is the persistence of large disparities across a range of risk factors and health outcomes for Māori and Pacific children and young people. Infant mortality rates are higher for Māori and Pacific children and those living in

70 ibid

71 Organisation for Economic Co-operation and Development (2008), *Growing Unequal? : Income Distribution and Poverty in OECD Countries* (Paris: OECD).

72 Fletcher M and Dwyer M (2001).

73 Office of the Children's Commissioner (January 2010), *This is how I see it: Children, young people and young adults' views and experiences of poverty* (Wellington: OCC), p 15

74 ibid p 13

75 Ministry of Social Development (2008), *Children and Young People: Indicators of Well-being in New Zealand 2008* (Wellington: MSD).

76 Organisation for Economic Co-operation and Development (2009)

the most deprived areas. [77] Disparities are also evident in risk factors such as obesity and smoking, and access to preventative measures such as immunisation. [78]

Recent research by the Public Health Advisory Committee (PHAC) identifies factors in the poor health status of New Zealand children, including: [79]

- increasing pressures on families/whānau (including financial and time pressures)
- widening socio-economic disparities
- comparatively low government investment in early childhood
- lack of co-ordination of services and of information collection and sharing.

The PHAC report highlights the particular vulnerability of children and the crucial importance of the early years, "as the positive and negative effects of young children's health can last a lifetime". The committee stresses the need for a holistic, comprehensive approach to improving child health, requiring a whole of government commitment, effective co-ordination and sustained investment.

Mental health services

In recent years, concerns have been raised regarding gaps in provision of essential mental health services for children and young people. [80] These gaps include a lack or shortage of:

- forensic, residential placements [81]
- mental health professionals who specialise in working with children and young people (although there have been attempts to address this, and the workforce has more than doubled over the last decade) [82]
- addiction services for young people and those with parenting responsibilities
- adequate co-ordination among the multiple agencies involved in the care and treatment of young people with very high needs (although this is being addressed through a variety of programmes with other government agencies). [83]

Recent research notes improvements in funding, staffing and access to mental health services. Despite progress, there is a continued need to broaden the range of services and support available, and to reduce inequalities and improve access to services for Māori and Pacific peoples. [84]

Education

> **I believe everyone has the right to an education. In New Zealand, we are very grateful to have opportunities to be educated.** [85]

> **Poverty is … not getting proper opportunities like going on school trips, hard-to-take-part-in things like sports and other activities.** [86]

New Zealand's education system generally performs well, but inequalities in access, participation and achievement indicate that the right to education is not fully realised for all students. These issues are discussed in further detail in the chapter on the right to education.

77 NZ Child and Youth Epidemiology Service (2009), *The Children's Health Social Monitor New Zealand* (2009). Accessible online at http://www.nzchildren.co.nz/infant_mortality.php

78 ibid. See also: Ministry of Social Development (2008), *Children and Young People: Indicators of Well-being in New Zealand 2008* (Wellington: MSD)

79 Public Health Advisory Committee, (2010)

80 Office of the Children's Commissioner (2008)

81 The Ministry has prepared a youth forensic guidance document for DHBs in preparation for further development when funding is available.

82 The shortage of trained professionals in this area is not limited to New Zealand but presents as an international problem.

83 For example, the Ministry of Health is working with the Ministries of Social Development and Education on health and education assessments for children coming into the care of CYFs and improving information-sharing mechanisms between agencies working with children and their families.

84 The Werry Centre for Child and Adolescent Mental Health Workforce Development, the University of Auckland (2009), *The 2008 Stocktake of Child and Adolescent Mental Health Services in New Zealand* (Auckland: The Werry Centre)

85 Beals F and Zam A (2010), *Opportunities for Kids*, one of the digital stories available at: http://a12aotearoa.ning.com/video

86 Office of the Children's Commissioner (January 2010), p 15

New Zealand's rates of educational achievement are the fourth best in the OECD. However, the gap that separates under-achieving students from others is large compared with other OECD countries.[87] The overall number of children participating in early childhood education services has increased. There has been an improvement in achievement rates for Māori and Pacific students and those from low-decile schools.

Although progress has been made since 2004, there continue to be inequalities in educational access, participation and achievement, particularly for students who are Māori, Pacific, disabled or from low-decile schools. While rates of participation in early childhood education have improved, they remain lower for Māori and Pacific peoples.[88] Higher suspension, exclusion, and expulsion rates also remain an issue for Māori, males and students from low-decile schools. Truancy rates are substantially higher among Māori and Pacific students.[89]

While there is limited disaggregated data on the engagement and participation of disabled students in education, disabled students with high or very high support needs have a significantly lower achievement rate than the general population.[90]

Revised curriculum

The New Zealand Curriculum for Schools was reviewed in 2006–07, with wide consultation. The revised curriculum, for the first time, makes an explicit policy statement that "community participation for the common good" and "respect for self, others and human rights" are values to be "encouraged, modelled and explored" and "evident in the school's philosophy, structures, curriculum, classrooms and relationships".

Immigration Act

Some children have experienced discrimination in accessing education because of their immigration status. New Zealand's reservation to UNCROC applies in this situation.

The revised Immigration Act 2009 ensures that education providers are not committing an offence by allowing children not entitled to study in New Zealand to undertake compulsory education.[91] Additional funding has been allocated in Budget 2010 to enable access to State schools.

Early childhood education

Access to early childhood education (ECE) has improved, particularly with the introduction of a 20-hours subsidy in 2007. However, participation rates are lower for Pacific and Māori children and those in low-decile areas. Budget 2010 retained the 20-hours scheme, with additional support for community-led ECE initiatives. However, it lowered the additional funding tagged to providers with 100 per cent fully qualified and registered teachers. Current providers with more than 80 per cent qualified staff have their government funding reduced. Fees paid by parents are likely to rise, and services may lose incentive to employ 100 per cent qualified teachers.

Bullying

Recent research has found that a significant proportion of young people experience various forms of violence and bullying:[92]

- A high 41 per cent of students reported being hit or harmed in the previous 12 months, and around a quarter of those students reported the violence as severe

87 Organisation for Economic Co-operation and Development (2009)

88 Ministry of Education (2010), *Prior participation in early childhood education: new entrants*. Accessible online at http://www.educationcounts.govt.nz/indicators/student_participation/early_childhood_education/1931

Ministry of Social Development (2009), *MSD Social Report 2009*. Accessible online at http://www.socialreport.msd.govt.nz/knowledge-skills/participation-early-childhood-education.html

89 Ministry of Education (2009), Student Participation Indicators. Accessible online at http://www.educationcounts.govt.nz/indicators/student_participation

90 Issues relating to disabled students' right to education are discussed further in the chapters on the right to education and the rights of disabled people.

91 Immigration Act 2009, section 315(3)

92 Clark T C, Robinson E, Crengle S, Grant S, Galbreath R A and Sykora J (2009). *Youth'07: The Health and Wellbeing of Secondary School Students in New Zealand. Findings on Young People and Violence.* (Auckland: The University of Auckland). Accessible online at http://www.youth2000.ac.nz/publications/reports-1142.htm

- Among secondary students, 6 per cent reported that they were bullied at school on a weekly basis or more often.

Particularly vulnerable groups include disabled; ethnic minorities; and same-sex-attracted, trans and intersex children and young people.

The incidence of violence in schools has prompted inquiries into the issue by the Human Rights Commission, the Ombudsmen and the Children's Commissioner.

The Children's Commissioner's inquiry found the incidence of bullying in New Zealand schools to be high compared with other countries, with rates more than 50 per cent above the international average in 2008. [93] The report found bullying to be a threat to student well-being, contributing to a significant number of school suspensions and to higher absentee and drop-out rates for victims of bullying. Effective practices identified through the inquiry were those that focussed on the school environment, rather than dealing only with individual bullies or victims. The inquiry highlighted the importance of a 'whole-school approach' to addressing violence and bullying. It suggested clear policies and procedures, ongoing review and professional development, and collaboration among the school, students, parents and community. [94]

The Human Rights Commission's review of legislation, regulations and policy found significant gaps in relation to consideration of the impact on victims, their right to education and providing for their right to be heard. The report emphasised the need for clear policies and guidelines that explicitly deal with the rights to security, education and natural justice. [95] Other recommendations related to the role of the Human Rights in Education initiative in supporting schools to become human rights communities, and the explicit inclusion of human rights in the National Education Guidelines.

Gay, lesbian and bisexual students are among those likely to feel unsafe at school. [96] A recent survey found that over half of same-sex-attracted students had been hit or physically harmed in the previous 12 months. Of those who had been bullied, a third had been bullied because they were gay and one in five continued to be scared that someone would hurt or bother them at school. [97]

> **I need a place where I belong. A place to connect.**
>
> Participant, NZ Diversity Forum – Youth Forum (2009)

The Commission's 2007 Inquiry into Discrimination Experienced by Transgender People [98] highlighted issues for trans children and young people. These included barriers within schools, at work, playing sport, accessing health services and actively participating in their community. A key recommendation to address discrimination in education is that schools share best practice about supporting trans children and young people.

Research on the experiences of disabled children in schools has also highlighted bullying suffered by this group of students. [99]

> **We asked ourselves, 'What needs to happen for diversity to really flourish in Aotearoa New Zealand?'. We believe it's about education, representation and kotahitanga." [100]**

93 Carroll-Lind J (2009), *School Safety: an inquiry into the safety of students at school* (Wellington: OCC). Accessible online at http://www.occ.org.nz/__data/assets/pdf_file/0016/6028/OCC_SchoolSafetyReport_160309.pdf

94 Carroll-Lind J (2010), *Responsive Schools* (Wellington: OCC). Accessible online at http://www.occ.org.nz/__data/assets/pdf_file/0006/7269/OCC_Responsive_01.04.10.pdf

95 Human Rights Commission (2009), *School Violence, Bullying and Abuse: A human rights analysis* (Auckland: HRC). Accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/01-Sep-2009_14-08-40_Human_Rights_School_Violence_FINAL.pdf

96 Nairn K and Smith A (2003), 'Taking students seriously: the right to be safe at school', Gender & Education, 15, 2, pp 133–147

97 Rossen F V, Lucassen M F G, Denny S and Robinson E (2009), *Youth '07 The health and wellbeing of secondary school students in New Zealand: Results for young people attracted to the same sex or both sexes.* Auckland: The University of Auckland. Accessible online at http://www.youth2000.ac.nz/publications/reports-1142.htm

98 Human Rights Commission (2007), *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (Wellington: HRC)

99 MacArthur J, Sharp S, Kelly B and Gaffney M (2007), 'Disabled Children Negotiating School Life: Agency, Difference and Teaching Practice', *International Journal of Children's Rights* 15,1, pp 99–120

100 The Story of the Youth Forum, video created by participants in the NZ Diversity Forum – Youth Forum (2009). Accessible online at http://www.facebook.com/pages/Youth-Human rights-NZ/355635249587

Participation rights

Article 12(1) of UNCROC provides that, in accordance with the evolving capacities of the child, due weight should be given to their views on matters affecting them. Other articles, such as 15 on the right to associate with others, and 23 on the right to special care and involvement in society by disabled children, also make provision for the participation of children and young people.

The UNCROC has highlighted the need to ensure that the right of young people to have their views taken into account in administrative or judicial processes that affect them is systematically included in legislation and regulations. [101]

FINDINGS OF *HEAR OUR VOICES WE ENTREAT: CHILD PARTICIPATION REPORT TO THE UN COMMITTEE ON THE RIGHTS OF THE CHILD*, SAVE THE CHILDREN NEW ZEALAND, 2010

What's hot (good) about children's and young people's rights in Aotearoa NZ:

- **We have families, schools and community groups that care about young people.**
- **We have health care for children and young people.**
- **We have good food.**
- **We have opportunities to learn and be educated.**
- **We have great things to do outdoors in our green environment.**
- **We have lots of fun things that we can do with our friends and families.**
- **We are nuclear free and protected from war.**

What needs to be addressed and improved on:

- **We need to teach New Zealanders about UNCROC.**
- **We need to respect the rights of and listen to the opinions of Māori people, leaders and activists.**
- **We need to include young people in discussions about climate change.**
- **We need to address bullying by teaching others how to accept everyone (despite their differences).**
- **We need to make sure that everyone can access public transport in the cities and towns that have buses and trains.**
- **We need to look at the connections between gangs, drugs, alcohol and child abuse and look at programmes that can address the effects of gang culture on young people.**
- **We need to give young people a better voice in national and local government, and include and listen to their opinions.**
- **We need to ask whether our education meets the needs of different groups of young people (particularly if alternative schools and activity centres are closing).**
- **We need to talk to children and young people when making changes to education.**
- **We need to look at teaching about diversity and sexuality in New Zealand schools.**
- **We need to celebrate our families.**
- **We need to look at the effects of domestic violence on children and address these.**
- **We need to look at the connections between gangs, drugs, alcohol and child abuse and look at programmes that can address the effects of gang culture on young people.**
- **We need to investigate the relationship between front-line police and young people and focus our job on encouraging police to prevent young people from becoming criminals.**
- **We need to ensure that young people have rights in the workplace which protect them from discrimination.**

101 United Nations Committee on the Rights of the Child (2003)

Recent and pending pieces of legislation (such as the Care of Children Act 2004, the Evidence Act 2006 and the Children, Young Persons and their Families Amendment Bill (No. 6)) provide for improved recognition and opportunities for children and young people to express their views and for these to be taken into account. [102] In some areas, however (notably adoption legislation) provision for children's participation in decisions remains limited.

Examples of initiatives to facilitate and enhance children's participation include:

- forums and events, such as Youth Parliament, Youth in Local Government Conference, Youth Week and Kids Voting 2008
- tools and resources that encourage and assist agencies to obtain and incorporate children's views, such as those developed by the Ministry of Youth Development (MYD)
- advisory groups, such as the Children's Commissioner's Young People's Reference Group, the MYD Activate group and Aotearoa Youth Voices Network, and local-government youth councils.

At loca government level, many local authorities have youth councils, reference groups and/or youth policies. The long-term community-council plans process under the Local Government Act 2002 increasingly sees young people as a population to consult specifically. Such measures are particularly important, given the impact that local-government decisions have on the lives of children. However, provision for children's views to be heard is still not consistent or automatic. In the recent major reforms of Auckland local government, there is a lack of provision in the draft legislation for mechanisms to ensure that children's perspectives are heard and taken into account in decision-making processes in the new Auckland Council. [103]

Online social networks, content-sharing sites and devices such as iPods and mobile phones are now fixtures of youth culture. [104] New media forms have altered how young people socialise, learn, participate, organise and take action. The growth in use of electronic communication media such as social networking sites offers new means of involving children and young people and enabling them to express their views on issues. These fora are increasingly being used by agencies and organisations for this purpose.

Digital stories created by young people, as part of a youth shadow report to the UNCROC, illustrate that children and young people have powerful stories and valuable perspectives to share on a wide range of issues. Examples of issues of concern to these young people include awareness of rights; discrimination and racism; violence and gangs; education; being listened to by decision-makers; environmental issues; and the importance of caring families and communities. [105]

> **I believe I have a voice. I know more than you think. I hate it when they don't ask for my opinion.**

Conclusion
Whakamutunga

The situation for most children and young people in New Zealand is generally positive. Most children are able to enjoy their human rights and are protected and cared for, with opportunities to learn, develop and have fun. Since 2004, there have been some significant developments in the key areas of health, education, justice and material well-being that have impacted positively on the lives of children.

However, children remain relatively invisible. Their rights and interests are not routinely considered, nor

102 For example, both the Care of Children Act 2004 (e.g. section 6) and the Children, Young Persons and their Families Amendment (No. 6) Bill provide that a child or young person must be given reasonable opportunities to express their views and their views must be taken into account. The Evidence Act 2006 makes it mandatory for the court to hear an application on how a child applicant is to give their evidence. Options include evidence being presented from behind a screen, from an appropriate place outside the court. and by video recording.

103 Office of the Children's Commissioner (2010), *Making Auckland a Great Place for Children* (Wellington: OCC), March

104 Ito M et al (2008), *Living and Learning with New Media: Summary of Findings from the Digital Youth Project.* Accessible online at http://digitalyouth.ischool.berkeley.edu/files/report/digitalyouth-TwoPageSummary.pdf

105 Information on the project and digital stories accessible online at http://a12aotearoa.ning.com/ See also Beals F and Zam A (2010), *Hear our voices we entreat: Save The Children NZ Child Participation Report to the UN Committee on the Rights of the Child* (Wellington: Save The Children NZ)

are their views sought or listened to. Without effective mechanisms that enable children to participate in decisions that affect them, their voice is largely unheard and their interests can be ignored or subsumed.

While a range of policies for children exist, there is little co-ordination of these. There is a need for a better understanding – through systematic data collation and analysis – of the level of investment being made for children, how and where spending is targeted and the impact it is having.

Despite improvements for children, significant numbers are being left behind and too many children experience violence and neglect, poverty and poor health, and barriers to the full enjoyment of their right to education. Enduring inequalities remain, with Māori and Pacific children disproportionately experiencing poor outcomes. These disparities represent a failure to meet all children's rights to development.

Children are the age group most likely to be affected by poverty and material hardship, and this distinction has persisted through good economic times and bad. Child poverty directly impacts on health and education outcomes, with the effects of poor outcomes in early childhood reaching into later childhood, adulthood and often into the next generation of children. Addressing these complex issues poses significant challenges and requires sustained commitment and careful targeting of those most vulnerable.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to progress the rights of children and young people:

Reservations to UNCROC

Removing the remaining reservations to UNCROC– with clear steps and timetable for action identified.

Legislative recognition

Establishing a mechanism to ensure that children's rights and views are systematically considered and incorporated in legislation and policy development.

UNCROC obligations

Ensuring that legislation reflects New Zealand's obligations under UNCROC, including:

- ensuring that the best interests of the child are a primary consideration
- raising the age of criminal responsibility
- extending the Children, Young Persons and Their Families Act protections to include all persons under the age of 18
- extending age discrimination protections to include all children
- reviewing adoption legislation.

Younger children

Prioritising resourcing for programmes and services for younger children and their families (from conception to age six).

Child poverty and inequality

Prioritising eliminating child poverty and addressing inequalities affecting Māori and Pacific and disabled children.

Data collection

Improving co-ordination, collation and analysis of data to support and inform policy-making and budgetary allocations and to monitor their impacts on children.

Positive environments

Developing and maintaining initiatives that support families, schools and communities to build positive, rights-respecting environments for children and to prevent violence and bullying.

Participation

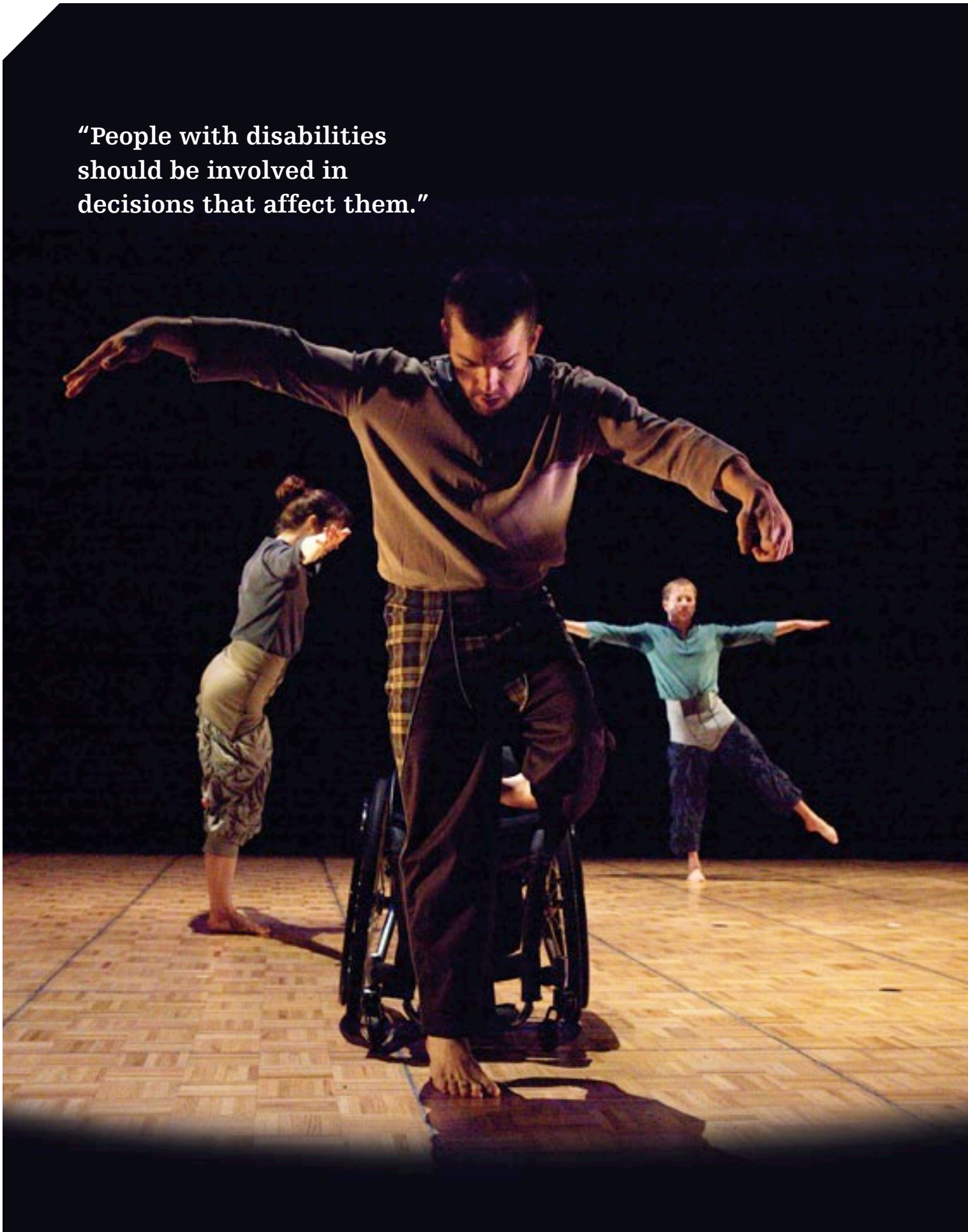
Increasing avenues for children to participate and have their views listened to, including by supporting and expanding existing initiatives that effectively enable child participation.

Awareness

Improving knowledge and awareness of human rights, including UNCROC.

17. Rights of Disabled People

Tikanga o te hunga hauā



Disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

United Nations Convention on the Rights of Persons with Disabilities, Preamble

Introduction
Tīmatatanga

WHAT IS DISABILITY?

Disability is an evolving concept. The Convention on the Rights of Persons with Disabilities (CRPD) says that disability results from the interaction between a non-inclusive society and individuals with impairments. Persons with disabilities include "those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others". [1]

Internationally, disabled people remain among the most marginalised in every society. Regardless of the human rights or economic situation of a country, disabled people are generally among the last to have their human rights respected. There are at least 650 million disabled people worldwide, making them the world's largest and most disadvantaged minority. An estimated 20 per cent of the world's poorest people are those with disabilities; 98 per cent of children with disabilities in developing countries do not attend school; and the literacy rate for adults with disabilities is as low as 3 per cent. [2]

From the little reliable national information available, it is clear disabled people in New Zealand have poor outcomes compared with the general population. There have now been three national disability surveys run in conjunction with the national census: in 1996, 2001 and 2006. The position of disabled people relative to the general population has barely changed in that period. In areas as fundamental as employment, education, adequate standard of living and accessible public transport, disabled people are significantly disadvantaged.

International context
Kaupapa ā taiao

THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

Disabled people are often denied the basic rights and fundamental freedoms that most people take for granted. The CRPD affirms that disabled people enjoy the same human rights as everyone else and are able to lead their lives as full citizens. It does not recognise any new human rights, but clarifies the obligations and legal duties of states to respect and ensure the equal enjoyment of all human rights by all persons with disabilities.

The CRPD was necessary primarily because of repeated failures to consider the just claims of disabled people within the existing human rights treaties. A leading international advocate says that the convention will have achieved its aim when governments internalise its values and when the just claims of disabled people are considered to be 'normal' politics. [3]

New Zealand ratified the CRPD on 26 September 2008, after its adoption by the United Nations General Assembly two years earlier. New Zealand has a long-standing policy of ratifying international treaties only once all domestic law is consistent with them. The Disability (United Nations Convention on the Rights of Persons with Disabilities) Act 2008 was passed after a comprehensive assessment of New Zealand's laws relating to disability. Its main effects were to change various laws that involve automatic disqualification for office because the person has a mental disorder, and to change the way some sections of the Human Rights Act 1993 (HRA) deal with reasonable accommodation. [4]

1 CRPD, Article 1

2 Office of the High Commissioner for Human Rights (2007), *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* (Geneva: United Nations). Accessible online at http://www.un.org/disabilities/default.asp?id=212

3 Quinn G (2008), 'The CRPD as an Engine for Domestic Law Reform'. A presentation at the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, New York, 31 October 2008

4 'Reasonable accommodation' is a term used to describe the creation of an environment that will ensure equality of opportunity for people with disabilities, family commitments or particular religious beliefs.

Dancers Julia Milsom (left), Daniel King (centre), Adrian Smith (right) of the Touch Compass Dance Company in dress rehearsal.

Article 1 says the purpose of the CRPD is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity".

Article 3 outlines the principles that govern the CRPD:

a. respect for the inherent dignity and individual autonomy of persons with disabilities, including the freedom to make one's own choices
b. non-discrimination
c. full and effective participation and inclusion in society
d. respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
e. equality of opportunity
f. accessibility
g. equality between men and women
h. respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

MONITORING THE CRPD

The CRPD anticipates a new approach to the protection, promotion and monitoring of human rights by signatory countries under Article 33. The Office for Disability Issues, as the focal point within the Government, and the Ministerial Committee for Disability Issues, as the co-ordinating mechanism, have joint responsibility for ensuring that all government agencies have a consistent and comprehensive approach to implementation. The Human Rights Commission, the Office of the Ombudsmen and the Disability Convention Coalition together form the independent mechanism that is responsible for promoting, protecting and monitoring implementation of the CRPD.

The CRPD Optional Protocol provides for individual complaints once all domestic remedies have been used, and allows the United Nations CRPD Committee to investigate any situation in New Zealand that may involve violations of the CRPD. New Zealand has not ratified the optional protocol and is not currently working towards ratification.

New Zealand's first periodic report to the committee on the implementation of the CRPD is due in October 2010, and every four years thereafter. The Commission, as New Zealand's national human rights institution (NHRI), has the role of providing an independent assessment to the United Nations of progress towards implementing the CRPD. The Commission is developing a monitoring framework and has appointed a reference group of disabled people to assist with this task. This chapter will inform the Commission's report to the committee.

The CRPD Committee has identified three issues which are likely to apply in all states that have ratified the CRPD. These are accessibility, reasonable accommodation, and legal capacity and supported decision-making.

Access to the built and social environment is one of the key requirements to enable disabled people to "live independently and participate fully in all aspects of life". Article 9 requires the Government to ensure that all disabled people can access the built environment, transport services, public facilities, individual supports, public services and communication technologies on an equal basis with others. To ensure this happens, the CRPD recognises that minimum standards and guidelines may need to be developed, used and monitored.

Reasonable accommodation is related to the requirements of many disabled people for adjustments to the standard way in which goods, services and facilities are delivered, in order for them to be available to disabled people on an equal basis with others. Over time, universal design and developing services to suit the whole population will lessen the need for specific adjustments. The CRPD says that failing to provide reasonable accommodation constitutes discrimination. Reasonable accommodation has two main elements: making the necessary adjustments in order to make the service available to the disabled person; and not imposing an undue burden on the service-provider. [5]

Reasonable accommodation is a specific requirement in articles dealing with the liberty and security of person (Article 14), education (Article 24) and employment (Article 27).

An area of concern for disabled people has been their rights to legal capacity on an equal basis with others. Article 12 provides that an individual cannot lose her or his legal capacity to act simply because of a disability.

5 CRPD, Article 2

Some disabled people will require assistance to exercise this capacity. The CRPD requires that states do what they can to support those individuals, and introduce safeguards against abuse of that support. Supported decision-making includes the principle that the person should be supported to exercise legal capacity to the greatest extent possible in every situation or circumstance. There are some models, such as the circle of support, which could be adapted for the New Zealand context.

New Zealand context
Kaupapa o Aotearoa

LEGISLATION

Disabled people have the same rights and legal entitlements as other New Zealanders. The Human Rights Act 1993 (HRA) and the New Zealand Bill of Rights Act 1990 (BoRA) protect the right of people with disabilities to freedom from discrimination.[6] Both rely on the HRA definition of disability:

- physical disability or impairment
- physical illness
- psychiatric illness
- intellectual or psychological disability or impairment
- any other loss or abnormality of psychological or anatomical structure of function
- reliance on a guide dog, wheelchair or other remedial means
- the presence in the body of organisms capable of causing illness.

In 2008, the High Court described the definition in the HRA as exhaustive. Although it held that the definition did not include the 'cause' of a disability, the court qualified this by stating that the definition needed to be interpreted in a broad and purposive way and considered in the context of the legislation as a whole.[7]

The HRA provides exceptions that permit disabled people to be treated differently in certain situations. Reasonable accommodation is a general term used to describe specific exceptions in particular areas. It refers to changes to a workplace or provision of services to ensure that a person with a disability can, for example, do a job or access premises. Whether an employer should make such changes is balanced against the disruption that may result. If it is unreasonable to expect the employer or service-provider to provide the necessary services or facilities (for example, relocating an office), then they are not obliged to do so. In 2008, changes were made to some of the employment-related areas of the HRA to ensure that the reasonable accommodation criteria in the act were consistent with the standards in the CRPD.

A further exception relates to the risk of harm. If a disability poses a risk of harm to the individual or others but measures can be taken to reduce the risk without unreasonable disruption, then the provider or employer should take those measures. If it is unreasonable to take the risk or measures to reduce the risk, an employer or service provider may be justified in discriminating.

In 2003, the Human Rights Review Tribunal considered that the test for deciding whether it is reasonable to make changes or adjustments is 'reasonableness', not 'undue hardship'.[8] This is a relatively low threshold, and one that is easier for an employer or service-provider to satisfy.

The Ministry of Justice is developing a guide to reasonable accommodation. The Commission sees this as a high priority, as there is widespread misunderstanding about the concept and how it should be applied. Equally important is the need to clarify how the interpretation of reasonable accommodation in the CRPD will be reconciled with the way reasonable accommodation is described in the HRA and other legislation. Cases currently before the courts may help with this.

The HRA contains some exceptions to take account of genuine occupational qualifications and justifications.[9] Special measures are permitted to ensure equality for vulnerable or disadvantaged groups or address historical

6 For more detailed comment on the structure of the HRA, see the chapter on equality and freedom from discrimination.

7 Trevethick v Ministry of Health (1/4/08) HC Wellington CIV-2007-485-2449. HRRT [2007] NZHRRT 21Dobson J

8 Smith v Air New Zealand Ltd, HRRT decision 23/03 (24/6/03) at para 126

9 Section 97 HRA. In Avis Rent A Car Ltd v Proceedings Commissioner (1998) 5 HRNZ 501, the tribunal accepted that the practice of rental car companies passing higher insurance costs for drivers under 25 on to the client was justified.

disadvantage. [10] A genuine occupational qualification could be, for example, specifying a male actor to play Macbeth in Shakespeare's play of the same name.

The BoRA affirms a number of the rights and freedoms in the International Covenant on Civil and Political Rights (ICCPR). In addition to the right to freedom from discrimination, the protections of the BoRA that may be relevant to disabled people include the right to be free of unreasonable search and seizure and arbitrary arrest and detention; the right to be treated with dignity and humanity if detained; and the right not to be subjected to cruel and unusual treatment or medical or scientific experimentation. Under section 5, the rights and freedoms in the BoRA can be restricted if the limitation can be justified in a "free and democratic society". The BoRA is also subordinate to other enactments. This means that rights, such as the right to refuse medical treatment, may not apply if another law has a provision specifically related to this right.

The Health and Disability Commissioner Act 1994 and the associated Code of Health and Disability Services Consumers' Rights protect the rights of disabled people as consumers of health and disability services. The code identifies 10 consumer rights, including the right to be treated fairly and without discrimination, the right to informed consent, the right to be treated with respect, the right to make decisions about your own care and the right to receive a quality service. A review of the act and the code in 2009 recommended that disability services include needs assessment and service co-ordination services, and that the code be amended to include the right to timely access to disability services.

Other laws that may apply to disabled people include:

- Mental Health (Compulsory Assessment And Treatment) Act 1992
- Protection of Personal and Property Rights Act 1988
- Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003
- Criminal Procedure (Mentally Impaired Persons) Act 2003 [11]
- Privacy Act 1993
- Injury Prevention, Rehabilitation and Compensation Act 2001
- Building Act 2004.

THE NEW ZEALAND DISABILITY STRATEGY

In addition to legislation, New Zealand has a high-level framework across the government sector relating to disabled people. The New Zealand Disability Strategy (NZDS) was established by the New Zealand Public Health and Disability Act 2000 to ensure that all government agencies consider disabled people in their decision-making processes. It has 15 separate objectives, which have subsequently been grouped into:

- rights of citizenship
- government capacity
- participation in all areas of life
- specific population groups.

The act requires the Minister for Disability Issues to report annually to Parliament on the progress made in implementing the NZDS. While it had no specific funding, departments and ministries were directed to consider the needs of disabled people as part of their normal planning cycles and to report on progress annually. The Office for Disability Issues (ODI) was set up within the Ministry of Social Development to provide policy advice to the Government on disability issues, and to monitor and report on progress on implementing the NZDS.

More recently, the Government has established a Ministerial Committee on Disability Issues under the chair of the Minister for Disability Issues. The committee requires that the Government's actions be focussed on improving the circumstances of disabled people and their whānau and friends who support them, improving the accessibility of the world they live in, and improving disability supports. [12]

In a 2007 review of the first six years of the NZDS, disabled people acknowledged that the implementation

10 Both the HRA and the BoRA provide for special measures. The provisions are similar. Both require any measures to be taken in good faith and permit actions that would otherwise be unlawful. The person or groups must also need, or be reasonably supposed to need, assistance in order to achieve an equal place in the community.

11 These four acts are covered in the chapter on the rights of people who are detained.

12 Office for Disability Issues (2009), *Work in Progress: 2009* (Wellington: Office for Disability Issues)

of the strategy had resulted in improvements in accessibility and communications, wider recognition of their value and contribution within their communities, and some inclusion within central decision-making processes. However, many participants in the review felt that progress had been too slow, some disabled people have benefited more than others, and there was still a long way to go before disabled people felt they lived in a fully inclusive society. The report recommended establishing a national implementation plan, with linked funding, which would focus on:

- improvements for those disabled people who are most disadvantaged
- multi-year plans and reports for priority areas that involve multiple agencies
- greater partnership between central government agencies and disabled people
- developing the capacity of disabled people
- improved information to monitor outcomes for disabled people. [13]

The legal requirements of the NZDS do not apply to territorial authorities. Nonetheless, a number of city councils have developed strategic plans and/or action plans based on the strategy or making reference to the strategy. These include the former Waitakere, Auckland and Manukau City Councils, and Christchurch and Dunedin City Councils. [14]

The NZDS has provided a focus and platform for action within the Government that has, for instance, provided an impetus for the passing of the New Zealand Sign Language Act, New Zealand's leadership in negotiating the CRPD, and some improvements in the way the Government involves disabled people in decision-making. Progress overall in achieving full human rights has, however, been slower than many disabled people had hoped for.

The New Zealand Public Health and Disability Act 2000 requires that a disability strategy be developed and reported on annually. Both the report on the first six years of the NZDS and the Social Services Select Committee report on the provision of disability services recommend, as a matter of some urgency, that a programme of work be developed to implement the NZDS, including targets, benchmarks, indicators and dedicated funding. [15] The Commission strongly agrees with this recommendation and notes that one of the early outcomes of New Zealand's ratification of the CRPD has been to raise expectations among disabled people of faster progress in realisation of their rights.

New Zealand today
Aotearoa i tēnei rā

Reviewing the rights of disabled people since 2004 reveals that they remain the most disadvantaged group in New Zealand society. While gains have been made in various areas, the breadth of marginalisation of disabled people, including children and young people, cannot be underestimated and is not easily quantified. Different groups of disabled people have different needs and there are intersectional issues such as gender, ethnicity, age and socio-economic disparities that make the rights of disabled people one of the most complex and pressing areas of human rights in New Zealand.

THE LACK OF INFORMATION ABOUT DISABLED PEOPLE

One fundamental barrier to any assessment of the rights of disabled people in New Zealand is the paucity of demographic and analytical data available about them. This lack plus their daily experiences, the barriers they face and their aspirations will impact on implementation of the CRPD and monitoring of the convention.

Article 31 requires countries to collect information to enable planning for implementation and assessing the success of implementation. Overall, the position of disabled people in relation to key social and economic

13 Litmus Consulting (2008), New Zealand Disability Strategy Implementation Review 2001–2007 (Wellington: Office for Disability Issues). Accessible online at http://www.odi.govt.nz/nzds/progress-review/index.html

14 See, for example, Dylan S (2009), *Strengthening Contribution: The Waitakere Disability Strategic Plan 2009–2011* (Auckland: Waitakere City Council)

15 Litmus Consulting (2008); Social Services Committee (2008), *Inquiry into the Quality of Care and Service Provision for People with Disabilities: Report of the Social Services Committee* (Wellington: House of Representatives), accessible online at http://www.parliament.nz/NR/rdonlyres/06259D2F-780B-40A0-9170-005C8C046E72/93089/DBSCH_SCR_4194_6219.pdf

outcomes such as employment, labour-force participation, educational participation and achievement, and public transport use and barriers is reliably measured on a national basis only once every five years. This limits effective programme and policy design, monitoring, reporting and evaluation.

The only reliable national survey of outcomes for disabled people is the New Zealand Household Disability Survey (the Disability Survey). Although the New Zealand General Social Survey (NZGSS) is described as a biennial survey of social and economic outcomes for all New Zealanders aged 15 years and over, it does not provide disaggregated data for disabled people. Other more regular surveys, such as the Household Labour Force Survey, do not provide data on disabled people. The Social Report provides an annual summary of how New Zealanders are faring on a range of social and economic indicators. The 2009 report included 43 indicators, yet none of these reported on how disabled people are faring compared with the population as a whole. Disability was mentioned only in the commentary about New Zealand's population and in the section on perceived discrimination, which is based on a Human Rights Commission-sponsored survey. [16]

The 2011 Disability Survey is being substantially redesigned to reflect the changing understanding of disability and changing requirements for data, particularly since the Government ratified the CRPD in 2008. From the 2006 Disability Survey, five in-depth reports have been produced, covering the labour market, education, disability and Māori, disability and informal care, and travel and transport. Some of the information from these reports is covered below.

In 2006, 17 per cent of New Zealanders reported having a disability. The general pattern of results is consistent with previous surveys.

Disability increases with age. Across all New Zealanders, 10 per cent of children aged 0–14 years had a disability, as did 20 per cent of adults aged 45–65 years, and 45 per cent of adults aged 65 years and over. The gender split was approximately equal at all ages except for children, where boys made up 59 per cent of those with a disability.

Accidents or injuries were the most common cause of disability for adults. An estimated 166,300 adults aged 15 years and over had disabilities caused by accidents or injuries, with most injuries occurring in the workplace. Among those with a disability, accident or injury was the cause for 31 per cent of those aged 15–44 years and 34 per cent of those aged 45–64 years.

There are significant differences in disability rates across different ethnicities. Total disability rates were 18 per cent for Europeans, 17 per cent for Māori, 11 per cent for Pacific peoples and 5 per cent for those of Asian ethnicity. Much of this variation is explained by the differences in the age structure of the populations. In every age group, Māori had a higher disability rate than other ethnic groups. Adjusting for the different age structures of the Māori and non-Māori populations, the disability rate for Māori was 19 per cent, compared with 13 per cent for non-Māori. [17]

Inquiries, complaints and consultation with disabled people indicate a number of issues where further research and information is urgently needed. These issues have a large impact on their ability to participate fully in all aspects of society. The Commission recommends that the Government's social research and evaluation work programme take into account these issues as a high priority.

THE COST OF DISABILITY

Many disabled people face additional costs that their non-disabled peers do not face. These are both direct costs and opportunity costs. Direct costs include medical treatment, support needs and transport modifications. Opportunity costs include the extra time and energy required to do things, especially where there are significant barriers. Not being able to use mainstream facilities and services and having to arrange alternative ways to get things done often involve significant ongoing cost to either the individual or society. A more effective long-term solution would be to invest in systemic, inclusive, universal design approaches. The cost of disability is often highest for people with high support needs and/or multiple impairments.

16 Ministry of Social Development (2009), *The Social Report 2009: Te Pūrongo Oranga Tangata*, (Wellington: MSD)

17 Ministry of Social Development (2009), p 1

Research carried out in 2006 identified the additional resources, and the costs associated with those resources, required by disabled people aged 18–64 years in order to live in the community and achieve an ordinary standard of living. Budgets were constructed for people with physical, vision, hearing, intellectual and mental health impairments, and arranged according to items required to meet moderate and high needs. The research did not cover those with multiple impairments or dependents, nor did it address where the funding would come from, among the mix of government funding, personal provision and natural supports. In 2006 values, additional weekly costs for the 10 identified groups ranged from $210 to $2560. An analysis of the needs of each group reinforces the principle that each person's situation needs to be assessed on its own merits, as no response will work for all disabled people. Other factors such as age, geographical location and cultural needs have a substantial effect on legitimate needs and associated costs. [18]

CAUSE OF DISABILITY AS A MEANS OF ALLOCATING RESOURCES

Support services for education, employment and income, personal, family and household support needs are currently allocated differently depending on how a person has acquired their impairment. Those who have acquired it through congenital or birth conditions, illness or an accident occurring prior to April 1974 have access to one set of support services, and those who have acquired their impairment due to an accident occurring after April 1974 are entitled to a different set. Many in the community perceive the second set of supports, usually paid through the national accident compensation scheme, to be more generous and aimed more clearly at achieving an ordinary standard of living. The Court of Appeal has determined that the cause of disability is not included in the definition of disability in the HRA. [19] It is clear that this continued distinction is contrary to the provisions of the CRPD.

ISSUES FOR PEOPLE WITH INTELLECTUAL DISABILITY

People with an intellectual disability experience a lower life expectancy and greater prevalence of health problems compared with the general population. They also do not have access to the same levels of preventative health care and health promotion programmes as others. No significant change has occurred since the National Health Committee identified this issue in 2003. [20]

The level of support services provided is currently determined by a person's background and history rather than their needs. Those who have moved from institutions to community-based facilities often have access to fully funded support, while those living in residential care services or living at home with their families often have access to lesser levels of support.

SYSTEMIC ISSUES

The problems disabled people face in relation to a number of issues are systemic and enduring and require action. Improving them will make a significant difference to the daily lives of disabled people, including children and young people. These issues are discussed below. They include two of the core basic human rights, employment and education, as well as discrimination and social inclusion, freedom from violence and abuse, and concerns about accessible transport, information, the physical environment and services.

EMPLOYMENT

Access to employment is a fundamental requirement for independent living and one of the top three issues identified in an online survey conducted by the Commission in November 2009. Article 27 of the CRPD recognises the right of disabled people to work on an equal basis with others, including the right to gain a living in a labour market and work environment that is open, inclusive and accessible. The convention prohibits discrimination in all aspects of employment. It also protects trade union rights and access to vocational guidance services, promotes employment in the public and private sectors, and specifically provides for reasonable accommodation.

Article 27 is the most modern expression in international treaties of the right to work. It refers explicitly to equal employment opportunities, equal pay for work of equal

18 Disability Resource Centre Auckland Inc (2010), *The Cost of Disability: Final Report* (Auckland: Disability Resource Centre)

19 Trevethick v Ministry of Health (1/4/08), HC Wellington CIV-2007-485-2449. HRRT [2007] NZHRRT 21Dobson J

20 National Health Committee (2003), *To Have an Ordinary Life: Kia Whai Oranga Noa,* (Wellington: National Advisory Committee on Health and Disability)

value, employment in the public sector, and concepts such as affirmative action.

Discrimination in employment

The gap between the employment rates of disabled people and non-disabled people has barely changed in more than a decade, despite favourable economic conditions for much of that time and support programmes provided by the Government. Many disabled people feel discrimination still operates at a systemic and attitudinal level to exclude them from work they are qualified and able to do.

In recent years, government policy has moved towards providing strategies, policies and funding to achieve greater inclusion in the workplace, but progress has been slow. The recently launched Employers' Disability Network aims to provide resources to employers to assist them to recruit and retain disabled employees.

Employment data

The most reliable information about the labour market outcomes for disabled people comes from the Disability Surveys, which followed the 1996, 2001 and 2006 Censuses.[21] In 2006, disabled Māori adults were least likely to be employed in the 15–64 age group.[22]

While participation in the workforce has steadily increased among both disabled and non-disabled between 1996 and 2006, the gap in employment rates has not reduced. The data for 2006, although not directly comparable with 1996 and 2001, indicates that government policy has had limited success in improving labour-market outcomes for disabled people.

EMPLOYMENT RATES OF PEOPLE WITH DISABILITIES: MĀORI AND NON-MĀORI

Group	*Employment rate*
Disabled Māori adults	**45%**
Disabled non-Māori adults	**62%**
Non-disabled Māori adults	**67%**
Non-disabled non-Māori adults	**77%**

There is a pattern of lower workforce participation for both men and women, across all major age groups and for all recorded ethnic groups. As for the total population, participation rates are higher for disabled men than disabled women across all age groups. Among both men and women with disabilities, participation is highest at the younger working ages (15–44 years); in the non-disabled population, participation peaks at 45–65 years. Pacific men with a disability (46 per cent) have a much lower participation rate than Māori men (63 per cent) and men from other ethnic groups (73 per cent). For disabled women, there is less variation among ethnic groups.

As with the total population, there is a positive association between educational attainment and labour force participation. At every level of qualification, however, disabled people are less likely than non-disabled people to be in the labour force, with the gap being widest among those with no qualifications. The participation rate of disabled people with post-school qualifications (76 per cent) is about the same as that of non-disabled people with no qualifications.

A similar pattern emerges for unemployment. In 2006, the unemployment rate for disabled men was 5 per cent, compared with 3 per cent for non-disabled men. For women, the comparable rates were 9 per cent and 5 per cent. Among Māori disabled, 16 per cent were unemployed, as were 20 per cent of Pacific disabled.

For employed people with disabilities, incomes are lower on average than for those without disabilities, due in part to lower levels of educational attainment and a heavier concentration in manual occupations.

The likelihood of being in the labour force is greater for some types of disability than others. People with a vision or hearing impairment are the most likely to be in the labour force, while people with an intellectual impairment or experience of mental illness are the least likely.

In employment, reasonable accommodation might include the provision of different equipment to enable work tasks to be completed, the provision of different training and support, and adjustments to workplace practices.

21 Statistics New Zealand (2008), *Disability and the Labour Market in New Zealand in 2006* (Wellington: StatsNZ)

22 Statistics New Zealand (2010), *Disability and Māori in New Zealand in 2006: Results from the New Zealand Disability Survey* (Wellington: StatsNZ)

Equal employment rights

The repeal of the Disabled Persons Employment Promotion Act 1960 in 2007 removed the exemption for sheltered workshops from minimum wage and conditions of employment provisions. Minimum wage exemption permits (MWEPs) are granted only if it can be shown that a disabled worker's competence or productivity is less than those of a non-disabled worker doing the same job. Negotiating MWEPs is supposed to include fair, good-faith bargaining between employers and workers who are properly represented and advised. Information from People First, the self-advocacy organisation for people with learning disabilities, indicates that only 5 per cent of workers are being represented by truly independent advocates. [23]

The Commission recommends the Department of Labour reports on the use of the Minimum Wage Exemption Permits and other labour-market support mechanisms, to ensure they are consistent with the work and employment requirements of the CRPD.

State-sector employment

Article 27 of the CRPD specifically requires countries to take appropriate steps, including through legislation, to employ disabled people in the public sector.

The State Services Commissioner has a responsibility under the State Sector Act 1988 to "promote, develop, and monitor equal employment opportunities for the Public Service", including for disabled people. In addition, chief executives must recognise the employment requirements of people with disabilities. [24] Prior to 2006, the State Services Commission collected data on disabled people in the public sector and published it in the Human Resource Capability (HRC) survey. Difficulties with the integrity and comparability of the data led to the collection being stopped. No alternative data collection method has since replaced the HRC data.

The most recent data indicates that people with a disability are:

- more likely to be employed in the 'associate professional' occupational group (social workers, customs officers, call-centre operators) than in the office-clerk occupational group (secretary, word-processing operator)
- more likely to work less than 30 hours a week
- more likely to be older than their non-disabled work colleagues.

Qualitative interviews carried out by the State Services Commission in 2008 indicated:

- There were no specific departmental initiatives for actively identifying and recruiting people with disabilities as a potential candidate pool.
- The public service needs to be more proactive in its strategies, policies and practices in attracting people with disabilities as candidates for vacancies.
- Disabled people are more likely to be concerned that the selection process for higher level positions would not be fair.

Overall recruitment, selection and accommodation processes were seen to be fair and based on merit, but not particularly innovative or proactive.

The Commission recommends that the State Services Commissioner adopt a work programme to promote and develop equal employment opportunities for disabled people in the state sector, and report on its outcomes.

National Conversation about Work

During 2009 and 2010, the Commission undertook extensive consultations with employers, employees and community groups about their experiences of work. More than 3000 people participated, including a significant number of disabled people and organisations working with disabled people. The evidence from the National Conversation about Work suggests that disabled people face significant barriers in achieving good work outcomes, including:

- inaccessible infrastructure, such as buildings and public transport
- inadequate and inconsistently applied benefit and support systems
- inaccurate health-and-safety concerns from employers

23 People First (2009), *Works 4 Us* (employment advocacy pamphlet)

24 State Services Commission (2008), *Enabling Ability: Meeting the employment requirements of people with disabilities in the public services* (Wellington: SSC)

- discrimination
- lack of part-time work
- unequal effects of the recession.

The inaccessibility of the built environment and public transport has long been identified as a significant barrier to disabled people getting and keeping work. People from the West Coast reported that there is still only one wheelchair-accessible taxi for the whole region, and this is not available to people going to work. Even in larger cities such as Wellington, with relatively good public transport systems, the lack of accessible public transport was cited as a barrier to working.

The complexities of the rules around benefit abatement often mean that people do not take up part-time work opportunities for fear of losing their benefit. The range of services available to support disabled people to get and keep work is often so fragmented and unco-ordinated that people do not receive the optimum mix of services that might support their work choices. Subsidy schemes are often used to different extents in different regions. The state sector two-year work-subsidy programme works well in some regions and not at all in others, and may not result in a permanent position.

Perceived health-and-safety issues are often an attitudinal barrier to disabled people getting work. Support workers report that disabled people are often not asked about health-and-safety issues, so that these can be explored. Employers simply assume that the issues would be difficult or expensive to fix and decide not to employ the disabled person. For Deaf people, this experience is particularly widespread. Many employers assume that a lack of hearing creates a higher occupational health risk. Discrimination can often be unintended. For example, many job advertisements require a response by telephone, which can be difficult for many Deaf people, even with the Relay Service.

Deaf people as a group are particularly susceptible to discrimination. Among a group of 12 Deaf people in Hawke's Bay, only three had full-time work. The rest were either unemployed or in part-time work supplemented by benefits. Two of the Deaf people who could not find jobs had professional qualifications and those in work were working at (or close to) the minimum wage.

People with intellectual disabilities find it difficult to be treated seriously when applying for work. The Community Living Trust in Hamilton listed the barriers as including a lack of knowledge and understanding, prejudice and an unwillingness to make accommodations. Many disabled people, however, find work essential to their well-being. As the trust regional coordinator commented, "When people get a job, they get a real life. They have improved self-esteem, financial stability and can get a house. It's life-changing."

For some disabled people, part-time work is the only viable option, while for others it represents a pathway to full-time employment. The lack of opportunities for part-time work often means that more expensive support services have to be put in place.

The global recession has affected all levels of society, but there is some evidence that it has disproportionately affected disabled people. Part-time work is less available and employers are less willing to offer work experience. Some employers have responded to the recession by amalgamating previously separate jobs into one new job. While this can result in a more interesting and varied work environment, it can also mean that workers with learning disabilities are unable to easily adapt to the new environment. Some employment support agencies suggest that when there is low unemployment and people are struggling to fill vacancies, employers can be more open to employing disabled people. With a recession, the pressure is off and some employers go back to using the easiest way to fill vacancies.

Work for blind and visually impaired people

Higher rates of unemployment and lower rates of labour-force participation were patterns confirmed in a Royal New Zealand Foundation of the Blind (RNZFB) survey of working-age members to identify the numbers who were employed or unemployed and the barriers they faced in seeking employment.[25] The survey also points to a large and growing number of members who are willing to work but are discouraged from actively seeking work, and to a

25 Wilkinson-Meyers L, McNeill R, Inglis C and Bryan T (2008), *Royal New Zealand Foundation of the Blind 2007 Employment Survey* (Auckland: Centre for Health Services Research and Policy, Faculty of Medical and Health Sciences, University of Auckland)

large proportion of employed members (42 per cent) who would prefer to work longer hours.

For blind, vision-impaired and Deaf-blind people, the top six barriers to employment were:

- presence of other disabilities (62 per cent)
- limitations due to an eye condition (61 per cent)
- lack of access to transport (59 per cent)
- lack of available work in their community (43 per cent)
- lack of skills and training (42 per cent)
- employer attitude (39 per cent).

A survey of New Zealand employers found that although attitudes towards blind and visually impaired people tend to be positive, they remain among the "less favoured groups of employees employers are willing to hire".[26] "Employers are ignorant of the abilities and capabilities of blind and vision-impaired people, the aids and adaptations that are available to assist them in their roles, and associated costs."

Work for people with experience of mental illness

The Mental Health Foundation undertook interviews with 22 people with experience of mental illness to understand the issues they faced in gaining and retaining employment. The majority found that employment was a positive experience that provided financial and social benefits and a focus in their lives. Beyond that, people's experience was varied. Some were able to negotiate accommodations with employers, others were not. Several had chosen to tell their employer and colleagues of their illness while others had not, fearing repercussions. Of those who had experienced discrimination, the unacceptable behaviour included not being offered employment, being teased by colleagues and being treated differently from workers without experience of mental illness.

The report also included an international literature review which concluded that work was important for recovery. However, people with experience of mental illness had higher levels of unemployment and lower levels of educational achievement, and there is a lack of knowledge of mental illness among employers.

EDUCATION

Education is a fundamental area in which many disabled people are fundamentally disadvantaged. This was a major issue identified in the Commission's online survey. Article 24 of the CRPD recognises the right of people with disabilities to education, without discrimination, on the basis of equal opportunity, with the purpose of achieving "the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity". It further recognises that for disabled students to reach their full potential, reasonable accommodation and support measures may need to be provided, and measures taken to ensure that professional staff are available to support this objective. For these objectives to be met, an "inclusive education system" should be provided at all levels, including lifelong learning.

Inclusive education

Inclusive education is based on the premises that:

- all students come to school with diverse needs and abilities
- it is the responsibility of the general education system to be responsive to all needs
- a responsive education system provides the resources, curriculum, environment and teachers to address the needs of all students
- the most successful outcomes are achieved by schools and communities working together.

The United Nations Special Rapporteur on the Right to Education has provided advice on how countries that have ratified the CRPD can provide an inclusive education system, by:

- recognising that inclusive education is a right
- identifying minimum standards in relation to the right to education
- identifying minimum standards in relation to the underlying determinants of the right to education
- developing a transition plan from special education to inclusive education

26 Inglis C (2006), *Blind People Can Do Anything But Not in My Company: Employer Attitudes Towards Employing Blind and Vision-Impaired People* (Auckland: Royal New Zealand Foundation of the Blind)

- providing resources
- identifying those with responsibilities and what their responsibilities are
- establishing monitoring and evaluation mechanisms. [27]

International and national views are divided in relation to two groups of students with disabilities: those with an acute sensory impairment, such as students who are either Deaf or blind; and those with severe and/or multiple disabilities.

Many parents of Deaf students believe that on both cultural and language grounds, separate schools or units are the only way students can be educated in their primary culture using their first language. Other parents believe that the facilities and/or teaching skills needed for their child to reach their full potential can be made available only in separate units or schools. There is no clear consensus either among educators or parents about the best option(s).

The New Zealand situation

The Education Act 1989 recognises that "people who have special educational needs (whether because of a disability or otherwise) have the same rights to enrol and receive education at state schools as people who do not". [28] Special Education 2000 stated that the aim for special education was to achieve "a world-class inclusive education system that provides learning opportunities of equal quality for all students". [29] In general terms students with moderate support needs are funded through the bulk grant paid directly to the school, while those with high or very high needs are funded through individualised funding packages. Approximately $450 million is spent by the Government each year on programmes to support students with special education needs. While there has been a noticeable shift away from supports being provided to students in segregated facilities towards maintaining students in their local community contexts, there are still situations where the local school is not a real option, where schools discourage students with special education needs from enrolling, and where schools enrol children but are not able to deliver the needed outcomes. [30]

In August 2009, the Associate Minister of Education released the terms of reference for the Review of Special Education. The aim of the review was to ensure that policies and processes are fair and consistent, reach those most in need and make the best use of government funding, and that parents have choices. The review must "result in services and supports which are consistent with the United Nations Convention on the Rights of Persons with Disabilities and the New Zealand Disability Strategy". [31]

The launch of Success for All: Every School, Every Child in October 2010 goes some way to fulfil this objective. The programme aims to have 80 per cent of schools fully inclusive by 2014. To achieve this, the Government has allocated extra resourcing for students with high or very high needs, and has made more money available for children to receive individualised specialist support in the first three years of school. The Blind and Low Vision Education Network New Zealand (BLENZ) and the two Deaf Education Centres (DEC) will have more access to specialist teachers, interpreters and note-takers. The New Zealand Teachers Council will require teacher education providers to focus on inclusive education in future initial teacher education programmes. Special schools will remain open, but will be encouraged to provide outreach specialist teaching services to support students with high needs in mainstream schools. [32]

The analysis of the responses to the education questions in the 2006 Household Disability Survey provides the

27 United Nations (2007), *The Right to Education for Persons with Disabilities: Report of the Special Rapporteur on the Right to Education,* Vernor Muñoz (February), A/HRC/4/29

28 Education Act 1989, section 8 (1)

29 Ministry of Education (1996), *Special Education 2000* (Wellington: MoE)

30 Ministry Of Education (2010), *Review of Special Education 2010: Discussion Document* (Wellington: MoE)

31 Ministry of Education (2010), Terms of Reference for the Review of Special Education. Accessed 20 September 2010 from http://www.minedu.govt.nz/theMinistry/Consultation/ReviewOfSpecialEducation.aspx

32 Ministry of Education (2010), Success for All: Every School, Every Child (Wellington: MoE). Accessed 27 October 2010 from http://www.minedu.govt.nz/NZEducation/EducationPolicies/SpecialEducation.aspx

most reliable data available on the achievement of the right to education for disabled people.[33]

There are many more disabled boys than girls of school age. Of the approximately 74,400 disabled children aged 5–14, 45,300 were boys and 29,100 were girls. The majority were enrolled in mainstream primary, intermediate, secondary or composite schools; approximately 2 per cent were in Kura Kaupapa Māori and 3 per cent were in special schools.

Of the students in this age group, 25 per cent were receiving special education support and 40 per cent needed at least one type of equipment or support service to help with their education. For many students, equipment and support services were not available. The main categories of shortage were:

- computer access (34 per cent)
- specialist teaching and therapy (32 per cent)
- help with note-taking, writing and reading (25 per cent)
- teacher aides (23 per cent)
- itinerant teachers (20 per cent).

The survey found that approximately 4700 children (6 per cent) were not able to enrol in the school of their choice. For others, the problem was not being able take part in the full range of school activities. Activities which disabled students were most excluded from included taking part in sports or games (29 per cent); playing at school (24 per cent); making friends (23 per cent); and going on school outings or camps (17 per cent).

Among disabled adults, women were more likely (8 per cent) to enrol in formal education than men (6 per cent). People with a psychiatric or psychological disability or a learning disability were least likely to enrol in formal education.

The Ministry of Education provides a wide range of indicators of both student participation and education and learning outcomes for the general population. However, none of the data for these indicators are available on a comparative basis for disabled students or by student impairment type.[34]

Those students with high or very high support needs have a significantly lower achievement rate in National Certificate in Educational Achievement (NCEA) qualifications than the general population. Overall, 22.11 per cent of students receiving Supplementary Learning Support funding or Ongoing Reviewable Resource Scheme (ORRS) funding gained NCEA awards in 2009, compared with 66.24 per cent of all students. The higher the level of the certificate, the wider the gap in achievement rates.[35]

NCEA QUALIFICATIONS GAINED BY SECONDARY SCHOOL AGED STUDENTS IN 2009

	Students with high or very high needs gaining NCEA awards (%)	*All students gaining NCEA awards (%)*
Less than /equal to Level one	**18.34**	**39.54**
Level 2	**2.76**	**17.04**
Level 3+	**1.00**	**9.67**
All qualifications	**22.11**	**66.24**

A number of recent official reports identify areas where further improvement is needed in the provision of special education. The Controller and Auditor-General has recently conducted a performance audit of how well the Ministry of Education manages four initiatives set up to support up to 20,500 disabled students with the highest level of support needs. The report concluded that identification of students with high support needs has to be improved, data collection needs to be more systematic and practices must be consistent throughout the country. The report suggests that improvements have begun, including increased funding allocated in the 2009 Budget.[36]

33 Statistics New Zealand (November 2008), *Disability and Education in New Zealand in 2006* (Wellington: StatsNZ)

34 Outcome indicators include school-leaver qualifications, participation in early-childhood education, suspensions, exclusions and expulsions from school, and early leaving exemptions. See Ministry of Education, 'Education counts'. Accessed 20 September 2010 from http://www.educationcounts.govt.nz/indicators/education_and_learning_outcomes

35 Information supplied by the Ministry of Education in response to a request from the HRC, 11 August 2010

36 Controller and Auditor-General (October 2009), Ministry of Education: Managing support for students with special educational needs (Wellington: OAG)

In 2009, the Education Review Office (ERO) completed a second evaluation of the Resource Teachers: Learning and Behaviour service (RTLB). The Government allocates approximately $73 million per annum to fund the service to support students with learning and behaviour difficulties and to build teacher capability in working with diverse groups of students. The report identified problems with governance and management of the scheme; poor self-review; failure to identify needs and priorities; and problems with supervision, performance management and inconsistent practices. [37]

The support of children with special needs is also one of the five most important concerns identified in the Ombudsmen's most recent annual report. The issues raised included inadequate support for students and teachers; the high number of suspensions and expulsions; and complaints about student discipline and bullying. [38]

The Education Review Office (ERO) recently reviewed how well 229 schools have provided an inclusive education environment for students with a significant physical, sensory, neurological, psychiatric, behavioural or intellectual impairment, who account for about 3 per cent of the student population. The review concluded that approximately half of the schools demonstrated mostly inclusive practice, a further 30 per cent had some inclusive practices and the remaining 20 per cent had few inclusive practices. ERO recommended that the Ministry of Education build school-wide capability through whole-of-school professional development programmes, review how well principal training and support fosters leadership for inclusive schools, and consider how the review of special education might recommend measures to improve the level of inclusion in New Zealand schools. [39]

In education, reasonable accommodation might include providing curriculum materials in alternative formats, providing access to the curriculum in a person's first language (such as New Zealand Sign Language), or making adjustments to the way a person's knowledge and skills are assessed. It may also involve providing learning experiences that are specially designed and adapted to the learning and behavioural needs of particular individuals.

Discrimination and social inclusion

Article 2 of CRPD defines discrimination on the basis of disability as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of preventing or impairing the enjoyment, on an equal basis with others, of all human rights and fundamental freedoms. It includes all forms of discrimination, including the denial of reasonable accommodation. [40]

For the past seven years, the Commission has sponsored a nationwide survey of perceived discrimination. In every year, over half the respondents have perceived disabled people as being subject to a great deal of or some discrimination. The level of perceived discrimination has remained relatively stable over the period, with 61 per cent in 2000 and 57 per cent in 2008 believing that disabled people are subject to significant discrimination.

One of the indicators of the barriers faced by disabled people is the nature of complaints about discrimination made to the Commission. Over the past four years, the Commission has also worked on a number of systemic issues.

For every year between 2005 and 2009, approximately 30 per cent of all complaints about discrimination have been on the grounds of disability. Disability has consistently been one of the two areas (the other being race) receiving the most complaints.

COMPLAINTS RECEIVED BY THE COMMISSION

Year	2005	2006	2007	2008	2009
Disability complaints	26%	28.4%	28%	32%	30%
Race-related complaints	30%	28.2%	31%	28%	32%

37 Education Review Office (2009), *Resource Teachers: Learning and Behaviour, An Evaluation of Cluster Management* (Wellington: ERO)

38 Office of the Ombudsmen (2009), *Report of the Ombudsmen: Nga Kaitiaki Mana Tangata* (Wellington: Office of the Ombudsmen)

39 Education Review Office (2010), *Including Students with High Needs* (Wellington: ERO)

40 CRPD, Article 2

Complaints related to employment and pre-employment are consistently among the most common the Commission receives. Over the past five years, the majority of employment complaints from disabled people have related to three issues: termination of employment, lack of reasonable accommodation in the workplace, and treatment on less favourable terms. In relation to pre-employment, being declined employment because of a disability and inappropriate questions on application forms were the two most common sources of complaint.

Another significant area of complaints relates to education. A 2009 Commission review of complaints and enquiries revealed that in the seven years from January 2002 to December 2008, the Commission received 261 complaints and enquiries about disabled students' right to education in the compulsory education sector. [41] The number of complaints rose sharply in 2007 and 2008. This may reflect increased awareness of the availability of the complaints process as an avenue to pursue complaints against the Government.

Approximately 60 per cent of education-related complaints and enquiries concern four general themes:

- problems surrounding the enrolment of children in school (51 complaints)
- students being stood down, suspended, excluded or expelled from school because of their disability or disability-related behaviour (43 complaints)
- funding or the need for special assistance (44 complaints)
- problems participating in the full school curriculum (24 complaints).

Other matters raised include issues related to discipline, lack of reasonable accommodation and bullying.

In the non-compulsory education sector, complaints reflect similar themes, with gaining enrolment (24 per cent), lack of reasonable accommodation (19 per cent) and expulsions and suspensions (12 per cent) the main areas of complaint.

The Commission has also received two major complaints from national disability organisations citing systemic discrimination against disabled students in education policies and practices. IHC Advocacy has brought a class action complaining about acts and omissions of the Government that prevent disabled students fully accessing the curriculum at their local mainstream state school. Deaf Aotearoa New Zealand has complained that government policy and practice discriminates against Deaf children by not providing the option of accessing their education in New Zealand Sign Language.

A third significant area of discrimination about which the Commission receives an increasing number of complaints is accessibility of transport. From September 2005 to September 2009, the Commission received 65 complaints about public transport. Most complaints were about access to buses (27) or aeroplanes (14). Complaints cover many issues, including inaccessible buses for wheelchair users; poor treatment by drivers; drivers failing to provide assistance; refusal of drivers to use accessible features, such as the kneeling facility; lack of information on which routes and times will be serviced by an accessible bus; and inaccessible bus stops.

Freedom from exploitation, violence and abuse

Overseas evidence and the experience of organisations working in the area suggest that disabled people are at a higher risk of domestic violence and abuse than the general population. Disabled women are one of the highest at-risk groups for sexual violence. Recent Ministry of Women's Affairs research revealed that a third of all sexual violence victims interviewed had a psychological or physical disability. [42] Evidence from Australia suggests that a person with an intellectual disability is twice as likely to be a victim of personal crime and 10 times more likely to be a victim of sexual assault. [43]

Article 16 of the CRPD requires states to take all appropriate legislative, administrative, social, educational, and other measures to protect persons with disabilities from all forms of exploitation, violence and abuse. The CRPD

41 Human Rights Commission (2009), *Disabled Children's Right to Education* (Auckland: HRC)

42 Ministry of Women's Affairs (2009), *Restoring Soul: Effective Interventions for Adult Victims/Survivors of Sexual Violence* (Wellington: MWA). Accessible online at http://www.mwa.govt.nz/news-and-pubs/publications/restoring-soul-part-one#2-2-who-is

43 Higgins D (2010), Sexuality, Human Rights And Safety for People with Disabilities: The Challenge of Intersecting Identities, *Sexual and Relationship Therapy* 25(3), August, pp 245–257

further requires that those who are victims of violence and abuse have access to appropriate recovery, rehabilitation and social reintegration services, and that allegations of exploitation, violence or abuse are identified, investigated and, where appropriate, prosecuted.

The Government's Taskforce for Action on Violence within Families has the primary responsibility for tackling this issue. The Disability Coalition against Violence, a group of organisations working to stop violence, ensures that disabled people have a voice and has developed a training package on the relationship between violence and disability. The 'Speaking Out' training has recently been trialled in four places around the country.

The Disability Clothesline is one of the coalition's projects. It aims to create a medium for disabled people to tell their stories safely by decorating colour coded T-shirts with their stories. The T-shirts can be viewed on-line or shown in displays around New Zealand.[44]

ACCESSIBILITY

Accessibility is one of the guiding principles of the CRPD and one of its most important articles requiring implementation by state parties.

Public land transport

Article 9 of the CRPD recognises accessibility as one of the key requirements to ensure disabled people are able to live independently and participate fully in all aspects of life. It requires that the Government identify and remove all obstacles and barriers to accessibility, including barriers to using transport services.

Accessible public land transport is essential to enable disabled people to take part in all aspects of community life, such as education, employment, recreation and leisure, and to access essential services such as health. A disproportionate number of disabled people do not have independent access to a motor vehicle and so are more reliant on public transport for independent mobility. After receiving a significant number of complaints and enquiries on this issue, the Commission conducted a national inquiry. Their findings were published in September 2005 as *The Accessible Journey*.[45]

The inquiry found that public land transport is significantly less available, less accessible, less affordable and less acceptable to disabled people than it is to non-disabled people. For transport services to be fully accessible, information, booking services, pedestrian infrastructure, transport facilities and transport vehicles must all be usable by everyone.

Since the inquiry report, a number of initiatives have significantly improved the accessibility of public land transport services:

- accessibility standards for all new urban buses
- improved regulations covering such things as the design and construction of wheelchair hoists, ramps and safety features, and the requiring of all taxis to display signs in Braille
- accessibility features developed for all new urban train carriages in Auckland and Wellington
- regional councils being able to impose controls on commercial public-transport operators, including accessibility standards, and Regional Public Transport Plans having to take into account the needs of the 'transport-disadvantaged', including disabled passengers
- clarification of the licensing rules for community transport services
- all new taxi and bus drivers being required to have a basic knowledge of the needs of disabled passengers.

The Ministry of Transport is currently investigating options for establishing an advisory committee on accessible public transport.

The inquiry recommended three main requirements for the development of accessible public land transport:

- involvement of disabled people in all levels of the planning process
- industry-wide education in disability awareness and competency
- mandatory national accessibility-design performance standards.

44 See www.disabilityclothesline.org.nz

45 Human Rights Commission (2005), *The Accessible Journey: Report of the Inquiry into Accessible Public Land Transport* (Wellington: HRC). Accessible online at http://www.hrc.co.nz/home/hrc/disabledpeople/inquiryintoaccessiblepubliclandtransport/finalreporttheaccessible-journey.php

While disabled people have opportunities to participate in transport planning at a local and regional level, there are limited opportunities at a national level. There are still no national standards for infrastructure and pedestrian facilities. The Transport Monitoring Indicator Framework, by which the Government measures progress across the transport network, has no indicators for accessibility. There are no industry-wide requirements for disability awareness and competency training and transport infrastructure projects are still planned and assessed without any reference to benefits for access for disabled people.

Information and environments

Some barriers to accessibility have recently improved. For example, the adoption of internet (web) standards for accessibility, which are mandatory for all core government departments and ministries, has led to an improvement in the accessibility of information. However, there are still many examples of 'high stakes' information not being available in accessible formats, such as personal health information and records, informed consent documentation for operations or medical procedures, patient information leaflets, labelling for medicines and self-test kits, school enrolment information for parents, and school reports of a student's progress.

The adoption of the web standards has not generally had any effect on the availability of official information in easy-to-read formats. Further work is needed in this area for people with an intellectual disability to be able to access information easily about their legal and citizen rights. The increased use of 'total communication' will also support the communication needs of people with intellectual disabilities.

Access to the built environment has deteriorated in recent years, according to some experts. At one time New Zealand's approach to building access provision, together with our enforcement procedures, were considered an international benchmark. However, New Zealand's standards have not kept pace with awareness of the diversity of needs, and the definition of disability in building legislation is not consistent with the HRA. New Zealand also lacks a mechanism for ensuring that older buildings which are not being altered have some minimum standards of accessibility. [46]

Services

Getting access to appropriate support services, where and when they need them, in the right amounts and to a professional standard is one of the longest-running battles that disabled people face.

In September 2008, the Social Services Select Committee reported on its inquiry into the quality of care and service provision for disabled people. [47] The inquiry was prompted by concerns raised in the media about two major residential service -providers, and by more general dissatisfaction with service provision. The report concluded that the provision of disability services lacks direction and leadership, services are variable throughout the country, and the NZDS has not been effectively implemented. The report recommended: establishing a national plan of action to implement the NZDS; improving service co-ordination, information and assessment; improving complaints and advocacy services; and providing age-appropriate services to younger disabled people.

The Government's response to the inquiry acknowledged that the underlying principle which should guide all disability support services is "a citizen-based model for disability supports that is based on improving disabled people's ability to live everyday lives through giving them increased choice and control over the supports they receive and the lives they lead". [48]

DIFFERENT COMMUNITIES

Deaf people in New Zealand

The Deaf community define themselves as a distinct language and cultural group, rather than a group of people with a specific impairment. In New Zealand law, policy and practice, Deaf people are commonly

46 Submissions of Bill Wrightson from Wrightson Associates and Richard Cullingworth as part of the consultation for this chapter

47 Social Services Committee (2008)

48 Government response to the report of the Social Services Select Committee on its Inquiry into the Quality of Care and Service Provision for People with Disabilities, 9 February 2009. Accessed 20 September 2010 from http://www.odi.govt.nz/what-we-do/improving-disability-supports/index.html

recognised only for their hearing loss and defined as disabled. This often means that the policy response is related to removing the disability-related barriers to participation, rather than protecting and enhancing the unique language and culture of Deaf people. [49]

The New Zealand Sign Language Act 2006 establishes New Zealand Sign Language (NZSL) as an official language of New Zealand. The act provides the right to use NZSL in legal proceedings and sets out the principles that should guide government departments in making their services and information accessible to Deaf people. The Government has indicated that the scheduled review of the act will take place in the second half of 2010.

The Government has provided some support for the development of NZSL. This includes funding to develop an online dictionary and translate some information into NZSL. There have been more cuts than initiatives, however. The Advance Centre in Auckland, which supported Deaf students to attend tertiary institutions, closed recently. In December 2009, the three Deaf resource person positions established under the Van Asch Deaf Education Centre were discontinued. These were the only state-funded positions available to support children and their families to learn NZSL. Cuts to adult community education funding also threaten the viability of one of the main sources of learning NZSL in the community.

The cumulative result is that Deaf people suffer inequalities through linguistic discrimination. Deaf children are not fully supported to access their schooling in NZSL. Parents and families of Deaf children struggle to access NZSL resources, and Deaf people are often unable to access interpreters, including in situations such as police interviews, hospital appointments and participation in the labour market.

In the period since the last status report, the Commission has received 13 complaints or enquiries about discrimination against Deaf or hearing-impaired students in education. The Commission also received two class-action complaints related to NZSL. One relates to the lack of access to education in NZSL, and the other to the non-regulation of NZSL interpreters. The Deaf community have identified the immediate priorities as making education accessible through NZSL, support for families to learn NZSL, and raising the quality and quantity of interpreting services.

People with hearing impairments

There are estimated to be over 450,000 people with hearing impairment in New Zealand, 290,000 of whom are reported to have some difficulty in performing the usual tasks of life. For most of these people, the desired solutions are aids, devices and therapies to correct their hearing loss. This will include access to amplification systems, assistive devices, FM equipment, hearing aids, audio loops and cochlear implants.

For people with hearing impairments, the right to access information and the right to equal communication are the key human rights issues. Access to information includes education and text-based information in all environments; the right to equal communication includes the right to use telephone-based services as freely as hearing people do. [50]

Whānau hauā: Māori disabled people

Allowing for the different age structures of the Māori and non-Māori populations, Māori are more likely to be disabled than non-Māori. The age-standardised disability rate is 19 per cent for Māori, and 13 per cent for non-Māori. Disabled Māori children and disabled non-Māori children are equally likely to attend early-childhood education and school. Disabled Māori adults have lower levels of educational achievement than disabled or non-disabled non-Māori adults or non-disabled Māori adults. A total of 42 percent have no educational qualifications. Disabled Māori are much more likely

Group	*Percentage living in the most deprived areas (NZDep 9–10)*
Disabled Māori	42%
Disabled non-Māori	17%
Non-disabled Māori	34%
Non-disabled non-Māori	11%

49 Mckee R (2005), The Eyes Have It! Our Third Official Language: New Zealand Sign Language, *Journal of New Zealand Studies* (October), pp 129–141

50 Submission of the National Foundation of the Deaf Inc, as part of the consultation on this chapter

to live in the most deprived areas of New Zealand, as measured by the New Zealand Deprivation Index.

Given the employment rates already noted, it is obvious that disabled Māori are among the most disadvantaged groups in New Zealand.[51] Despite this, the Government appears not to have regularly consulted with this group in order to find out their needs and incorporate them in various strategies and work programmes.

Conclusion
Whakamutunga

Disabled people are among the most marginalised in New Zealand. In fundamental areas such as employment, education, an adequate standard of living and accessible public transport, disabled people are significantly disadvantaged. Disabled children and young people who are reliant on adults for fulfilment of their rights are particularly vulnerable.

Government policy has moved towards providing strategies, policies and funding to meet these challenges, but progress has been slow.

New Zealand adopted a strong leadership role in ensuring that the CRPD was developed as a partnership between disabled people and their organisations, national human rights institutions and government representatives. It also enhanced its commitment to the CRPD by ensuring that New Zealand's laws were consistent with it before ratification took place. The role New Zealand played internationally in the development of the most recent international treaty has brought with it heightened expectations that New Zealand will continue to be a leader in promoting and implementing the CRPD.

The continuation of a dedicated ministerial portfolio (a Minister and an Associate Minister for Disability Issues) and the formation of a Ministerial Committee on Disability Issues to co-ordinate the implementation of the CRPD set in place high-level leadership to continue the work on implementation.

Other areas in which New Zealand has made good progress for disabled people include:

- the adoption of NZSL as an official language of New Zealand
- the development and review of the Telecommunications Relay Service to assist people with hearing or speech impairments to use telecommunications services on a similar basis to others
- the development of web standards for all core government department and ministry websites, meaning a gradual improvement in the accessibility of some official information for those able to use this means of communication.

There remain, however, significant issues in relation to supported living services, education, employment, health and transport, as well as to the participation of disabled people in decisions that affect them.

A singular barrier to effective measurement of progress for disabled people is the absence of data about them and their experiences. Their lack of visibility in statistics on many important areas, such as employment and labour-market participation, prevents comparisons and limits time series data. The result is a limited policy overview of the progress disabled people are making. It will also limit the monitoring of the CRPD and will impact on New Zealand's first report to the UNCRPD Committee.

Among the most important systemic issues for adult disabled people in New Zealand is equal access to employment opportunities. The gap between employment rates for disabled people and non-disabled people has barely changed in more than a decade, despite favourable economic conditions for much of that time. Particular issues include the transition from school to work; further education and community life; the integrated functioning of various government supports to produce high quality employment outcomes; residual discrimination; and the operation of supported employment systems to produce the best solutions for those not able to obtain or maintain mainstream employment.

A significant issue for many disabled children and young people is universal access to inclusive education. New Zealand has made progress in shifting education for disabled students away from segregated facilities and towards supporting students in their local communities. There are a number of very good initiatives at the national, regional and local level. However, a significant

51 Statistics New Zealand (2010), *Disability and Māori in New Zealand in 2006: Results from the New Zealand Disability Survey* (Wellington: StatsNZ)

number of disabled students cannot get access to their local school, have difficulty accessing the supports necessary to reach their full potential, and cannot access the full curriculum. A number of recent official reports highlight both the progress made and the work yet to be done. The requirements for inclusive education set out by the UN Special Rapporteur on Education provide guidelines for future progress in this area.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to progress the rights of people with disabilities:

Measuring outcomes
Developing a full range of social statistics to ensure that key outcomes for disabled people are measured.

Inclusive education
Ensuring all disabled students have a right to inclusive education, including explicit protection in the Education Act, mandatory minimum standards and adopting the United Nations guidelines on inclusive education.

Whole of government approach
Adopting a whole of government approach to providing supports to disabled people, so they can achieve an ordinary standard of living and access to, and maintenance of, equal employment opportunities.

Implementing the Convention on the Rights of Persons with Disabilities
Ensuring an integrated and co-ordinated government response to implementing the CRPD, including the full participation of disabled people in the process and the adoption of the optional protocol.

Public land transport
Ensuring all public land transport services are fully accessible through the development, by the Ministry of Transport and the New Zealand Transport Agency, of a comprehensive work programme to respond to all outstanding issues arising from the *Accessible Journey: Report of the Inquiry into Accessible Public Land Transport*.

New Zealand Sign Language
Developing a mechanism to promote the maintenance and development of NZSL, including competency standards for interpreters and educators and promoting respect for NZSL to all New Zealanders.

Equality before the law
Reviewing all relevant legislation to ensure that disabled people have equal recognition before the law and, where necessary, have access to supported decision-making.

Whānau hauā – Māori disabled people
Ensuring that the needs of whānau hauā (Māori disabled) are assessed and responded to by inclusion in government strategies for health, mental health, employment and education.

18. Rights of Women

Tikanga o te Ira Wahine

We condemn discrimination against women in all its forms.

Convention on the Elimination of all Forms of Discrimination against Women, Article 2

Introduction
Tīmatatanga

Women and girls have the same fundamental human rights as men and boys have. These rights are set out in the Universal Declaration of Human Rights, and more explicitly referred to in the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Beijing Platform for Action. In the Preamble to CEDAW, discrimination is described as:

> **"...an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity".** [1]

The Beijing Platform for Action identifies 12 critical areas of concern, including violence against women, economic inequality and the burden of poverty on women, insufficient mechanisms to promote women's advancement, and inadequate promotion and protection of the human rights of women. [2]

Women are also members of other marginalised groups, such as indigenous women, women from ethnic minorities and disabled women. They suffer from multiple disadvantages and therefore require additional human rights protections. The promotion and protection of women's rights in international and domestic legislation have traditionally included affirmative action, often referred to as special measures. Rights which acknowledge the unique role of women as mothers are also included in international human rights protections.

New Zealand women fare relatively well on several authoritative international measures. The Global Gender Gap Index, produced by the World Economic Forum, calculates gender equality in terms of economic participation and opportunity; educational attainment; health and survival; and political empowerment. New Zealand was placed fifth, behind the Nordic countries, for the fourth year in a row in 2010.

The Human Development Reports from the United Nations Development Programme include two measures of gender equality. The Gender Empowerment Measure (GEM) combines indices such as: the participation of women in economic and political life; the representation of women in parliament, as senior officials and management, and as professional and technical workers; and the gender disparity in earned income. In 2009, New Zealand was ranked 10th out of 109 countries. The Human Development Index (HDI) is a composite measure of three dimensions of human development: life expectancy, education and standard of living. The Gender Development Index (GDI) captures inequalities between men and women on these indicators. In terms of the ratio of the GDI to the HDI, New Zealand ranks 69th out of 155 countries.

New Zealand was the first nation to grant women the right to vote, in 1893. Since then women have made huge gains in participation in many fields, such as education, the labour market and politics. Despite positive economic and social progress, equality between men and women has not yet been achieved, and progress on many key indicators is either painfully slow or static.

The focus of this chapter is on four critical issues relating to women's rights: economic equity; representation and participation; violence against women; and maternity protections. These issues have been selected because the Commission considers them to be among the most pressing issues for women in New Zealand. They have persistently been a focus of CEDAW committee recommendations and requests, and are critical areas of concern in the Beijing Platform for Action. Women's reproductive and sexual health is covered in the health chapter. The review includes the contributions of civil society to strengthening the implementation of human rights for women, and refers to several significant cases.

1 ibid

2 Fourth World Conference on Women (1995), Beijing Platform for Action. Accessible online at http://www.un.org/womenwatch/daw/

Three generations of women: Louisa Dobbs, with twins Amara and Emma Reti-Dobbs visit grandmother Tracey Dobbs in Mt Wellington.

The Commission has recently undertaken the National Conversation about Work, an extensive consultation with employers, employees and community groups in all regions of New Zealand. More than 3000 people have participated in the conversations – at least half of them women, including women's groups.

This chapter draws on material from the National Conversation, which will be used to develop a new equality-in-employment framework for the Human Rights Commission.

This chapter acknowledges that women are not a homogeneous group, and that in particular indigenous women, migrant women, rural women and women with disabilities often face multiple barriers to full and equal participation. Specific reference is made to these groups in various sections of this chapter, where pertinent and where data is available. The Commission has had difficulty sourcing data about women from different groups and has advocated for improved data collection and publication.[3]

International context
Kaupapa ā taiao

The Convention on the Elimination of all Forms of Discrimination Against Women, CEDAW, is the principal international instrument on the rights of women. The Convention's focus is on eliminating all forms of discrimination against women so that substantive equality, which requires equality in practice and the elimination of structural forms of inequality, can be achieved. Substantive equality is discussed in the chapter on equality.

The CEDAW committee[4] describes the three obligations that are central to state parties' efforts to eliminate discrimination against women as:

1. **To ensure that there is no direct or indirect discrimination in their laws and that women are protected against discrimination – whether committed by public authorities, the judiciary, organisations, enterprises or private individuals – in the public as well as the private spheres, by competent tribunals as well as by sanctions and other remedies.**
2. **To improve the de facto position of women through concrete and effective policies and programmes.**
3. **To address prevailing gender relations and the persistence of gender-based stereotypes that affect women, not only through individual acts by individuals but also in the law, and legal and societal structures and institutions.**[5]

CEDAW requires state parties to take all appropriate measures, including legislation, to eliminate discrimination against women by persons, organisations or enterprises, and by abolishing or modifying laws, regulations, customs and practices which constitute discrimination against women.

The convention specifically allows for special measures to accelerate equality, and states that these measures, such as affirmative action and positive obligations or duties, do not constitute discrimination. Temporary special measures are permissible for the purpose of accelerating equality, but these can only be in place while the inequality that the measure is designed to address persists.

Article 11 requires state parties to take all appropriate measures to eliminate discrimination in employment. In the context of just and favourable conditions of work,

3 For example, the State Services Commission no longer collects disability data in the annual Human Resource Capability Survey across the public service

4 Report of the Committee on the Elimination of Discrimination Against Women (2004) general recommendation No 25 on Article 4(1) of CEDAW on temporary special measures pp 78–86 30th Session A/59/38

5 International human rights standards and national laws originally focussed on sex as the basis for different treatment of men and women, and prohibited discrimination based on sex. Sex refers to the biological distinction between males and females and includes people of indeterminate sex. But it was soon realised that this term was not broad enough to include the various forms of discrimination related to women and men. Social and cultural assumptions or stereotypes about the roles and responsibilities of men and women were also relevant (for example, whether it was socially acceptable for women to work in certain jobs or to do paid work at all). 'Gender' is the term which came to refer to the social, cultural or other constructions of what it means to be a man or a woman, including expectations about roles and behaviours. Today, the term 'gender discrimination' is often used in place of the term 'sex discrimination'. The CEDAW committee has stated that 'sex discrimination' includes discrimination based on gender stereotypes

CEDAW specifically refers to both equal pay for equal work, and "fair wages and equal remuneration for work of equal value". Equality of treatment in the evaluation of the equality of work is also specifically required. CEDAW also requires equality of opportunity; the right to promotion; job security; and access to vocational training and retraining, including apprenticeships.

The Convention includes a number of maternity protections and prohibition of discrimination on the basis of marriage or maternity. Maternity protections include paid maternity leave or comparable social benefits "without loss of former employment, seniority or social allowances".[6] State parties are also required to encourage the provision of the necessary social services to enable parents to meet family obligations, as well as work responsibilities and participation in public life. In particular, this includes the establishment and development of a network of childcare facilities.

The convention includes specific mention of rural women (Article 14), which includes a statement that state parties should ensure the application of the provisions of the convention to women in rural areas.

"The issue of gender-based violence is not specifically addressed by the CEDAW Convention, but the committee has adopted the approach that it is included in the prohibition on gender-based discrimination in the convention, being "violence that is directed at a woman because she is a woman or that affects women disproportionately" (general recommendation no. 19)."[7] The Declaration on the Elimination of Violence Against Women was adopted by the General Assembly in 1993.

The Beijing Platform for Action has been accepted as the implementation framework for CEDAW. In the Beijing Declaration, governments, the international community and civil society, including non-governmental organisations and the private sector, were called on to take strategic action in the following critical areas of concern:

- the persistent and increasing burden of poverty on women
- inequalities and inadequacies in and unequal access to education and training
- inequalities and inadequacies in and unequal access to healthcare and related services
- violence against women
- the effects of armed or other kinds of conflict on women, including those living under foreign occupation
- inequality in economic structures and policies, in all forms of productive activities and in access to resources
- inequality between men and women in the sharing of power and decision-making at all levels
- insufficient mechanisms at all levels to promote the advancement of women
- lack of respect for and inadequate promotion and protection of the human rights of women
- stereotyping of women and inequality in women's access to and participation in all communication systems, especially in the media
- gender inequalities in the management of natural resources and in the safeguarding of the environment
- persistent discrimination against and violation of the rights of the girl child.

Specific reference to the rights and needs of the girl child feature prominently in the Beijing Declaration. For example, it states "[We reaffirm our commitment to] ensure the full implementation of the human rights of women and of the girl child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms."[8]

Prohibiting discrimination against women is reinforced by the major human rights instruments of the United Nations:

The Universal Declaration of Human Rights

The Covenant on Civil and Political Rights

The Covenant on Economic, Social and Cultural Rights

The Convention on the Elimination of all forms of Racial Discrimination

6 Convention on the Elimination of Discrimination Against Women, Article 11(2b)

7 Ministry of Foreign Affairs and Trade (2008), *New Zealand Handbook on International Human Rights* (Wellington: MFAT), p 86

8 Fourth World Conference on Women (1995), Beijing Platform for Action. Accessible online at http://www.un.org/womenwatch/daw/beijing/platform/declar.htm

The Declaration on the Rights of Indigenous Peoples

The Convention on the Rights of the Child

The Convention on the Rights of Persons with Disabilities

Recent conventions and declarations have articulated the multiple disadvantages experienced by particular groups of women, and the need to take additional measures to ensure their fundamental human rights and freedoms. At a Committee on the Status of Women 2010 side event held in New York, there was strong advocacy for the use of CEDAW and the Convention on the Rights of Persons with Disabilities (specifically Article 6) to be used to mutually reinforce the rights both of women and of persons with disabilities. [9]

Article 6 urges state parties to:

1. **recognise that women and girls with disabilities are subject to multiple discrimination, and in this regard…take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms, and**
2. **take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms.**

The Convention also includes reproductive rights and sexual and reproductive health (Articles 23 and 25). This is considered groundbreaking from a human rights perspective.

Article 1 of the Declaration on the Rights of Indigenous Peoples urges states to take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention is to be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22 states that particular attention is to be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of the declaration. States are also urged to take measures, in conjunction with Indigenous peoples, to ensure that indigenous women and children enjoy full protection and guarantees against all forms of violence and discrimination.

Six ILO [10] conventions also focus specifically on women. They are:

C111 Discrimination (Employment and Occupation)

C100 Equal Remuneration

C156 Workers with Family Responsibilities

C183 Maternity Protection

C175 Part-time Work

C168 Employment Promotion and Protection Against Unemployment

New Zealand has ratified C100 and C111.

New Zealand context
Kaupapa o Aotearoa

The New Zealand Government has an obligation to ensure non-discrimination and equality, having ratified international conventions. The Government regularly reports to international bodies on compliance and progressive realisation of rights set out in the international human rights treaties.

New Zealand ratified CEDAW in 1985. In 2007 it withdrew its reservation to Article 11(2)(b), after the implementation of paid parental leave. The last reservation, on women's participation in the armed forces, has also been withdrawn. In 2000 New Zealand signed and ratified the Optional Protocol to CEDAW, which provides a complaint mechanism once all domestic remedies are exhausted.

Domestic legislation includes the Human Rights Act 1993 (HRA) and the Bill of Rights Act 1990 (BoRA). The HRA includes these prohibited grounds of discrimination: sex, including pregnancy and childbirth; marital status, including being single, married, in a civil union, or in a de facto relationship, as well as being the surviving or separated spouse or partner of any one of those relationships, or a party to one of those relationships

9 Rangita de Silva de Alwis, Director of International Human Rights Policy at the Wellesley Centers for Women, has urged that both treaties be used to "cross-fertilise both agendas" at a workshop at the Committee on Status of Women meeting in New York 2010

10 The ILO Conventions are accessible online at http://www.ilo.org/ilolex/english/convdisp1.htm

which has ended; and family status, which includes having responsibility for children or not, being a relative of a person or being in a marriage, de facto relationship or civil union with a particular person.

In 2001 the HRA was amended to include an Equal Employment Opportunities Commissioner. The mandate of the EEO Commissioner includes responsibility for providing leadership, advice and guidance on equal employment opportunities, including pay equity (equal pay for work of equal value).

The HRA and the BoRA both protect the right to freedom from discrimination. The BoRA applies to the public sector, the legislature, the executive, and the judiciary. The HRA applies to both public and private sectors:

A publicly funded, free dispute resolution service is available for complaints of discrimination in the public and private sectors, and public-sector employers are required to meet the same non-discrimination standards as private-sector employers.

Special measures are permissible in both the HRA and the BoRA. Although the wordings of section 73 (1) of the HRA and section 19 (2) of the BoRA differ, both are designed to ensure equal outcomes by addressing disadvantage that is the result of unlawful discrimination. There are limits to introducing special measures. The measure must be tailored to reduce the actual disadvantage of the group it is aimed at; the impact of the measure on those to whom it does not apply should be considered; the measure should be proportional to the degree of disadvantage; and measures to ensure equality should be temporary, that is, until the disadvantage is resolved. [11]

New Zealand today
Aotearoa i tēnei rā

This section focusses on economic equity, representation and participation, violence against women and maternity protections. Within each section, relevant legislation and case law are outlined, together with a description of recent developments.

The four topics are included in a number of domestic statutes:

Government Services Equal Pay Act 1960

Equal Pay Act 1972

State Sector Act 1988

Local Government Act 2002

Crown Entities Act 2004

Domestic Violence Act 1995

Paid Parental Leave Act 2002

Employment Relations Act 2008 amendment: infant feeding

Employment Relations Act 2007 amendment: flexible work

Complaints to the Human Rights Commission in the last two years show a gendered pattern. The number of complaints and enquiries by women on the grounds of sexual harassment was much higher than the number by men, whereas men made complaints and enquiries about race at a much higher rate than women did.

Approaches to the Commission by women, disaggregated by ethnicity, are fairly similar to the proportions recorded in the 2006 Census, with a slightly higher proportion of Māori women and a slightly lower proportion of Pacific women approaching the Commission. The proportion of women from 'other' ethnicities, such as African, Middle Eastern and Latin American, is significantly lower than their proportions in the general population.

ECONOMIC EQUITY

"Opportunities for women in employment have increased, and they have taken up careers once considered the prerogative of men. Despite this, and despite advances in women's educational achievements, their earnings are still on average less than men's. It is also difficult for women to reconcile family duties with paid work without affecting their chances of promotion or skill enhancement. However, even when they manage to overcome these obstacles, they earn less then men." [12]

11 Human Rights Commission (2007), Guidelines on Measures to Ensure Equality (Auckland: HRC). Accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/18-Mar-2007_18-54-53_Special_Measures_A4_Final_PDF.pdf

12 International Labour Office (2007), *Equality at Work: Tackling the challenges*, pp xi –xii

Closing the gender pay gap is increasingly a global focus of civil society, with its members urging improved labour-market legislative and policy responses. For example, BPW International, the Federation of Business and Professional Women, runs an International 'Equal Pay Day' awareness campaign which is gaining traction in Europe, Australia and New Zealand.

Legislative framework

In 1960, equal pay legislation eliminated different pay rates for men and women doing the same job in the public service. The Equal Pay Act 1972 extended the right of women to equal pay for equal work into the private sector.

When the act was passed, the award system was in place, meaning that many wage rates were negotiated for various occupations and applied across the labour market. The effectiveness of the equal pay legislation has been limited in recent decades, partly due to the abolition of the award system. The Employment Equity Act, providing for equal pay for work of equal value, was passed in 1990 but repealed six months later. "Currently the remedy for employment discrimination (including pay) under the Equal Pay Act, the Employment Relations Act and the Human Rights Act is for the individual affected to lodge a complaint. Under all three acts the onus is on the employee to identify the problem and instigate the complaint. It is against the law for employers to discriminate, but there is no requirement for employers to ensure or demonstrate that pay systems are equitable." [13]

Provisions in public sector [14] legislation, the State Sector Act 1988, the Crown Entities Act 2004 and the Local Government Act 2004, require that employers must be 'good employers'. This includes having an equal opportunities programme, that is "a programme that is aimed at the identification and elimination of all aspects of policies, procedures, and other institutional barriers that cause or perpetuate, or tend to cause or perpetuate, inequality in respect of the employment of any persons or groups of persons".[15] Good-employer provisions also require "recognition of the employment needs of women".[16] The legislation does not specify reporting mechanisms or detail about how an EEO programme is to be developed.

At present, only public sector employers are required under law to engage in these positive duties. There is no private sector obligation to undertake these in domestic legislation. The private sector is bound only by the general anti-discrimination and employment law frameworks.

Case law

In 2007, a landmark case on sexual discrimination in employment in the private sector was successfully concluded in the High Court. The decision in Talleys Fisheries Limited v Lewis and Edwards established that employers should not be segregating women into work that is substantially similar to work undertaken by men, but with lesser pay. The court said that what is "substantially similar" needs to be assessed by looking at core aspects of jobs, rather than "difference in detail". The judgment said that "the reason she [Ms Lewis] received less money was because she was made a trimmer and the reason she was made a trimmer was because she was a woman". Talleys (the employer) agreed to implement an EEO programme, to train managers about the Human Rights Act and to pay compensation to Ms Lewis.

Women in poverty

Women are over one-and-a-half times more likely than men to live in a household with a total annual income of $30,000 or less. At the same time there is little distinction between men and women in reporting whether or not income is adequate to meet everyday needs.[17] Nearly two-thirds (63 per cent) of those aged 15 and over with a personal income of between $1 and $5000 a year are women. Three-quarters (75 per cent) of those with a personal income of over $75,000 a year are men.[18]

13 L. Hill (2004), Equal pay for work of equal value: Making human rights and employment rights work together, *Social Policy Journal of New Zealand,* March Issue 21 pp1–25

14 'Public sector' refers to public service departments; the wider state sector which includes Crown entities such as District Health Boards, School Boards of Trustees, tertiary education institutions, state owned enterprises; and local government. See http://www.ssc.govt.nz/display/document.asp?NavID=47

15 See section 118 Crown Entities Act 2004, section 56 State Sector Act 1988 and section 36 of schedule 7, Local Government Act 2002

16 ibid

17 Statistics New Zealand (2009), *New Zealand General Social Survey 2008* (Wellington: Statistics New Zealand).

18 ibid

Personal income is only one indicator of poverty, which can have profound effects economically and in terms of social isolation. "Poverty leaves women more exposed to violence, less able to escape it. It severely restricts women's ability to organise and fight for change." [19]

In the 2006 Census, the median annual income from all sources for people aged over 15 was $31,500 for men and $19,100 for women, a gap of 39 per cent. [20] This is attributed to differences in employment, "among other factors". Men are more likely than women to be in paid work, working full-time and working longer hours. The median income for Māori women was $17,800 and for Pacific women $17,400. [21] The cost of disability and ensuing poverty is an issue requiring more detailed research.

Women head 83 per cent of one-parent households. [22] For couples with children, median income from all sources is $75,600; for families of one parent with children, it is $27,400. [23] International experience shows that the global recession is impacting negatively on women: families who have to rely on a female breadwinner's income are exposed to a greater risk of poverty, because of women's lower gross hourly wages. [24]

Progressive improvements to the minimum wage have increased the income of women earning at or near that level. Over the past decade, the minimum wage increased from $7.55 (March 2000) to $12.75 (April 2010).

As a result of lower lifetime earnings, due partly to a combination of fewer hours worked because of broken and part-time employment, most often because of caring commitments, as well as lower income while working, women in general are less able to save for retirement than men. In addition, an annuity bought with savings is likely to provide less annual income, because of the longer life expectancy of women. However, New Zealand Superannuation, which is "effectively a Universal Basic Income for the over 65s" [25], ensures that poverty levels are low and living standards comparatively high among the older population. It is estimated that some 55 per cent of women and 38 per cent of men have no other income in retirement.

The gender pay gap

In response to New Zealand's most recent periodic report to the CEDAW Committee, in 2006 the committee noted concern about women's disadvantaged status in the labour market, and recommended that efforts be intensified to eliminate occupational segregation and close the wage gap. It called on the Government to monitor the impact of measures taken in both the private and public sectors, and to report on those measures in the next periodic report. [26]

Internationally, calculation of the gender pay gap has proved to be controversial. The UK Office for National Statistics (ONS) has recommended that the British Government use three statistics: the median hourly pay of all workers; the median [27] hourly pay of full-time workers; and the median hourly pay of part-time workers. This recommendation arose from concerns that the gender pay gap was being calculated as the ratio between the median hourly rate of men working full-time and that of women working part-time. In New Zealand, it is common practice to express the gender pay gap in terms of the median hourly rate for all employees. "Estimates based on hourly earnings yield the narrowest pay gaps as women are more likely to work fewer hours in a week

19 Irene Khan (2009), Amnesty International, *Flame: Amnesty International Aotearoa New Zealand's Supporters Magazine,* Summer, p 5

20 QuickStats About Incomes 2006 Census Statistics New Zealand http://www.stats.govt.nz/census/2006censushomepage/quickstats/quickstats-about-a-subject/incomes.aspx

21 QuickStats, 2006 Census, Statistics New Zealand, as above

22 Calculated from Ministry of Social Development (2009), *The Social Report* (Wellington: MSD), p 16

23 QuickStats About Incomes, 2006 Census, Statistics New Zealand, as above

24 Committee on the Status of Women (2010), Country report Germany, New York, 1–12 March,

25 Prue Hyman (2007), 'Retirement Income – Issues for Women', background paper prepared for the 2007 Review of Retirement Income Policies (Wellington: Retirement Commissioner), p 9

26 Committee on the Elimination of Discrimination Against Women 39th Session 23 July–10 August 2007 CEDAW/C/NZ/CO/6 http://www.un.org/womenwatch/daw/cedaw/39sess.htm

27 Half earn more, half earn less

and a year than men." [28] According to the New Zealand Income Survey, 71 per cent of part-time workers are women and 58 per cent of full-time workers are men.

The Commission has adopted the ONS recommendation for analysing the gender pay gap in New Zealand. The median hourly rates of pay from the Statistics New Zealand Income Survey for the June 2010 quarter, and the gender pay gaps, are shown in the charts below.

The gender pay gap had persisted at approximately 12 per cent since 2001, and the mean (average) gap is 13 per cent according to Statistics New Zealand. When the variable of ethnicity is added, the results suggest double disadvantage.

MEDIAN HOURLY RATE

	All	Full-time	Part-time
Men	$21.25	$22.12	$14.50
Women	$19.00	$20.62	$15.33
Total	$20.00	$21.58	$15.00

Full time and part-time employment	Median gender pay gap (% difference)
All female employees / all male employees	10.6
Full time male employees / full time female employees	4.8
Part time male employees / part time female employees	-5.7

The gender gap between the highest hourly rate (European men) and the lowest (Pacific women) is 24.4 per cent.

In 2003 a complaint was taken to the Human Rights Commission by female students, who argued that the interest charged on student loans was discriminatory because the gender disparity in lifetime earnings placed a considerable additional burden of debt on women. The case was dropped when the Government introduced interest-free student loans in 2006.

ETHNICITY

	Men (median hourly rate)	Women (median hourly rate)
European	$22.06	$19.33
Māori	$18.00	$17.00
Pacific peoples	$17.88	$16.68
Asian	$19.18	$18.00
MELAA*	$22.00	$20.00
Other	$22.06	$18.00

* Middle-Eastern, Latin American, African.

Pay and employment equity in the public sector

In 2004 the Pay and Employment Equity Unit was established in the Department of Labour to implement a five-year 'Pay and Employment Equity Plan of Action', as recommended by the Pay and Employment Equity Taskforce.

The unit and a tripartite steering group oversaw the rollout of pay and employment equity reviews across the public service and the public-health and public-education sectors, as well as two local councils and three Crown entities. In total, 14.2 per cent of all employees in New Zealand – approximately 225,600 employees – were covered by the reviews.[29]

In addition, the Equitable Job Evaluation System and the New Zealand Gender-inclusive Job Evaluation Standard were developed and made available for implementation.

The reviews found gender pay gaps for all but one of the 36 public-service departments. (Child, Youth and Family

28 Hicks S and Thomas J (2009), *Presentation of the Gender Pay Gap* Office for National Statistics. http://www.statistics.gov.uk/articles/nojournal/PresentationoftheGenderPayGap.pdf

29 See Department of Labour (2009), Public sector pay and employment equity reviews: Overview report (Wellington: DOL) (June) http://www.dol.govt.nz/services/PayAndEmploymentEquity/papers.asp

undertook a separate review from the Ministry of Social Development.) Pay gaps for median equivalent full-time hours ranged from 3 per cent to 35 per cent. Common findings included:

- unequal starting salaries for the same job
- female-dominated jobs being lower-paid than male-dominated jobs
- gender disparities in pay progression and performance pay
- women predominating among the lowest-paid staff and forming a minority of those in the best paid jobs
- women having a smaller share of additional rewards
- significant gender differences in opportunities to participate in all roles and at all levels.

In the five years to 2009, the overall gender pay gap in the public service decreased slightly, from 16.4 per cent in 2005 to 15.4 per cent in 2009, according to the Human Resource Capability survey of the public service collated by the State Services Commission (SSC). The published survey report does not include a breakdown of the pay gap by individual departments, but this information is provided to individual departments by the SSC.

Across the public health sector,[30] aggregate pay gaps of 50–100 per cent in average total remuneration were reported. However, this figure does not separate out the effect of part-time work. One district health board which reported on full-time equivalent earnings found a pay gap of 31 per cent. As with the public service, women in the public health sector were over-represented in lower-paid occupations and under-represented in higher-paid ones. Gender pay gaps were also found within occupations, including starting rates in some cases.

The review of schools and kindergartens did not identify concerns about the pay rates for teachers. However, women were under-represented in higher-paid "senior management roles and in principals' positions". This is consistent with earlier research, which found that 40 per cent of principal positions were occupied by women, despite women making up 82 per cent of the teaching workforce. "Seen from another perspective, 60 per cent of the principals are appointed from the 18 per cent male pool of the workforce."[31] The review also identified concerns about some aspects of pay and progression for school support staff, and about the basis on which the work of cleaners and teachers aides is evaluated.

Reviews conducted in Crown research institutes and local government also found gender pay gaps. Similar disparities as in the public service were found. Women were found to be earning less than men in the same occupations, and were concentrated in lower paying occupations and under-represented in senior management. Equitable job sizing, especially for support roles, was also raised as an issue.

Each review included a response plan. "Response plans were much stronger on taking action to prevent problems in the future than in immediate action remedying the identified problems. In many cases, there were very limited monitoring, accountability and reporting arrangements, including in relation to reporting on progress to employees within organisations."[32] The Department of Labour also commented that "some organisations could not be confident that they were meeting all their responsibilities under equal pay, equal employment opportunity and anti-discrimination legislation."

In 2009, the Pay and Employment Equity Unit was disestablished and the plan of action and pay investigations were discontinued. Recommended pay investigations will not now proceed or be completed. A cabinet minute noted the decision to discontinue pay investigations, but also noted that public-service departments and the public-health and public-education sectors were to continue to implement response plans, excluding pay investigations. Chief executives were reminded of their obligation to ensure that they continue to address and respond to gender inequities. The minute also noted government "encouragement of employers in the voluntary participation of both public- and private-sector organisations in pay and employment equity projects".

30 The district health boards and the New Zealand Blood Service

31 Brooking, K (2003), *Boards of Trustees' selection practices of principals in New Zealand primary schools: Will the future be female?*, p 1. Paper presented at BERA Conference, Edinburgh 11–13 September 2003

32 Extracts from 'Public sector pay and employment equity reviews – Overview report' Department of Labour June 2009 http://www.dol.govt.nz/services/PayAndEmploymentEquity/papers.asp

In November 2009, a survey of Crown entities undertaken by the Commission as part of annual monitoring of good-employer reporting included questions about pay and employment equity. Only six (13 per cent) of the Crown entities who responded reported having a pay gap. Of these, the findings show significant gender-pay gaps ranging from 3 per cent to 29 per cent. Nine Crown entities (20 per cent) said they did not know whether they had a pay gap, and 30 (67 per cent) reported that they had no pay gap at all.

Eighty per cent of respondents said they were not interested in analysing the pay gap in their organisations in the next two years, and an additional 10 per cent did not feel the need for further information or guidance on pay and employment equity issues.

The Human Rights Commission held a Pay and Employment Equity Roundtable in August 2009 to advance issues of pay and employment equity, following the disestablishment of the Pay and Employment Equity Unit of the Department of Labour. Its aim was to explore ways of continuing the momentum towards closing the gender pay gap, with the Government expressing interest in ensuring that pay and employment equity is the responsibility of all employers.

A legal opinion by Helen Aikman QC for the Commission found that despite the disestablishment of the Pay and Employment Unit, the public sector would still be expected to address equality issues as part of being a good employer (section 118 Crown Entities Act 2004 and section 56 State Sector Act 1988).

The Commission developed a monitoring framework for pay and employment equity which is published online on the Commission's EEO website, www.neon.org.nz. This toolkit is aimed at improving the availability of self-help mechanisms for the public and private sectors.

The Ministry of Women's Affairs "received a 12 per cent funding increase – an additional $2 million over four years to do more research and policy work on the gender pay gap. The extra funding would be spent taking a fresh look at the causes of the gender pay gap and taking effective measures to reduce it." [33]

A sex discrimination complaint has been made to the Human Rights Commission on the discontinuation of a pay investigation into the pay of social workers which had been recommended in the pay and employment equity review at Child, Youth and Family. Parties to the complaint were notified in May 2010 and mediation initiated.

Pay and employment equity in the private sector

Other than broad labour market data, very little is known about the gender pay gap in the private sector, because there are no reporting obligations on business concerning equal-employment opportunities. The Talley's sex discrimination case referred to above highlighted the lack of visibility of unequal pay between men and women doing similar work. At CSW 2010 in New York, there were repeated international calls for greater transparency around remuneration in the corporate world.

What next?

Women continue to express frustration about the lack of progress and the lack of effective mechanisms to address entrenched and systemic pay inequality both in the public and private sectors. A school support worker told the Commission during the National Conversation: "I don't begrudge cleaners and caretakers a pay rise, but the unfairness is blatant. A cleaner earns more vacuuming than a teacher's aide who tube-feeds and catheterises a student." [34]

In its last report, in 2007, the CEDAW committee recommended that New Zealand:

> **...enact and implement 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. It also recommends that the state party include adequate sanctions for such acts of discrimination against women and ensure that**

33 Minister of Women's Affairs press release, 9 June 2009 Accessed online at http://beehive.govt.nz/release/women%E2%80%99s+affairs+gets+boost+gender+pay+gap+work

34 Human Rights Commission (2009), *National Conversation about Work: Nelson/Marlborough/Tasman Report,* Department of Labour (2009). Presentation at the National Refugee Resettlement Forum, Wellington. 27 May 2009

effective remedies are available to women whose rights have been violated. [35]

The Human Rights Commission has recommended a timetabled approach to implementation of pay and employment equity that reflects New Zealand's economic conditions. It has also recommended that the Government set a minimum target for halving the gender pay gap by 2014 and eliminating it by 2020. This will require cross-party political commitment and broad-based civil society and business support.

REPRESENTATION AND PARTICIPATION

Over the past decade women have at some time held many of the positions of power in New Zealand. Two consecutive female prime ministers led New Zealand for over 10 years. At one point, Helen Clark was Prime Minister; former Prime Minister Jenny Shipley was Leader of the Opposition, and the positions of Attorney-General, Chief Justice and Governor-General were all held by women. The chief executive officers of the two largest tele-
communications companies were also women.

However, Dame Silvia Cartwright, then Governor-General of New Zealand, noted:

New Zealand and international media have focussed on the perceived predominance of women across some of the country's key leadership positions during recent years. This type of commentary has been welcomed by many as proof that our nation is paying more than lipservice to issues of gender equity in the workforce. Such attention, however positive, carries the risk of a double-edged sword. It is all too convenient to assume that this profile accurately reflects the status of all professional women. [37]

In 2010, at the beginning of a new decade, only one of those positions (Chief Justice) is held by a woman.

Women in leadership positions

Every two years the Commission publishes a comprehensive stocktake of women in leadership in public and private life, entitled the *New Zealand Census of Women's Participation*. The last census was published in 2010. Early indications for the next census are that improvement in many areas is likely to be minimal, and in some cases there has been regression.

In general, the census reveals poor progress and a considerable disparity between the public sector, where there is a legislative imperative, and the private sector, where a voluntary approach is the norm.

In the private sector, women are significantly under-represented in governance positions on the boards of companies listed on the three securities markets of the New Zealand Stock Exchange. The New Zealand stock market (NZSX) companies have women making up 8.65 per cent of board members; debt market (NZDX) companies have 5.73 per cent; and alternative market (NZAX) companies have 5.07 per cent.

Women are better represented on state sector boards, making up 34 per cent of the boards of Crown companies and 42 per cent of state-sector statutory bodies. [38] This falls short of the 50 per cent target for gender parity in government-appointed bodies by 2010. Disaggregated data about the representation of groups of women is lacking. The collection of ethnicity data for boards is not mandatory, and appointing agencies tend not to ask nominees or appointees to disclose their ethnicity. [39] Where this is done, [40] limited representation of Māori and Pacific women is evident. Of the women appointed to boards of companies monitored by Crown Ownership Monitoring Unit, a total of 33.5 per cent of board members, 4 per cent are Māori and 1 per cent are Pacific.

35 Committee on the Elimination of Discrimination Against Women 39th Session 23 July–10 August 2007 CEDAW/C/NZ/CO/6

36 Human Rights Commission (2009), Periodic Review Report to the United Nations on the Universal Declaration of Human Rights in 2009

37 Human Rights Commission (2004), Foreword, New Zealand Census of Women's Participation (Auckland: HRC), http://www.hrc.co.nz/home/hrc/newsandissues/glacialprogressinwomenoncompanyboards

38 Human Rights Commission (2004), foreword, *New Zealand Census of Women's Participation* (Auckland: HRC)

39 Ministry of Pacific Island Affairs (2010), *Report on Pacific appointments and reappointments for the period 1 July–31 December 2009*

40 As at 1 March 2009 Crown Ownership Monitoring Unit http://www.comu.govt.nz/boards-and-appointments.html

Of the 186 publicly listed companies in the three securities markets, only three, a tiny 1.6 per cent, had female chief executives.[41] The percentage of women in senior management in privately held businesses shows a distinct improvement. An annual business survey undertaken by accountancy company Grant Thornton reported that in New Zealand, 27 per cent of senior management were women, a higher level of representation than Australia, the United Kingdom and the United States. However, the difference in women's representation between the boards of publicly listed companies and those of privately held businesses reflects the number of family-owned private companies, the smaller size of many private businesses in New Zealand, and the fact that female entrepreneurship generally starts in private business.

The public sector has had an equal employment opportunity mandate under the good-employment provisions of the State Sector Act since 1988. Despite this, women continue to be under-represented in management positions. Women make up 59 per cent of the public service, but only 17 per cent of chief executives and 38 per cent of senior management (tier 2 and 3).[42] A survey of Crown entities conducted by the Human Rights Commission in November 2009 found that in the 47 per cent of organisations that responded, women made up 61 per cent of staff but only 11 per cent of chief executives. They make up 42 per cent of tier 2 management positions and 39 per cent of tier 3 positions.[43]

While data from the state sector is often sliced by gender and ethnicity, reporting does not include both factors together. Data provided on request by the State Services Commission[44] shows that the composition of senior management positions in the public service includes European women 31.5 per cent, Māori women 3.9 per cent, Pacific women 0.6 per cent, Asian women 0.6 per cent, MELAA women 0.09 per cent, and other women 1.5 per cent.

The Commission, recognising the lack of data on Māori women leaders, included a chapter on Māori women in the 2008 Census of Women's Participation. The observation was made that "the relative invisibility of Māori women in governance does not represent the true reality of their contribution".[45] Māori women have very high participation rates in voluntary, paid and unpaid work outside the home, compared with non-Maori and Māori men.

Data on people with disabilities in general, let alone disabled women, is even less visible, with information about representation in the state sector extrapolated from Census data collected by Statistics New Zealand in 2006. Complaints data collected by the Commission shows that for those who identified as female and disabled, and who approached the Commission on the ground of disability, the most common area of complaint was employment, accounting for 27 per cent of these approaches, followed by government activity (21 per cent), educational establishments, and the provision of goods and services (17 per cent each).

Women in politics

In the current Government, of 20 Ministers inside Cabinet, six (30 percent) are women. The highest ranked woman is Judith Collins, at seventh. When all ministers outside Cabinet and support party ministers are included, the proportion of women falls to 25 per cent.[46]

The percentage of women in Parliament has increased from 21 per cent in the last first-past-the-post electoral system in 1993 to 34 per cent in the most recent election in 2008, the fifth mixed-member proportional election. More women are list MPs (54 per cent) than electorate MPs. This has been a feature of all mixed-member proportional elections except one: 2002. The majority of men elected to Parliament are electorate MPs.

41 Judy McGregor (2010) (in press), Women in management in New Zealand. In M Davidson and R Burke (eds), *Women in management: Progress and prospects*, vol 2 (Gower UK)

42 State Services Commission (2009) H*uman Resource Capability Survey of Public Service Departments 2009* (Wellington: SSC) http://www.ssc.govt.nz/upload/downloadable_files/hrcs09.pdf

43 Human Rights Commission (2010), *Crown Entities and the good employer: A progress report* (Auckland: HRC).

44 Data made available by the State Services Commission from the 'Human Resource Capability Survey 2009'

45 Human Rights Commission (2008), 'New Zealand Census of Women's Participation 2008' (Auckland: HRC), p 45

46 As at 13 September 2010

Relative to other OECD countries, New Zealand compares well. The OECD average female representation in national government is 23 per cent. New Zealand ranks eighth, after Sweden, Finland, the Netherlands, Denmark, Spain, Norway and Belgium.

Similar levels of representation are found in local government elections. In 2007, 32 per cent of elected members were women. Women's representation is highest on district health boards at 46 per cent, followed by city councils, at 37 per cent. Of the 73 mayors elected in 2007, 13 (18 per cent) are women. Three women were elected mayors of city councils and 10 women were elected mayors of district councils. Disaggregated data which identifies gender and ethnicity together was not published.

Council-controlled organisations (CCOs), including utility companies, transport services (including airport authorities), bus companies and parking operations, tourism and cultural boards, fire authorities and an array of other services, appear to be increasing in number. Women's representation on CCO boards is below that for elected councils, at about 20 per cent. [47]

Women in the labour force

Both in New Zealand and across the globe, in the past two decades greater numbers of women have entered the paid workforce than ever before. The labour force participation of New Zealand women was 62.3 percent as at the September 2009 quarter, just below the peak level of 62.6 per cent in the previous year. The labour force participation of men is 74.1 per cent, and their overall labour force participation is 68 per cent. [48] The participation rate for Māori women is the same as for non-Māori women; [49] the rate for Pacific women is 59.2 per cent. [50]

Women are far more likely than men to work part-time. Approximately four out of 10 women in employment work part-time (i.e. less than 37 hours a week), compared with one in 10 men. [51] Women are also more likely to be involved in unpaid work, and patterns of female unpaid work are changing in the household and the community. In the National Conversation about Work, the notion of 'granny work' was identified, with grandparents providing childcare for working parents. [52]

"As well as being less likely to participate in the labour force than non-disabled, disabled people who do participate are less likely to be in work." [53] Women with disabilities experience a double disadvantage in the labour market. In 2006, the unemployment rate for disabled men was 5 per cent, compared with 3 per cent for non-disabled men, whereas the unemployment rate for disabled women was 9 per cent, compared with 5 per cent for non-disabled women. [54] Qualifications improve labour market participation, but disabled people with tertiary qualifications have the same participation rate as non-disabled people with no qualifications.

Sexual harassment in the workplace

Sexual harassment at work is a barrier to full participation in and enjoyment of the workplace. Complaints and enquiries to the Commission about sexual harassment are highly gendered, especially for younger women. Of the 85 approaches to the Commission by women on the ground of sexual harassment, the vast majority were from women in the 18–50 age group.

Women in education

There has been considerable public debate on gender and education in recent years. A great deal of publicity has focussed on the increasing overall proportions of women

47 Human Rights Commission (2008), New Zealand Census of Women's Participation 2008 (Auckland: HRC), p 57

48 Department of Statistics (2009), *Household Labour Force Survey,* September (Wellington: StatsNZ).

49 Department of Labour (2009), *Māori in the New Zealand labour market* (Wellington: DOL), http://www.dol.govt.nz/publications/lmr/maori/in-the-labour-market-2009/executive-summary.asp

50 Ministry of Pacific Island Affairs and Department of Labour (2009), *Pacific women's work: an overview of Pacific women's participation in New Zealand labour market* (Wellington: MPIA/DOL)

51 National Advisory Council on the Employment of Women (2010), Wellington, New Zealand

52 Human Rights Commission (2010, National Conversation about Work: Canterbury regional report. Accessible online at http://www.neon.org.nz/nationalconversationaboutwork/regionalreportswhatnext/

53 Statistics New Zealand and the Office for Disability Issues (2008), *Disability and the labour market in New Zealand in 2006* (Wellington: StatsNZ/ODI)

54 ibid

in tertiary education and with completed degrees, and on girls' versus boys' levels of achievement in primary and secondary education, as opposed to the continuing gender disparities in labour market outcomes. These show entrenched occupational segregation and a persistent gender pay gap disadvantaging women with tertiary qualifications. [55]

Participation in tertiary education is an indicator of the extent to which women are currently acquiring the skills and qualifications for participating in work, society and public life. In 2007, women (14.2 per cent) were slightly more likely than men (12.3 per cent) to be enrolled for a tertiary qualification, and accounted for 54 per cent of domestic students enrolled. Women are also more likely than men to be enrolled in higher-level rather than lower-level qualifications. [56]

Participation of Māori women in tertiary education is particularly high. Māori women have the highest levels of participation overall, followed by Māori men, Pacific women and European women. Māori women in particular have very high levels of participation in sub-degree-level qualifications (certificates and diplomas). European women are slightly more likely than Māori and Pacific women to study at bachelor level. [57]

Completion rates are also higher for women. Of students who completed a tertiary qualification in 2006, 59.3 per cent were women. [58]

Young women are significantly under-represented in trades training through the Modern Apprenticeship Scheme. The addition of hairdressing as an occupation qualifying for funding under the scheme has increased the proportion of women in modern apprenticeships to 11.7 per cent. Of those young women, 71 per cent are European/Pakeha, 19 per cent Māori and 3 per cent Pacific. The Modern Apprenticeship Scheme has received considerable public funding at a time when financing a university qualification is increasingly user-pays.

What next?

Successive governments have eschewed target setting for women's representation. The CEDAW committee has called on New Zealand to consider using special temporary measures such as benchmarks, targets, recruitment and support programmes, incentives and quotas. As a follow-up to the Beijing Women's Conference held in 1995, New Zealand committed to improving the proportion of women on statutory boards (Crown companies) to 50 per cent by 2000. This target has been endorsed by successive governments, with the target date reset at 2010 in the 2004 Action Plan for New Zealand Women compiled by the Ministry of Women's Affairs. [59] The Beijing Platform for Action urges governments to "take measures to ensure women's equal access to and full participation in power structures and decision-making". [60]

The Human Rights Commission has recommended the adoption of targets to improve representation of women in political and public office in its comments on the fifth periodic report on the International Covenant on Civil and Political Rights. [61]

VIOLENCE AGAINST WOMEN

Violence against women is perhaps the most shameful human rights violation, and it is perhaps the most pervasive. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to

55 Judy McGregor (2010) (in press), Women in management in New Zealand. In M Davidson and R Burke (eds), *Women in management: Progress and prospects*, vol 2 (Gower UK)

56 Ministry of Women's Affairs (2008), Indicators for change (Wellington: MWA)

57 ibid

58 NZ UniGradStats (2008) New Zealand University Vice-Chancellors' Committee http://www.nzvcc.ac.nz/files/u10/NZUniGradStats3.pdf

59 Action Plan for New Zealand Women (2004) Ministry of Women's Affairs Wellington http://www.mwa.govt.nz/news-and-pubs/publications/actionplanReportFinal.pdf

60 Strategic Objective G1 Beijing Platform for Action 1995, accessible on line at http://www.un.org/womenwatch/daw/beijing/platform/

61 Comments on New Zealand's fifth periodic report on the Convention on Civil and Political Rights presented to the UN Human Rights Committee, New York March 2010 http://www.hrc.co.nz/home/hrc/internationalhumanrights/unitednationshumanrightscommittee.php

be making real progress towards equality, development and peace. [62]

It is estimated that violence against women "affects one third to one half of all women over their lifetime". [63] The CEDAW committee has emphasised that violence against women is a form of discrimination, perpetrated against women on the grounds of their sex. It is both a cause and a consequence of gender inequality. 'Gender-based violence' refers to violence against any person based on their actual or perceived gender. It includes violence against men who do not conform to male social or cultural stereotypes, for example assaults on a man because he is seen as insufficiently masculine.

This section focusses on two aspects of violence against women: violence against women in the home (also known as 'domestic violence' or 'family violence'), and sexual violence. These two aspects of violence against women are often linked. It is has been estimated that "around 75 per cent of sexual abuse overlaps with family violence (primarily women and children as victims)". [64]

Legislative framework

New Zealand has enacted specific legislation dealing with family violence: the Domestic Violence Act 1995. The definitions of violence in the act closely mirror the wording of the Declaration against Violence against Women:

The objectives of the Domestic Violence Act 1995 are to reduce domestic violence through the use of education and counselling programmes and to deal with violence when it occurs, through the use of 'protection orders.

The act covers a range of 'close personal' domestic relationships where protection may be necessary. This includes any form of family relationship, "regardless of whether the relationship arises from a legal or a de facto union". The definition of acts of violence "includes physical, sexual and psychological abuse. It covers such things as intimidation, harassment, damage to property and threats of abuse. This could be a single serious act or a pattern of behaviour resulting from a number of minor acts." [65]

The Domestic Violence Act, the Sentencing Act 2002 and the Bail Act 2000 were amended in 2009 to strengthen protection orders. Changes included introducing police-issued safety orders, and enabling criminal courts to issue a protection order where an offender is sentenced for a domestic violence offence. Training on the use of safety orders and evaluation of their impact are advocated by groups working in this field. It is argued that "greater priority needs to be given to the human right to safety if women and children are to remain safe when seeking protection under the Domestic Violence Act". [66]

Concerns about the adequacy of current legislation and implementation issues, in the context of alarming rates of unreported sexual violence crimes and a low rate of successful prosecution of reported crimes, have prompted a number of initiatives to improve official and community responses to violence. Domestic violence intervention organisations have also expressed concern about the way in which the Domestic Violence Act is implemented. [67]

Changes sought in submissions from the Human Rights Commission [68] and Amnesty International [69] on Improving Sexual Violence Legislation in New Zealand include reconsideration of consent provisions in the Crimes Act, and the admissibility of evidence of a sexual history between the complainant and the accused.

62 Kofi Annan (1999), quoted in 'Violence Against Women in Aotearoa New Zealand 2009', Herbert R, Hill A and Dickson S. Published online at http://www.roundtablevaw.org.nz/Integrated.pdf

63 ibid

64 'Pulling it all together': Family Violence and Sexual Violence in New Zealand, Ruth Herbert (2010). Powerpoint presentation supplied by the author

65 Domestic Violence – Protection orders fact sheet, Neighbourhood Support New Zealand, downloaded from http://www.ns.org.nz/7.html

66 Towns A and Scott H (2006), 'Accountability, natural justice and safety: The protection order pilot study (POPS) of the Domestic Violence Act 1995', *New Zealand Family Law Journal,* 7(7):157–168

67 ibid

68 Submission to the Ministry of Justice, 2008

69 Submission to the Ministry of Justice, 2008

At the time of writing, changes to social welfare legislation were being proposed. The National Council of Women has raised the issue of the effect the proposed changes could have on women fleeing situations of domestic violence. The effect of the changes will be to require solo parents to look for and accept suitable part-time work when their youngest dependent child turns six years old. Given the proposed work-test regime, the cost of childcare and the need of women to accept poorly paid work, these changes could result in women being forced to return to or remain in violent relationships. [70]

Sexual violence

Sexual violence is a highly gendered crime. Overwhelmingly sexual assault is perpetrated by men against women. [71]

The 2006 Crime and Safety Survey found that approximately 29 per cent of women and 9 per cent of men had experienced unwanted and distressing sexual contact over their lifetime. [72] Studies quoted by the Ministry of Women's Affairs show the gender of victims of sexual violence as being between 92 and 95 per cent female.[73] In 2008, New Zealand women were three times more likely than men to feel unsafe or very unsafe when walking alone in their neighbourhood at night. [74]

The groups most at risk of sexual violence are young women, Māori women, women who have been victimised before and people with disabilities. [75] Young women between the ages of 16 and 30 comprise 66–70 percent of victims of sexual violence. Just under half of all victims are New Zealand European, just under one third are Māori, and just over one tenth are Pacific.

Globally, persons with disabilities are up to three times more likely to be victims of physical and sexual abuse and rape, and have less access to physical, psychological and judicial interventions. [76] In New Zealand, disabled women are one of the groups most at risk of sexual violence, although the proportion of disabled victims changes depending on whether disability is self-identified (31 per cent of victims) or determined by a doctor (15 per cent). [77]

The impact of sexual violence on victims includes significant and long-standing physical and mental health consequences. "High numbers of female prisoners, mental health patients and people with drug and alcohol problems report a history of sexual violation." [78] Short- and long-term effects can include "low self-esteem, post-traumatic stress disorder, suicide, injury, permanent disability, pregnancy complications, chronic pain syndromes, and injurious health behaviours such as smoking, alcohol and sexual risk taking". [79]

Despite sexual offences being the fifth most common offence reported in the Crime Survey and the "most costly crime per incident" by Treasury estimates, only 10 per cent of sexual offences are reported to the police. Of those, only 8 per cent "result in a perpetrator being convicted". [80] This means that for every 1000 incidents of sexual violence, only 100 are reported and only eight perpetrators are convicted.

The principal providers of services to survivors of sexual violence are specialist sexual-violence agencies, which

70 National Council of Women press release, 30 March 2010

71 Ministry of Justice (2009), Report of the Taskforce for Action on Sexual Violence (Wellington, New Zealand)

72 Family Violence statistics report (2009), Research Report no. 4 /09 Families Commission (Wellington, New Zealand), p 155

73 'Restoring Soul' (2009) Ministry of Women's Affairs (Wellington, New Zealand), p 84

74 New Zealand General Social Survey (2008), Statistics New Zealand (Wellington, New Zealand). Accessible on-line at http://www.stats.govt.nz/nzgss/

75 Kingi V and Jordan J (2009) and Triggs S et al (2009), quoted in 'Restoring Soul' (2009), Ministry of Women's Affairs (Wellington, New Zealand), p 12, http://www.mwa.govt.nz/news-and-pubs/publications/restoring-soul-pdf

76 'Promoting Sexual and Reproductive Health for Persons with Disabilities' (2009) WHO/UNFPA

77 ibid

78 Report of the Taskforce for Action on Sexual Violence (2009), Ministry of Justice (Wellington, New Zealand)

79 'Restoring Soul' (2009), Ministry of Women's Affairs (Wellington, New Zealand), citing Mossman E et al 2009

80 Report of the Taskforce for Action on Sexual Violence (2009), Ministry of Justice (Wellington, New Zealand)

provide two main services: crisis support and ongoing support designed to assist recovery. Specialist services are typically funded fully or partly by government agencies under contract. Ongoing funding is not guaranteed, and some funding sources are contestable.[81] The availability of culturally appropriate services and services for diverse population groups (including Māori, Pacific people and ethnic communities, including refugees, people with disabilities, men and young people) is uneven and has been identified as a gap in services.

Family violence

Domestic violence is a significant issue in New Zealand. Despite the government's efforts to tackle it, the levels of violence within the family, particularly violence against women, remain surprisingly high.[82]

Relative to other OECD countries, the New Zealand homicide rate is "considerably higher" for women (1.2 per 100,000) than men (0.7 per 100,000).[83] New Zealand police statistics collected in the period 2000 to 2004 stated that 45 women were murdered by their male partner or ex-partner, and three men were murdered by their female partner or ex-partner.[84] Family violence statistics collected by the police in 2006 recorded that 81 per cent of victims were women and 81 per cent of offenders were male.[85] In 2009, 14 women were murdered by their male partner or ex-partner.[86]

Māori women are at three times higher risk of partner violence than women overall. Beneficiaries and those in sole-parent households were also at much higher risk than women overall.[87]

In 2006, 13,091 women and 5549 children used refuge services.[88] The National Collective of Independent Women's Refuges report an increase between 2002 to 2006 of 55 per cent in services and programmes delivered. Services include advocacy and support services and the provision of safe-house accommodation. As with services for victims of sexual violence, culturally appropriate services and services for groups such as disabled women and women from different ethnic backgrounds are not readily available in many areas. Shakti Community Council, which provides support services for New Zealand migrant and refugee communities, has established four ethnic women's refuges in Auckland, Christchurch and Tauranga.

Difficulties understanding and acting on legislative provisions addressing emotional abuse have also been identified. Access to protection for migrant women and for disabled women is hampered by language and cultural barriers, and by the limited availability of appropriate safe places of refuge.

Rural Women New Zealand have noted: "For rural women, there are additional inherent risk factors for the occurrence of domestic violence, as well as additional risk factors in choosing to take action to deal with violence."[89] Implementation of the Domestic Violence Act is particularly problematic for rural women. The difficulties noted include "accessing information and support services for victims, delivery and access of programmes for offenders, and ensuring safety for both women and children with respect to the process of obtaining and enforcing protection orders".[90]

81 'Restoring Soul' (2009), Ministry of Women's Affairs (Wellington, New Zealand)

82 'It's Not OK: New Zealand's Efforts to Eliminate Violence against Women' (2008), Leitner Center for International Law and Justice, Fordham Law School, NY http://www.leitnercenter.org/files/doc-17866.pdf

83 The Social Report 2009, Ministry of Social Development (Wellington, New Zealand) quoting OECD homicide death rates for the period 2003–2007

84 New Zealand Family Violence Statistics Fact Sheet (2009), Family Violence Clearinghouse http://www.nzfvc.org.nz/StatisticsFactSheet.aspx

85 Family Violence Statistics Report (2009), Families Commission (Wellington, New Zealand), quoting the Police Family Violence Database.

86 Police Statistics on Culpable Deaths in New Zealand, (2010), Police National Headquarters, Wellington New Zealand

87 Family Violence Statistics Report (2009), Families Commission (Wellington, New Zealand)

88 Family Violence Statistics Report (2009), Families Commission (Wellington, New Zealand)

89 Submission of the Domestic Violence (Enhancing Safety), Bill by Rural Women New Zealand (2009)

90 ibid

The 'It's Not OK' Campaign for Action on Family Violence, which began in 2007, includes a social marketing campaign aimed at changing the way people think and act about family violence, as well as funding resources for government and non-government organisations working on this issue. Heather Henare, chief executive of the National Collective of Independent Women's Refuges, has commented that through this campaign, more victims are reporting crime and that "statistics show all agencies are upping their game in responding to victims". [91]

What next?

Despite a plethora of reports, a strong legislative framework, significant government funding and the efforts of many dedicated groups and individuals, real improvements in both the family violence and sexual violence sectors in New Zealand remain illusive. [92]

It has been asserted that "there is consensus that New Zealand has sound legislation on domestic violence", yet has a "serious problem eliminating violence against women". [93] The Leitner Centre [94] identified a number of factors inhibiting progress. These included: difficulties experienced by both victims and perpetrators of violence in accessing programmes; difficulties experienced by victims in accessing legal aid (not just the funding for legal aid, but also the availability of appropriate legal aid); and lack of training in domestic violence for key groups, such as judges, police, lawyers and benefits officers. Domestic violence organisations have also identified the disadvantage experienced by women who leave an abuser, including economic disadvantage. [95]

Other barriers identified are:

- a paucity of data collection to properly evaluate policies
- problems of implementing legislation
- the objectification of women by the advertising and pornography industry.

In late 2009, the Report of the Taskforce for Action on Sexual Violence [96] was released by the Minister of Justice, Simon Power. Its key recommendations include:

- sustainable funding for specialist programmes on primary prevention of sexual violence
- specific work on child sexual abuse and adult rape within the It's not OK campaign
- funding shortfalls evaluated for the provision of community treatment for offenders
- a pilot programme for the treatment of non-mandated perpetrators of sexual violence
- legislative amendments (consent, reasonable belief and the rape shield) progressed
- enhancing of the rights of victims in the criminal justice system
- piloting of a specialist court support role for victims of sexual violence
- delivery of specialist training to relevant criminal justice personnel on sexual violence and Te Ao Māori
- ongoing involvement and resourcing of TOAH-NNEST [97] in sexual violence work
- monitoring of progress on the report's recommendations.

MATERNITY PROTECTIONS

Paid parental leave

New Zealand provides paid parental leave (PPL) after the birth of a child, but there continues to be debate about eligibility criteria, and also about the duration of leave and level of pay. The Department of Labour has reported

91 Henare H reported on TV3, 1 October 2008, downloaded at http://www.3news.co.nz/Police-Its-Not-OK-campaign-behind-rise-in-reported-violent-crime/tabid/423/articleID/74049/Default.aspx

92 'Pulling it all together: Family Violence and Sexual Violence in New Zealand', Ruth Herbert (2010). Powerpoint presentation supplied by the author

93 It's Not OK: New Zealand's Efforts to Eliminate Violence against Women (2008), Leitner Center for International Law and Justice Fordham Law School NY http://www.leitnercenter.org/files/doc-17866.pdf

94 ibid

95 'It's Still Not OK', submission from ISNO (2010) to the Human Rights Commission

96 Report of the Taskforce for Action on Sexual Violence (2009), http://www.justice.govt.nz/policy-and-consultation/taskforce-for-action-on-sexual-violence

97 'Te Ohaakii a Hine National Network Ending Sexual Violence Together'

that to 31 May 2008, more than 100,000 parents had taken paid parental leave since it was introduced in 2002.

The Parental Leave Act 2002 provided for twelve weeks' state-paid leave for mothers. As a consequence of this legislation, New Zealand was able to withdraw its reservation on Article 11(2)(b) of the CEDAW convention. The act was later amended to include teachers employed by more than one board of trustees, and medical practitioners employed by more than one district health board. A further amendment extended the paid-leave period to 14 weeks, and to self-employed women.

Eligibility for PPL requires continuous employment for the same employer for a period of six months. This requirement can exclude casual and seasonal workers and multiple job holders. [98] The exclusion from paid parental leave of female employees with continuous attachment to the workforce, but multiple employment arrangements, is a significant issue for women, families, and children, as well as for business and industry. It is particularly important given the growing diversity of types of employment status and situations in the modern workplace. Rural Women New Zealand noted that "difficulties arise for seasonal workers in that they are exempt from accessing PPL", and stated that this group are consequently resigning from the sector and "taking up alternative career options more suitable for family life". [99]

Fathers do not have a primary entitlement to paid parental leave; they are entitled to two weeks' leave without pay, and can access PPL only if it is transferred from their baby's mother to them. Extending paid parental leave entitlement to men would "support greater choice for parents and gender equity in the home" and would "support fathers to be more involved in the early care of their children". [100] A range of agencies, such as the Human Rights Commission, the Families Commission and the National Advisory Council for the Employment of Women, have long advocated for extending PPL to men in their own right. In response to a recent Families Commission report, the Minister of Labour ruled out extending the current provision for men. [101]

An international comparison of parental leave entitlements by UNICEF showed that of the 25 OECD countries for which data was available, New Zealand came near the bottom, at 23. The measure used was "effective parental leave", and was calculated by weighting the duration of leave by the percentage of salary offered. [102]

Flexible work arrangements

The Employment Relations Act was amended in 2007 to give employees with caring responsibilities the right to request flexible work arrangements.

The act requires employers to consider the request for flexible working arrangements, and provides grounds upon which they can refuse a request. Flexible work practices can include changes to hours of work, days of work and place of work.

A review of the act will be completed in 2010, and will consider whether the statutory right to request flexible work should be extended to all employees. It is not known how many employees have used the provisions of the act to request flexible work, as there are no reporting requirements.

Engagements across the country in the National Conversation have shown many examples of informal provisions made by employers, ranging from working-from-home arrangements and flexible start times to temporary and permanent part-time work arrangements in response to personal circumstances. For example, "at one workplace we heard of an unusual variant on flexi-time, which worked for them. Employees could start work at 6:00am, 7:00am or 8:00am, and do an eight-hour day. It was possible to vary start times throughout the week. Working from home was available in a number of industries visited and for a number of work roles. In one workplace which

98 Priority Improvements to Parental Leave (2008), National Advisory Council on the Employment of Women (NACEW)

99 Submission from Rural Women New Zealand on the Parental Leave in New Zealand 2005/2006 Evaluation (2007)

100 Priority Improvements to Parental Leave (2008), National Advisory Council on the Employment of Women (NACEW)

101 Reported 2 December 2009 TV3 www.3news.co.nz

102 The childcare transition (2008), Innocenti Report Card 8 Unicef

operated 24 hours a day, everyone was supplied with a laptop. "We might finish at 5pm but the rest of the world hasn't." [103]

Maternity services

After work on a draft, the Government has decided not to proceed with a maternity action plan. The Ministry of Health has identified the following four key actions [104] to improve maternity outcomes:

- develop a quality and safety programmes for maternity services
- review and update guidelines in relation to transfer of care
- develop a national standardised set of maternity notes
- improve maternity and newborn information to better monitor quality and safety of maternity services.

Adoption

Currently birth mothers in New Zealand are able to give consent to adoption within 10 days of giving birth. This period is much shorter than in other countries, and can lead to women's decisions being unduly influenced by pressure from their family, from the father of the baby and from agencies offering help to unmarried mothers, at a time when they are still subject to hormonal changes resulting from childbirth and lactation. [105]

Breastfeeding

In 2008 the Employment Relations Act was amended to include the provision of appropriate breaks during the working day, and appropriate facilities in the workplace, for the purpose of infant feeding (including the expressing of breast milk). The breaks are unpaid unless both employer and employee agree. Infant feeding facilities are to be provided where it is reasonable and practicable in the circumstances, and subject to the operating environment and employers' resources. While these amendments represent a step in legislative protection for breastfeeding rights, paid breastfeeding breaks would bring legislative protection in line with international standards. The Department of Labour has recently launched the *Code of Practice on Infant Feeding* to assist employers with the issue of breastfeeding in the workplace.

The Human Rights Commission receives complaints and enquiries on the issue of the rights of women to breastfeed (and infants to be breastfed) in public and in the workplace. In 2005 the Commission published a paper entitled 'The Right to Breastfeed'. Many women who have experienced negative reactions to public breastfeeding want its practice and benefits more widely understood and accepted in society. For that reason the Commission has sought amendments to the grounds of discrimination under the Human Right Act to explicitly include breast-feeding. Currently the right to breastfeed is implicit in prohibitions on sex discrimination.

Parental rights of disabled women

The Commission has received reports that a small number of disabled mothers who need high levels of support have experienced difficulty in mothering and retaining custody of their children, especially when the children are small babies. The Ministry of Health has a policy of not supporting non-disabled children in these situations. The mothers feel that they need the support to parent their children. Intellectually disabled mothers have also experienced the same difficulty, as there are no support services available for them. This may well contradict Article 23 (4) of the Convention on the Rights of Disabled Persons, which says: "In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents."

Early childhood services

Enrolments in early childhood have increased sharply (50.3 per cent) in the past 20 years. Education and care services and home-based services have seen the highest increase in enrolments in the last four years, while kinder-gartens, playcentres and kōhanga reo have experienced declines. [106] This is attributed to greater demand for all day services that require little parental involvement.

In 2006 the Government announced a policy to provide up to 20 hours' free optional early-childhood education

103 Human Rights Commission (2009), National Conversation about Work: Bay of Plenty Report p 9 http://www.neon.org.nz/nationalconversationaboutwork/regionalreportswhatnext/

104 Action on Maternity (2010), Ministry of Health (Wellington New Zealand), http://www.moh.govt.nz/moh.nsf/indexmh/maternity-action

105 Robert Ludbrook (2010), editorial in *Adoption News and Views,* April 2010

106 Ministry of Education (2009), Annual ECE Summary Report – Education Counts

to all three- and four-year-olds in teacher-led services from July 2007. This has reduced the cost of childcare for families considerably.

In the Commission's engagement with people across the country, reported in the National Conversation about Work, parents identified the provision of childcare as critical to realising labour force participation and equal-employment opportunities for mothers of young children. Three critical aspects of childcare facilities came up repeatedly: affordability, accessibility and availability.

For low-paid workers especially, the cost of childcare remains prohibitive, and often informal and unregulated arrangements are made with friends and family to care for children while parents (mainly mothers) work.

Childcare facilities located either close to home or close to the workplace are highly valued, and the Commission often heard of lengthy waiting lists for centrally located facilities. Working parents in rural and semi-rural areas found it particularly difficult to access childcare facilities, and either made informal arrangements or withdrew from the labour force. In some rural and remote areas, absence or unavailability of childcare centres prompts the relocation of the whole family.

Childcare centre opening hours have also been identified as a barrier to equal opportunities. Women wanting to work in occupations that demand non-traditional hours (for example, shift work and weekend work) or women who work longer hours or start work early (such as nurses and care workers) struggle to reconcile childcare needs and work demands. In some areas childcare centres do not operate five days a week, so the only options available to working parents are part-time work or informal care arrangements.

Conclusion
Whakamutunga

Compared to many women across the world, women in New Zealand have made significant progress towards equality over the past century. In recent years, however, progress in a number of key areas has either stalled or is regressing. Analysis of the progress of women from different ethnicities or disabled women across a range of areas lacks visibility because of the inadequate collection of, and disaggregation of, data. This limits the ability of the Commission and other agencies to analyse the participation and representation of different groups of women across a wide range of public life and professional activities.

In terms of economic equity, progressive increases to the minimum wage over the past 10 years have improved the wages of a significant number of women in low-paid work, and universal superannuation has ensured that in retirement, very few women live in poverty. The Department of Labour's Pay and Employment Equity Unit, before its disestablishment, developed a suite of tools for reviewing the equity of remuneration and employment conditions, which have been used in reviewing pay and employment equity across the state sector.

The persistent gender-pay gap is very much higher for Māori and Pacific women. There is variable evidence of progress in implementing pay and employment equity-review response plans in the state sector and limited evidence of positive outcomes. There is no transparency around addressing pay and employment equity issues in the private sector. Robust mechanisms, including legislation, are needed to progress pay and employment equity. This will require a broad political commitment and public consensus.

The participation rate of women in both the labour market and in tertiary education is high by international standards. There are a number of legislative and policy initiatives that support women's participation in the workforce. They include 20 hours a week free early-childhood education, paid parental leave, flexible work policies and legislation, and legislative support for breast-feeding working mothers. These initiatives are precarious, however, with changes to the provision of early-childhood education funding already announced. The availability of early-childhood education is scarce in rural areas in particular, and parents who work non-standard hours also have difficulty accessing early-childhood services.

Mixed-member proportional representation has resulted in increased diversity in Parliament. One in three members of parliament are women. Women continue to be under-represented in senior management and governance roles in both the public and private sector. Increased account-ability for the good-employer provisions of state-sector legislation would be helpful.

The incidence of violence against women remains a significant concern. There is increased public awareness of the issue and political will to reduce the level of violence in the community, with the Government recently responding to the recommendations of the Taskforce on Sexual Violence.

While most women have access to paid parental leave (PPL), some (for example seasonal workers with multiple employers) do not. The level and length of PPL is also minimal compared with what is available in other similar countries. At present improvement to PPL, including men's entitlement, is seen by the Government as unaffordable. The right to breastfeed in public places and in the workplace are established in law and guidelines have been produced. As yet, breastfeeding breaks in the workplace are unpaid. The introduction of paid breaks would ensure New Zealand's compliance with ILO Convention 183.

New Zealand is at a critical juncture in eliminating discrimination against women and achieving equality. The gains made by women in recent decades are fragile and at risk of being eroded. Concerted action by the Government, public agencies and civil society is needed to keep gender on the agenda.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. Following the public consultation process, the Commission has identified the following areas for action to progress women's rights:

Pay and employment equity
Timetabling pay and employment equity implementation that reflects New Zealand's economic conditions, with a minimum target of halving the gender pay gap by 2014 and eliminating it by 2020.

Sexual and family violence
Reducing sexual and family violence through target setting and fully resourcing a national programme of action.

Paid parental leave and early-childhood education
Extending paid parental leave to seasonal workers presently excluded and men in their own right, and the increased availability and affordibility of early childhood education in rural, provincial and urban areas.

Representation
Improving female representation at CEO and senior management level, and on boards in the public and private sectors.

19. Rights of Sexual and Gender Minorities

Tikanga Taera me te Tangata Taitini

People of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Article 1

Introduction
Tīmatatanga

WHAT ARE HUMAN RIGHTS IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY?

All people, regardless of their sexual orientation or gender identity, have the same human rights and freedoms. All sexual and gender minorities in New Zealand have these rights. This includes people who identify as gay, lesbian, bisexual, takataapui, intersex, transgender, whakawāhine, tangata ira tane, fa'afafine or fakaleiti.

Human rights in relation to sexual orientation or gender identity include, for example, the rights to:

- freedom from discrimination
- recognition as a person before the law
- life, liberty and security of the person
- freedom from arbitrary detention and to a fair trial
- an adequate standard of living, including decent work and housing
- education
- health and protection from medical abuses
- found a family
- participate in public life and in cultural life
- freedom of expression
- freedom of association and peaceful assembly
- freedom of thought, conscience and religion.

These rights provide a framework of equality, security and participation. This chapter uses this framework to assess the status of human rights in relation to sexual orientation and gender identity for sexual and gender minorities in New Zealand, and outlines some of the main developments for sexual and gender minorities since the Commission's status report on human rights in 2004. [1]

Language and terminology are particularly important to sexual and gender minorities. The words people choose to describe themselves can both affirm and challenge constructs of identity. At the same time, the absence of inclusive language can cause barriers to participation and reinforce exclusion. The broad terms used to describe groups – for example, children and young people, people with disabilities or people from diverse ethnic groups – can also obscure the richness of diversity within those groups.

People who would today be described as sexual and gender minorities have always lived in New Zealand societies. Historical accounts confirm that traditional indigenous Māori communities included people with a diversity of sexual orientations and gender identities, including takataapui (a term for close friends of the same sex), whakawāhine and tangata ira tane (terms for trans women and trans men respectively). Some Pacific communities in New Zealand use terms that Pacific countries have traditionally used to recognise people born biologically male who embody the spirit of a woman, have female gender expressions, and perform female as well as male gender roles. Pacific language terms include fa'afafine (Samoa), fakaleiti (Tonga), akava'ine (Cook Islands), vaka sa lewa lewa (Fiji) and fafafine (Niue). [2]

Pākeha/European communities in New Zealand also have a history of diverse terms to describe sexual and gender minorities. Today the terms most commonly used to describe sexual orientation include gay, lesbian and bisexual. The word queer has been reclaimed by some, particularly younger people, as a generic term for sexual minorities. In these communities, the word trans is increasingly being used as a broad, neutral term for people whose gender identity differs from their biological sex. It includes, for example, female to male (FtM) and male to female (MtF) transsexual and transgender people, cross-dressers and those who identify as androgynous or genderqueer.

1 Human Rights Commission (2004), *Human Rights in New Zealand Today – Ngā Tika Tangata o te Motu* (Wellington: HRC)

2 For a brief overview of the Pacific region, see Pacific Sexual Diversity Network (2009), *HIV/AIDS, Men who Have Sex with Men and Transgender People in the Pacific: recommendations for an improved response* (Sydney: Pacific Sexual Diversity Network and AIDS Council of New South Wales). Accessed 13 August 2010 from http://www.acon.org.au/sites/default/files/PSDN-Advocacy-Report-2009-online.pdf

◀ Auckland singer-songwriter samRB at The Voice Box in Ponsonby, Auckland.

The word trans will be used in this report, but it is important to note that the term is contested and that people have the right to self-identify and use terms that best describe their sex, gender identity and/or gender expression. Some people argue that use of trans risks obscuring the diversity of people who are supposed to be represented within the broader term. Many terms used to discuss sexual and gender identities are contested, and some intersex people and some trans people consider that their experiences are better described as sex diversity.

In New Zealand, the term intersex has predominantly been used to describe medical conditions where a person's physical body or chromosomes differ from what is considered standard for a male or a female. However, a small and increasingly visible number of people have reclaimed the term as an identity, and are using this as a basis for raising awareness about issues for intersex people.

In this report, sexual and gender minorities refers to lesbian, gay, takataapui, bisexual, intersex, trans and gender-diverse people, including those with culturally diverse constructs of gender identity. [3] New Zealand is progressive in the formal legal equality protections provided to most sexual and gender minorities. Yet full legal equality has not been achieved; discrimination remains and appears pervasive in some areas; and barriers exist in the pathways to equality and security for some groups.

International context
Kaupapa ā taiao

Despite international human rights standards applying to all people, everywhere, the international context has been characterised by tensions in states' discussions of sexual orientation and gender identity. These tensions have emerged from the historical absence of a specific human rights standard in relation to sexual orientation and/or gender identity and in the light of steps towards inclusion. [4] Tension has been evident, for example, in debate at the United Nations about the human rights of sexual and gender minorities. Some states consider the issue to be one of simply applying existing human rights standards, because the principles of universality and non-discrimination mean such human rights protections automatically apply to all people. Others are opposed to discussion about sexual and/or gender minorities.

There have been concrete steps to increase the visibility of the human rights of sexual and gender minorities across the United Nations system, in regional and sub-regional meetings, regional courts and other international fora. Through this visibility there has been clear progress in securing protection of existing human rights standards. However, there has been strong opposition to such visibility or perceived extension of protection. Examples are the opposition to General Assembly resolutions and the accreditation to the United Nations of international non-government organisations which focus on these minorities. [5] In general, there has been increasing reference to the human rights of sexual and gender minorities, wider application of existing human rights standards, and new dialogue about these rights. Increasingly, the scope of issues has extended from a sole focus on sexual orientation to including concerns about gender identity and gender minorities. Less attention has been paid to sex diversity and the specific concerns of intersex people.

APPLICATION OF EXISTING INTERNATIONAL LAW

The major human rights treaties have been used to challenge a range of human rights violations based on sexual orientation and to uphold the application and protection of existing international law. A landmark case was Toonen v Australia. [6] The United Nations Human Rights Committee upheld the claim of Nick Toonen that

3 International Lesbian and Gay Human Rights Commission (2001), S*exual Minorities and the Work of the Special Rapporteur on Torture* (Working Paper), E/CN.4/2002/76 The term 'sexual minorities' is also contested. For example, see Miller A (2006), 'Sexual Rights Words and Their Meanings: The Gateway to Effective Human Rights Work on Sexual and Gender Diversity' (Background Paper, Yogyakarta)

4 For example, see Sanders D (2007), 'Human Rights and Sexual Orientation in International Law', *World*, 11 May. Accessed 13 August 2010 from http://ilga.org/ilga/en/article/57.

5 Charbonneau L, 'UN Committee Moves to Keep Out Gay-Lesbian NGO', Reuters, 3 June 2010. Accessed 13 August 2010 from http://www.reuters.com/article/idUSTRE6526BQ20100604

6 Toonen v Australia, communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)

certain Tasmanian laws prohibiting male homosexuality violated his privacy and equality rights under Article 17 of the International Covenant on Civil and Political Rights (ICCPR). [7] The Committee subsequently ruled that sex discrimination includes discrimination based on sexual orientation. [8]

Anti-discrimination provisions in all major international human rights treaties spell out specific grounds on which discrimination is prohibited. These include the term 'or other status' to encompass unlawful discrimination against any non-specified groups. The Committee on Economic, Social and Cultural Rights has issued a 'General Comment on Non-Discrimination'. This clarifies that the definition of 'other status' in Article 2 of the convention includes sexual orientation and gender identity. [9]

Treaty bodies have expressly referred to the rights of sexual minorities, with the Committee on Economic, Social and Cultural Rights being the first to explicitly refer to sexual orientation in its General Comment on the Right to Health. [10] By 2005, the principle of non-discrimination on grounds of sexual orientation had become "one that is firmly grounded in international standards, requiring not only the repeal of discriminatory criminal laws but also the adoption of proactive anti-discrimination measures". [11] The principle of non-discrimination also applies to other human rights. For example, in 2010 the United Nations special rapporteur on the Right to Health examined the relationship between this right and criminalisation of private, adult, consensual sexual behaviour. The Special Rapporteur concluded that criminalisation of same-sex sexual conduct was discriminatory and inconsistent with the right to health. [12]

The scope of protection is now understood to include human rights related to all sexual and gender minorities – for example, discrimination based on actual or perceived gender diversity or gender identity. An increasing number of special rapporteurs have referenced human rights violations committed against people because of their actual or perceived sexual orientation or gender identity. United Nations treaty bodies are more regularly referring to sexual orientation, gender identity, transgender people and sexuality in concluding Observations on States Parties' reports. For example, in 2010 the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee made observations in a number of reporting processes. These highlighted the need to protect women against discrimination on the grounds of sexual orientation, and called on the State to strengthen efforts to eliminate stereotypical images, including on the basis of sexual orientation. [13] The committee also expressed concern at specific health problems experienced by transgender women, and stereotypes that cause multiple discrimination on grounds including sexual orientation and gender identity. [14]

The United Nations High Commissioner for Human Rights has also made statements affirming the rights of sexual minorities. In 2010, the High Commissioner's Office identified, in its strategic management plan, a particular focus on countering discrimination on the grounds of race, sex, religion and against others who are marginalised, including on the grounds of sexual orientation. [15]

Outside the United Nations, regional courts have made significant decisions upholding the human rights of sexual and gender minorities. For example, in 2002 the European

7 ibid

8 Toonen v Australia Communication, para 8.7

9 ICESCR (2009), General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights, E/C12/GC/20, 25 May

10 ICESCR (2008), General Comment 14: The Right to the Highest Attainable Standard of Health, E/C12/2000/4 (2000), para 18

11 Pacific Sexual Diversity Network (2009); see also Siaz I (2004), 'Bracketing Sexuality: Human Rights and Sexual Orientation - A Decade of Development and Denial at the UN', *Health and Human Rights 7*, no. 2, pp.49-80.

12 Grover A (2010), Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, A/HRC/14/20

13 See, for example, the CEDAW Committee's 2010 Concluding Observations in relation to the country reports of the Netherlands, Ukraine, and Panama. Accessed 22 November 2010 from http://www2.ohchr.org/english/bodies/cedaw/cedaws45.htm

14 The CEDAW Committee used the term "transgender women" as an umbrella term for trans women.

15 UNHCHR (2010), *Report of the United Nations High Commissioner for Human Rights,* Strategic Management Plan 2010–2011, A/HRC/13/26, pp 24, 54, 66, 68, 123

Court of Human Rights held that the British Government's failure to alter the birth certificates of transsexual people or to allow them to marry in their new gender was a breach of the European Convention on Human Rights. [16] These decisions prompted the United Kingdom to pass the Gender Recognition Act, enabling trans people to obtain a gender recognition certificate that legally recognises their 'acquired' gender and sex. [17]

INCREASING REFERENCES TO HUMAN RIGHTS IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY

During the past decade there have been various attempts to obtain a United Nations resolution on human rights and sexual orientation, all of which have been supported by New Zealand. These attempts have been characterised by intense debate and have failed for various political and other reasons. In 2005, in response to failures of the Commission on Human Rights to reach agreement, New Zealand issued a joint statement on behalf of 32 states, noting: [18]

> **Sexual orientation is a fundamental aspect of every individual's identity and an immutable part of self. It is contrary to human dignity to force an individual to change their sexual orientation or to discriminate against them on this basis. And it is repugnant for the State to tolerate violence committed against individuals because of sexual orientation. … we recognise that sexuality is a sensitive and complex issue. But we are not prepared to compromise on the principle that all people are equal in dignity, rights and freedoms. The Commission must uphold the principle of non-discrimination. We urge all states to recognise this common ground and to participate in debate. We hope this Commission will not be silent for too much longer.**

A second statement followed in 2006, made by Norway on behalf of 54 countries. [19] The statement "affirmed the principle of non-discrimination, which requires that all human rights apply equally to every human being regardless of sexual orientation or gender identity".

The statement noted the attention paid to sexual orientation and gender identity by special rapporteurs, treaty bodies and civil society, and expressed deep concern at such human rights violations. The statement did not deal with the issue of same-sex marriage.
In 1999, in Joslin v New Zealand, the Human Rights Committee had ruled that the "mere refusal to provide for marriage between homosexual couples … does not disclose a violation of any provision of the International Covenant". [20] This ruling followed a complaint to the United Nations by two New Zealand lesbian couples, under the Optional Protocol to the ICCPR, that the failure to provide for same-sex marriage under New Zealand law amounted to discrimination on the grounds of sexual orientation.

In December 2008, Argentina issued the first broad-ranging statement on human rights, sexual orientation and gender identity to be made at the United Nations General Assembly, on behalf of 66 countries. [21]

STATEMENT ON THE APPLICATION OF PRINCIPLES OF EXISTING INTERNATIONAL LAW

In response to concerns about the application of international law and continued human rights violations, a group of human rights advocates and jurists developed a statement on the application of existing international

16 Goodwin v United Kingdom (2002) 35 EHRR 18 and I v United Kingdom (2003) 36 EHRR 53

17 Gender Recognition Act (United Kingdom). Accessed 13 August 2010 from http://www.opsi.gov.uk/acts/acts2004/pdf/ukpga_20040007_en.pdf

18 New Zealand joint statement on promotion and protection of human rights, Commission on Human Rights, 61st session, 15 April 2005. Accessed 13 August 2010 from http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2005/0-15-April-2005a.php

19 Norwegian joint statement on human rights violations based on sexual orientation and gender identity, Human Rights Council, 3rd Session, Geneva, 1 December 2006. Accessed 13 August 2010 from http://ilga.org/ilga/en/article/944

20 Joslin v New Zealand. Communication no. 902/1999 CCPR/c/75//D/902/1999, p 9, para 8.3

21 Argentinean joint statement on human rights, sexual orientation and gender identity, United Nations General Assembly, 63rd session, Geneva, 22 December 2008. Accessed 13 August 2010 from http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/311-1.pdf

human rights standards to sexual orientation and gender identity. The resulting document is known as the 'Yogyakarta Principles'. [22]

The Yogyakarta Principles have since become widely recognised as a useful statement of international human rights law. They are used as a means for monitoring state performance in relation to the rights of sexual and gender minorities. They have also been used to advocate for the promotion and protection of the human rights of these minorities. For example, some states have commented on the situation of sexual and gender minorities in their Universal Periodic Review reports or during that review process. As a result, some states have agreed to apply the Yogyakarta Principles domestically. [23] The principles were also cited by the Committee on Economic, Social and Cultural Rights in its General Comment on Non-Discrimination in Economic, Social and Cultural Rights, stating that the definition of 'other status' includes sexual orientation and gender identity. [24]

The Yogyakarta Principles recommend that national human rights institutions "promote respect for these principles by state and non-state actors, and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities". [25] In response, the Asia-Pacific Forum of National Human Rights Institutions (APF) convened a meeting in 2009 to discuss the principles. This was the first time a group of national institutions had met to discuss human rights in relation to sexual orientation and gender identity. The meeting considered evidence from the Asia-Pacific region and concluded that discrimination on the grounds of sexual orientation and gender identity is a serious problem in many countries across the region. [26] The APF Council subsequently asked the Advisory Council of Jurists to carry out a review of the laws and policies of the 17 countries in the region in relation to sexual orientation and gender identity. The council is due to report to the APF in 2011. [27]

NEW DIALOGUE

Intersections between human rights in relation to sexual orientation and gender identity and other human rights are increasingly apparent. For example, in the area of disability rights, Article 25 of the Convention on the Rights of Disabled Persons expressly refers to states' obligations to ensure that disabled people have the same sexual and reproductive health and population-based health programmes as other people. In the area of race discrimination, the International Lesbian and Gay Association–Europe has drawn attention to the issue of multiple discrimination (on grounds of race, nationality, religious belief, gender, sexual orientation and gender identity). It has called for European Union member states to adopt a proposed EU directive to address multiple discrimination. [28]

In the area of sex discrimination, the Council of Europe's seventh Conference of Ministers Responsible for Equality between Women and Men recognised the need to combat sexual orientation and gender identity discrimination against women, girls and trans people. The conference adopted an action plan which recommends that the

22 The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007). Accessed 13 August 2010 from http://www.yogyakartaprinciples.org/principles_en.pdf

23 The Universal Periodic Review Process is a new process by which member States of the United Nations may be 'peer-reviewed' on their human rights performance. Further information available on the Commission's website at http://www.hrc.co.nz/home/hrc/internationalhumanrights/nzsnationaluniversalperiodicreviewuprreport/nzsnationaluniversalperiodicreviewuprreport.php

24 ICESCR (2009)

25 The Yogyakarta Principles (2007), recommendation 28

26 Asia-Pacific Forum of National Human Rights Institutions (2009), Conclusions of the Workshop on the Role of National Human Rights Institutions in the Promotion and Implementation of the Yogyakarta Principles. Accessed 13 August 2010 from http://www.asiapacificforum.net/issues/sexual_orientation

27 Asia-Pacific Forum of National Human Rights Institutions (2009). Accessed 13 August 2010 from http://www.asiapacificforum.net

28 International Lesbian and Gay Association (2010), Statement on the occasion of International Day for the Elimination of Racial Discrimination (21 March). Accessed 13 August 2010 from http://www.ilga-europe.org/home/news/latest_news/ilga_europe_s_statement_on_the_occasion_of_international_day_for_the_elimination_of_racial_discrimination

Council of Europe "undertake research on the situation of lesbian, bisexual and transgender women, with a view to drafting specific guidelines on preventing and combating all forms of discrimination against them". [29]

New Zealand has reported on the human rights situation of sexual and gender minorities in its United Nations treaty body reports. For example, the Universal Periodic Review (UPR) included a section on equality and non-discrimination, referring explicitly to sexual orientation and the situation of trans people. [30] Priority should also be given to reporting on the status of sexual and reproductive rights.

SEXUAL AND REPRODUCTIVE RIGHTS AND IDENTITY

Sexual and repoductive rights are central to human rights. Sexual rights are the norms that emerge when existing human rights standards are applied to sexuality.

An identity-based approach to sexual rights is necessary in order to fulfil the right to self-determination, and to increase visibility, create community and overcome stigma and isolation. However, taking only an identity-based approach can lead to a failure to acknowledge the sexual rights of those who do not, or do not wish to, 'fit' an identity category. The International Planned Parenthood Federation's declaration on sexual rights states:

> **Sexual rights protect particular identities, but reach beyond this and protect all people's right to be allowed to fulfil and express their sexuality, with due regard for the rights of others and within a framework of non-discrimination.** [31]

New Zealand context
Kaupapa o Aotearoa

LEGISLATIVE FRAMEWORK

In just over 25 years, New Zealand has moved from a society where homosexual activity was illegal to one that promotes tolerance and understanding by respecting the diversity of individuals of all sexual orientations and, increasingly, diverse gender identities. This progress would not have been possible without years of activism and advocacy by civil society groups and the courage displayed by those who spoke out publicly as gay, lesbian, bisexual, trans and intersex people.

New Zealand's domestic laws have progressed from decriminalisation of homosexuality, based on a conscience vote in Parliament, to positive protection from discrimination on the grounds of sexual orientation. [32] In the past five years, this has moved to include many aspects of partnership recognition. This sequence of law reform is common to many states that have recognised human rights in relation to sexual orientation. Today the legislative framework is anchored across key general non-discrimination laws and a wider range of specific laws in relation to welfare, property and legal recognition of registered partnerships. The legislative framework of human rights in relation to gender identity is less comprehensive.

The right to freedom from discrimination is enshrined in section 19 of the New Zealand Bill of Rights Act 1990 (BoRA). The scope of section 19 is limited by its cross-reference to the prohibited grounds of discrimination in section 21 of the Human Rights Act 1993(HRA). Section 21 was amended in 1993 to prohibit discrimination on the grounds of sexual orientation (which is defined to include heterosexual, homosexual, lesbian or bisexual orientation).

29 'Council of Europe Baku conference calls for further action to make equality between women and men a reality', edited release from seventh Conference of Ministers responsible for Equality between Women and Men, 25 May 2010 .Accessed 13 August 2010 from https://wcd.coe.int/ViewDoc.jsp?Ref=PR418(2010)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE

30 Accessed 15 November 2010 from http://www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/Human rights/Universal-Periodic-Review/Final-Report/index.php

31 Accessed on 15 November 2010 from http://www.ippf.org/en/Resources/Statements/Sexual+rights+an+IPPF+declaration.htm

32 For an overview of the steps towards decriminalisation, see Ministry for Culture and Heritage (n.d.), 'Homosexual Law Reform in New Zealand', updated 4 July 2010, accessible online at http://www.nzhistory.net/culture/homosexual-law-reform/ homosexual-law-reform

The Commission accepts complaints of unlawful discrimination from gender minorities (trans or intersex people) under the ground of sex. The Commission has interpreted sex to include gender and gender identity. [33] In 2004, the Human Rights (Gender Identity) Amendment Bill was introduced as a parliamentary private member's bill. [34] The bill would have added gender identity as a prohibited ground of discrimination. In response to the bill, the Attorney-General requested a Crown Law Office opinion on whether such an amendment was necessary. The office concluded that trans people were already protected under the ground of sex in the HRA, because sex could be legally interpreted to include gender and gender identity. [35] As a result, the bill was withdrawn. The need to include gender identity as an explicit ground under the HRA, however, is highlighted by groups who are particularly vulnerable to discrimination (including trans sex workers) and typically are not aware that they are protected under the ground of sex.

During the Consistency 2000 project, the Commission reviewed New Zealand legislation to ensure its consistency with domestic and international human rights standards. The Commission's 1998 report highlighted discriminatory treatment of same-sex relationships, compared with their opposite-sex counterparts. [36] A process for law reform commenced and, over the following years, laws relating to sexual orientation were amended. These included:

- the Property (Relationships) Amendment Act 2001, which generally gives same-sex and de facto heterosexual couples the same property rights and obligations as married couples on the breakdown of a relationship
- the Administration Act 2001, which gives same-sex partners access to the same rights and entitlements as married partners in relation to the estate of a deceased partner who has not left a will
- the Family Protection Amendment Act 2001, which provides same-sex partners with rights and legal standing to make a claim against a deceased partner's estate, including when the deceased's will is out of date or the deceased has failed to make provision for the surviving partner
- the Family Proceedings Amendment Act 2004, which extended maintenance provisions after a relationship ends to cover civil union and de facto couples
- the Status of Children Act 2004, which gives the same-sex partner of a birth mother the same legal parental status as an opposite-sex partner when an assisted human-reproduction procedure has been used to conceive a child and that partner has consented to the procedure. A partner may also be a child's legal guardian
- same-sex partners being accorded the same legal protections as heterosexual partners under the Domestic Violence Act 1995
- the Relationships (Statutory References) Act 1995, which amended a number of laws to remove provisions that discriminated on the grounds of sexual orientation. Amendments were made to a range of legislation, including immigration, social welfare and relationship property, with wide-ranging implications. Resulting amendments to the Social Security Act 1964 were significant and resulted in all welfare programmes, policies and procedures being rewritten to ensure that same-sex relationships were given equal recognition and treatment.

This programme of law reform has not yet been fully reviewed to ascertain its effectiveness in practice, or any difficulties faced by same-sex couples.

The Civil Union Act 2004 allows same-sex and opposite-sex couples to register their relationships as civil unions

33 See the definitions of 'sex' and 'gender' in the chapter on human rights and women.

34 Human Rights (Gender Identity) Amendment Bill. Accessed 13 August 2010 from http://legislation.knowledge-basket.co.nz/gpprint/docs/bills/20042251.txt. See also Human Rights (Gender Identity) Amendment Bill 2004 (member's bill, Georgina Beyer): Bills Digest No 1168. Accessed 13 August 2010 from http://www.parliament.nz/NR/rdonlyres/941DC4F3-BA6A-47FA-B3F2-8565AC7B2BB3/41001/1168GenderIdentity1.pdf.

35 Office of the Attorney-General, Crown Law opinion on transgender discrimination, media release, 22 August 2006. Accessed 13 August 2010 from http://www.beehive.govt.nz/release/Crown+law+opinion+transgender+discrimination

36 Human Rights Commission (1998), Report to the Minister of Justice Pursuant to Section 5(1)(k) of the Human Rights Act 1999, Consistency 2000 (Wellington: HRC). Accessed 13 August 2010 from http://www.courts.govt.nz/publications/publications-archived/1998/human rights-commission-report-consistency-2000-december-1998.

under the Birth, Deaths and Marriages Registration Act 1995. Since 2004, 1876 civil unions have been registered. In 2009, 312 civil unions were registered, with 78 per cent being same-sex unions. The Civil Unions Recognised Overseas Relationships Regulations 2005 recognise civil unions registered in Finland, Germany, the United Kingdom, New Jersey and Vermont (United States of America). In 2009, 58 such civil unions were recognised.

Remaining areas where heterosexual people have different legal rights from sexual and gender minorities relate primarily to family life. Same-sex marriage is not permitted under the Marriage Act 1955, which has been interpreted by the New Zealand Court of Appeal as prohibiting marriages of two persons of the same sex. [37] There have been attempts to explicitly exclude same-sex couples from marriage legislation. The Marriage (Gender Clarification) Amendment Bill was introduced in 2005 by a member of parliament. It sought to add a provision to the Marriage Act 1955, stating that marriage means a union between a man and a woman and not between two persons of the same sex. The bill also sought to amend the BoRA to specify that measures taken in good faith for the purposes of assisting or advancing marriage do not constitute discrimination. The bill was defeated at its first reading by 73 votes to 47.

Anything less than full legal recognition of same-sex relationships is of particular concern for vulnerable couples, including older people in residential care and/or when power of attorney is being exercised on their behalf.

The Adoption Act 1955 provides that 'two spouses' or any individual, regardless of their sexual orientation, are eligible to adopt in New Zealand. The term 'spouse' has been interpreted as enabling only married couples to adopt jointly. In June 2010, the High Court had to consider whether the expression 'spouses' in section 3 of the Adoption Act 1955 can include a man and a woman who are unmarried but in a stable and committed relationship. It decided that such an interpretation was permissible and that reading 'spouses' to mean that only married couples may adopt jointly seemed to discriminate against other types of relationships which were commonplace in New Zealand. However, the court limited its consideration of the issue to heterosexual opposite-sex couples, the status of the applicants in this case. [38] The current legal position, therefore, is that same-sex couples are unable to jointly adopt a child.

Given that a lesbian woman or gay man can apply to adopt a child as a sole applicant, and that same-sex couples can share the parenting of a child as legal guardians, it is anomalous and discriminatory under the Human Rights Act and the Bill of Rights Act that a same-sex couple cannot adopt a child jointly.

Other countries have recently changed their law to permit same-sex couples to adopt a child jointly. In England and Wales, the Adoption and Children Act 2002 broadened the eligibility criteria to allow unmarried couples, including same-sex couples, to adopt a child. Scotland has also recently followed the same path. It is time for New Zealand to follow suit by amending the Adoption Act to permit same-sex couples to jointly adopt a child, as part of reforms to this act making the best interests of the child the paramount consideration.

A birth parent's same-sex partner can be listed as 'other parent' on a child's birth certificate. However, there are conflicting legal views on the exact status of an 'other parent'. Some 'other parents' have applied for and been granted guardianship status from the Family Court, in addition to parenting status. However, concern remains around guardianship and access rights, in the event of a relationship dissolution or death of the named parent.

New Zealand has made some limited progress in affirming the legal rights of trans people. For example, a 2009 Family Court decision, Re Michael, stated that full gender reassignment surgery is not always necessary for a trans person to change sex details on a birth certificate. [39] However, significant challenges remain.

Section 30(2) of the Births, Deaths, Marriages and Relationships Registration Act 1995 prevents a trans person who transitions after marrying from changing sex details on their birth certificate. This requirement reflects the

37 Quilter v Attorney-General [1998] 1 NZLR 523

38 Re AMM [2010] NZFLR 629

39 Michael v Registrar-General of Births, Deaths and Marriages: judgment of Judge A J Fitzgerald: a declaration as to sex (Family Court, Auckland 2009) FAM-2006-004-002325

current prohibition on same-sex marriages. As a result, a trans person is effectively required to take the preliminary step of dissolving their marriage or changing it to a civil union. This legal restriction applies only to changing sex details on a birth certificate. The Department of Internal Affairs has clarified that if a married trans person applies for a Family Court declaration to amend their sex details, that document can be used to update those details on a passport. [40] Trans people have also requested clarification around what steps are necessary in order for their appropriate sex details to be recorded on a death certificate.

There are also restrictions on whether a trans person who has changed their sex details on a birth certificate is able to marry as that sex. In Attorney-General v Family Court, the High Court held that it is possible for a trans woman to be recognised as female and marry a man, and for a trans man to marry a woman. [41] However, the legal threshold in this 1995 High Court case was that the person must have reached 'the end of the continuum' in terms of their physical transition process. The judge held that the minimum requirement would be vaginoplasty for a trans woman and a full hysterectomy and mastectomy for a trans man. This threshold is likely to exclude the majority of trans people from the right to marriage.

In 2008, the Family Court also held that the word 'indeterminate' should have been recorded on an intersex person's original birth entry. This correction was made under section 85 of the Births, Deaths and Marriages Registration Act 1995. [42]

MECHANISMS TO ENHANCE PROTECTION

Anti-discrimination legislation alone is not sufficient to ensure the protection of the human rights of sexual and gender minorities. Policy and practices also have to be proactively developed and reviewed to ensure that the human rights of these communities are being protected. Public education and training for those responsible for developing and delivering public services is also necessary.

Alongside legal measures to ensure freedom from discrimination, a small 'Gay, Lesbian, Bisexual, Transgender and Intersex' (GLBTI) policy function was established within the Ministry of Social Development in 2004. It oversaw a work programme that focussed on assisting government agencies to meet their obligation to develop policies and practices consistent with the Human Rights Act. In 2009, the Ministry mainstreamed the GLBTI policy role, including the people and work programme, into its core policy function.

New Zealand today
Aotearoa i tēnei rā

As the previous section illustrates, successive New Zealand governments have taken steps to remove the legal barriers that prevent sexual and gender minorities, particularly lesbian, gay and bisexual people, from being able to exercise their human rights. The Commission's status report on human rights in 2004 highlighted outstanding human rights issues for trans and intersex people. There have been significant developments since then, including the Commission's Transgender Inquiry. This chapter assesses the current human rights situation for sexual and gender minorities in three broad areas: equality, participation and security.

EQUALITY

Equality is affirmed by visibility, because it acknowledges a person's place in society. In New Zealand, the visibility of diverse sexual and gender minorities helps to prevent stereotyping and remove barriers to equal participation.

Visibility is a particular issue for sexual and gender minorities in relation to data collection. Official estimates of populations defined by sexual orientation and gender identity and relevant data on discrimination and social wellbeing are needed to monitor human rights status and to evaluate the economic, social, cultural and other impacts of policy and legislation on sexual and gender

40 Human Rights Commission correspondence with the Department of Internal Affairs, 2010

41 The legal test for a trans person's ability to marry is set out in M v M [1991] NZFLR 337 and Attorney-General v Family Court at Otahuhu [1995] NZLR 603 and discussed in the Re Michael decision.

42 R v The Registrar General of Births, Deaths and Marriages (unreported, Wellington, October, 2008). Note that the original birth entry was created under the previous legislation, the Births and Deaths Registration Act 1951. In 1995 the Births, Deaths and Marriages Registration Act was enacted. It was renamed the Births, Deaths, Marriages and Relationships Registration Act in 2009.

minorities. For example, the limited statistical information available about the lesbian population limits the health sector's ability to monitor the health risks that lesbians face. Reliable data is also often required when agencies are seeking funding to provide services to target specific needs within the community. Lack of data may therefore lead to a lack of funding for community services.

No official data is collected about sexual orientation. This is of particular concern to those civil society groups and individuals who have lobbied unsuccessfully for data collection for many years. The absence of a question on sexual orientation in the census and in population-based surveys, especially health surveys, is viewed by some as discriminatory. Data is collected on other forms of identity [43] protected from discrimination under New Zealand law, such as ethnicity, marital and family status, and religious belief. This issue echoes concerns raised about the lack of adequate data on disability in official statistics. [44]

A key question, which has not been legally tested, is the relationship between the Human Rights Act, the Bill of Rights Act and the Statistics Act 1975.

In 2002 and 2006, the Human Rights Commission received a complaint stating that the failure to include a sexual-orientation question in the New Zealand Census amounted to discrimination under the Human Rights Act 1993. Furthermore, it said, Statistics New Zealand had failed to meet its statutory obligation to collect information that would inform government policies and enable communities to make a case for resources.

The Commission's mediation process was not able to resolve the 2002 complaint and the complainant was referred to the Office of Human Rights Proceedings. A sexual-orientation question was not included in the 2006 Census, and a second complaint was made to the Commission, though this was not resolved. The complainant applied to the Office of Human Rights Proceedings for legal representation to take this case to the Human Rights Review Tribunal. A decision about whether or not to provide legal representation was deferred while the complainant used other avenues to discuss these issues with Statistics New Zealand.

In 2010, the absence of a sexual-orientation question in the New Zealand Health Survey resulted in several submissions to the Ministry of Health, expressing concern at the continuing lack of appropriate data collection. One group submission was made on behalf of 37 key stakeholders. [45]

The Commission's 2004 report noted that the lack of official data collection, including any census question on sexual orientation, was a serious impediment to advancing the rights of sexual and gender minorities. [46] Concerned at the lack of progress, in 2009 the Commission convened a roundtable with Statistics New Zealand and lesbian, gay and bisexual community leaders to discuss the official collection of sexual orientation data. A clear community view emerged that the absence of a question on sexual orientation was regarded as a fundamental violation of the rights to equality, participation and security. Concerns were expressed that the lack of official data limited the State's ability to measure health, social and other outcomes and identify policy priorities for lesbian, gay and bisexual people.

Statistics New Zealand has expressed concern that homophobia and discrimination may result in negative reactions to a sexual-orientation question. [47] This may result in a poor-quality census response or in resistance, undermining the veracity of the data. The Commission has recommended that Statistics New Zealand establish an advisory group to enable consultation with diverse

43 Identity is only one component of sexual orientation, alongside attractions and behaviour.

44 For more information, see the chapter on the rights of disabled people.

45 Saxton P et al (2010), submission to the Ministry of Health regarding the New Zealand Health Survey on behalf of key sexual orientation data collection stakeholders in New Zealand; New Zealand AIDS Foundation (2010), Submission on New Zealand Health Survey Discussion Paper

46 Human Rights Commission (2004), chapter 19

47 Statistics New Zealand (2003), Sexual Orientation Focus Group Research, accessible online at http://www.stats.govt.nz/browse_for_stats/people_and_communities/marriages-civil-unions-and-divorces/sexual-orientation-focus-group-research.aspx

lesbian, gay and bisexual communities around the collection of sexual orientation data. [48]

Statistics New Zealand has produced a discussion paper [49] and commissioned the Sexual Orientation Data Collection Study (SODCS) to look at technical concerns around collecting sexual orientation data in probability surveys.[50] The SODCS concluded that "identified measurement and data collection issues relating to sexual orientation data are all amenable to resolution to a degree that would ensure the collection of timely, accurate, reliable, comparable and high-quality sexual-orientation data in New Zealand". [51]It considered that the data collection approach developed by the Office for National Statistics in the United Kingdom was an appropriate model for New Zealand. The study further recommended that this model should be tailored to encompass local cultural perspectives on sexual orientation, particularly those of Māori, Pacific and Asian peoples. Importantly, the study produced sexual orientation conceptual, measurement and data-collection frameworks tailored to New Zealand's Official Statistical System.

Data collection issues for gender minorities are less clear-cut. Among trans people there is no single view about whether gender identity data should be collected,[52] nor should a single view be expected. Many trans people have a strong preference to be recognised as simply male or female, as this is their chosen sex and gender identity. Other trans and intersex people have indicated their preference for a third 'sex' category, as long as there is no requirement that all trans and intersex people would be required to select that option. This reflects concerns about the need for greater visibility to combat prejudice, enhance participation and identify policies required to address human rights issues faced by trans people. Without such protections, visibility alone can expose trans people to greater levels of discrimination. This includes official documentation or client records that disclose a trans person's original sex details and therefore identify the person as trans.

In 2009, trans people raised their concerns with Statistics New Zealand that the statistical standard for sex required trans people to respond to questions based on their biological sex. In 2010, Statistics New Zealand reviewed this standard, which addressed these concerns while still ensuring that the standard would produce robust data. The resulting revised Statistical Standard for Sex now provides guidelines enabling people to be classified to the appropriate sex once they have started to transition and live as that sex. [53] This has been welcomed by members of the trans community. [54]

The revised standard includes guidelines for the collection and output of 'indeterminate' sex data where required in administrative data sets. Currently, this is used in only a limited number of administrative data sets, including the Department of Internal Affairs' register of births. The classification of 'indeterminate sex' may also be added to death and civil union (but not marriage) register entries. The Commission and some intersex people submitted that a third sex category, 'indeterminate', is the most accurate reflection of some people's sex. Therefore, they recommended adding this third option to the standard so that it could be used for all official data-collection purposes. Statistics New Zealand has indicated interest in undertaking further background work on the collection of data on gender identity, as distinct from sex. [55]

48 Human Rights Commission (2009), Submission to Statistics New Zealand on the Culture and Identity Statistics Domain Plan: Draft for Consultation

49 Statistics New Zealand (2008), *Considering Sexual Orientation as a Potential Official Statistic: Discussion Paper* (Wellington: StatsNZ).

50 Pega F, Gray A and Veale J (2010), 'Sexual orientation data in probability surveys: Improving data quality and estimating core population measures from existing New Zealand survey data', *Official Statistics Research Series*, 2010–2

51 ibid, p 2

52 See Human Rights Commission (2008), Inquiry into Discrimination Experienced by Transgender People: *To Be Who I Am – Kia noho au ki tōku ano ao* (Wellington: HRC)

53 Accessed 13 August 2010 from http://www.stats.govt.nz/methods_and_services/surveys-and-methods/classifications-and-standards/classifications-and-related-statistical-standards/sex/definition.aspx

54 Accessed 13 August 2010 from http://www.gaynz.com/articles/publish/2/article9110.php

55 Human Rights Commission consultation meeting with Statistics New Zealand on the review of the Statistical Standard for Sex, 6 May 2010

COMPLAINTS OF DISCRIMINATION

Complaints by sexual and gender minorities comprise a small but persistent group of complaints to the Human Rights Commission. Some forms of discrimination are similar to those experienced by other marginalised groups. For example, employment discrimination is a common area of complaint, whether based on a person's sexual orientation, sex, gender identity, race, age or disability. Recent changes in employment law allowing employers to place new employees on a 90-day trial period have raised concerns that employees will be dismissed on grounds prohibited under the Human Rights Act. This concern applies to sexual orientation and sex (including gender identity) as well as other grounds. Other complaints are specific to the experiences of sexual and gender minorities. In addition, racism and poverty may compound the discrimination some may face.

The Commission received 241 approaches relating to sexual orientation human rights issues between 2005 and 2009. The major areas of complaint related to discrimination (particularly within employment and when accessing goods and services), safety in schools, lack of official sexual-orientation data, the inability of same-sex couples to legally adopt or to marry, restrictions on blood donations, and the situation of lesbian and gay clergy.

Since the 2004 report, the number of complaints and inquiries to the Commission about discrimination faced by trans people has increased. There were a total of 272 such complaints and inquiries between 2005 and 2009.

Prior to the start of the Transgender Inquiry in 2006, the number of trans people approaching the Commission was relatively low. The inquiry process built greater community awareness that trans people are protected from discrimination based on their gender identity. A fuller outline of progress made since the inquiry, including in response to experiences of discrimination, is set out later in this chapter.

Approximately one third of trans people approaching the Commission sought general information, including about the Transgender Inquiry. The main areas of specific concern were discrimination (particularly in employment, housing, at school and in public places), the requirements for changing sex details on official documents and access to health services.

The small number of complaints and enquiries the Commission received from intersex people between 2005 and 2009 reiterated issues raised in submissions to the Transgender Inquiry. These included significant concerns about medical procedures performed on children and young people with intersex conditions. Intersex adults faced major difficulties trying to access medical records that would confirm their intersex condition or the medical interventions that have taken place.

The data given here is drawn from complaints and enquiries to the Commission as part of its everyday work. In addition, 83 per cent of the 128 submissions to the Transgender Inquiry documented experiences of discrimination. These experiences were so commonplace that

HOMOPHOBIA AT A GARAGE

What happened

Mark, a gay man, worked as a mechanic in a garage. His workmates knew he was gay and harassed him regularly at work about his sexual orientation, calling him a "faggot" and other insulting names. He tried to ignore it, but it was extremely distressing and he found it increasingly difficult to concentrate on his job. Mark reached his limit when he arrived at work to see a pornographic picture displayed in the workplace, with writing on it directed at him. He resigned and complained to the Commission.

The disputes-resolution process

The employer investigated the allegations and attended a mediation meeting with Mark. Mark's co-workers had admitted to the behaviour.

The outcome

The employer paid Mark $3000 in compensation and agreed to promote the company's anti-harassment policies more vigorously on the workshop floor. They also promised to establish a process for complaints.

CLUB APPEALS AGAINST TRANS CRICKETER

What happened

After a game of women's club cricket, the losing team complained to the local cricket association that the winning team had included a trans woman. It asked that the club's winning points be taken away. The player's club supported Anne's right to play. It asked her to provide information about her gender identity and history playing for another association so it could report back to the local association. Anne contacted the Commission for information about her rights under the Human Rights Act so she could pass this on to her club.

The disputes-resolution process

The Commission told Anne the view of the Commission and the Crown Law Office is that trans women are covered under the HRA, as outlined in the Transgender Inquiry report. A trans woman who had taken decisive steps to live as a woman should be recognised as such and should be free from discrimination under the ground of sex. However, the HRA also includes a sport exception, which allows women-only and male-only sports where strength, stamina or physique are relevant. This meant it was necessary to also consider whether other female competitors would be disadvantaged by competing against a trans woman. The Commission told Anne that overseas sporting organisations are increasingly taking into account the impact that taking female hormones for a number of years would have in reducing any competitive advantage a trans woman might have over other women.

The outcome

The information was passed on to the cricket association, which ruled that Anne was eligible to play and supported her right to do so.

many trans people simply expected to be discriminated against. Submissions from health professionals, family members, unions and academics reinforced the obstacles to dignity, equality and security faced by both trans and intersex people in New Zealand.

PARTICIPATION

Participation includes the rights to participate in public and cultural life, freedom of expression, freedom of association and assembly, and the rights to found and form a family. New Zealand families are becoming increasingly diverse, to the extent that blended, sole parent, and lesbian and gay parented families are becoming an increasing proportion of family groupings. Yet research has revealed that lesbians and gay men can still face significant challenges in their rights to create and maintain a family. [56]

New Zealand case law reinforces the point that the sexual orientation of parents is immaterial when considering custody or access issues. [57] The determining issues are the best interests of the child and good parenting. Similar case law does not exist in relation to trans or intersex parents, although discrimination issues were raised by trans parents in the Transgender Inquiry. Complaints received by the Commission indicate that some trans parents face significant barriers in Family Court hearings, including expert reports that assume children will be negatively affected if they have a trans parent.

Discrimination is unlawful and prevents participation in public life. There is also evidence that it is likely to affect the health and well-being of marginalised groups. [58] There is direct evidence linking personal experience of racial discrimination to poorer health outcomes for

56 Gunn A and Surtees N (2009), *We're a Family: A Study of How Lesbians and Gay Men Are Creating and Maintaining Family in New Zealand* (Wellington: Families Commission)

57 Atkin B, Henaghan M, Caldwell J, Webb D, Clarkson D and Partridge D (2009), *Butterworths Family Law in New Zealand* (14th ed, Wellington, LexisNexis);); Neate v Hullen [1992] NZFLR 314; Judge Mahony in VP v PM (1998) 16 FRNZ 621

58 Ross L E, Dobinson C and Eady A (2010), 'Perceived Determinants of Mental Health for Bisexual People: A Qualitative Examination', *American Journal of Public Health* 100(3), pp 496–502

Māori. [59] In addition, both sexual [60] and gender minorities [61] report negative experiences when seeking and receiving health care. Discrimination based on both race and gender identity may compound the negative health impacts for takataapui, whakawāhine, tangata ira tane, fa'afafine and other Māori and Pacific sexual and gender minorities.

TRANSGENDER INQUIRY

In January 2008, the Commission released the report Inquiry into Discrimination Experienced by Transgender People: *To Be Who I am – Kia noho au ki t ku an ao*. [62] The inquiry focussed on three areas: experiences of discrimination, access to health services and barriers to legal recognition of gender status. Its final report documented obstacles to dignity, equality and security and how discrimination impacted on all aspects of trans people's lives.

The inquiry identified major gaps in availability, accessibility, acceptability and quality of medical services required by trans people, including those needed in order to physically transition. Many of the health services required by trans people were available within the public health system for other medical conditions (for example, access to hormone specialists, assessments by mental health professionals and some surgical procedures, including mastectomies and orchidectomies). However, trans people and their clinicians faced significant barriers to accessing these procedures.

The inquiry also found that many, if not most, trans people could not obtain official documents that provided consistent and accurate information about their gender identity and sex.

The final report made five recommendations:

- enable effective participation by trans people in decisions that affect them
- reduce discrimination and marginalisation experienced by trans people (starting with three priority areas: employment, education and safety)
- improve trans people's access to public health services and develop treatment pathways and standards of care for gender reassignment services
- simplify the requirements for changing sex details on birth certificates, passports, and other documents to ensure consistency with the Human Rights Act
- further consider the specific human rights issues facing intersex people.

The Minister of Justice directed the Ministry of Justice to oversee government agencies' progress in assessing and implementing the inquiry recommendations. Since the report was released, some significant progress has been made, including:

- allowing Family Court declarations (under sections 28 and 29 of the BDMRRA) to be made for overseas-born New Zealand citizens and permanent residents, as well as applicants born in New Zealand
- the Department of Internal Affairs revising policies for changing sex details on passports and evidentiary citizenship certificates in line with the Re Michael case, so that a Family Court declaration is sufficient – and therefore evidence of full sex-reassignment surgery will not always be necessary
- the Department of Labour developing Transgender People at Work guides for employers and employees [63]
- dialogue sessions between trans people and a range of government agencies on search and detention issues
- an extensive human rights education programme on human rights issues for trans people, co-ordinated by

59 Harris R, Purdie G et al (2007), Appendix 3: Estimating Māori hospitalisations and cancer registrations. In Robson B and Harris R (eds), H*auora: Māori Standards of Health IV. A study of the years 2000–2005* (Wellington, Te Rōpū Rangahau Hauora a Eru Pōmare), pp 249–259

60 Neville S and Henrickson M (2006), Perceptions of Lesbian, Gay and Bisexual People of Primary Health Care Services, *Journal of Advanced Nursing* 55(4), pp 407–415

61 Human Rights Commission (2008)

62 ibid

63 Department of Labour (2009), *Transgender People at Work: Guide for Employers* (Wellington: DoL). Accessed 13 August 2010 from http://www.ers.dol.govt.nz/publications/transgender/transgender-people-employers.pdf

the Commission and supplemented by online resources and a quarterly email newsletter [64]

- funding for Counties Manukau District Health Board to work with trans people and clinicians to develop training resources, and provide health practitioners nationally with a 'how-to' manual, including details of health professionals who can be contacted as a resource. [65]

The inquiry found that many trans people and groups were not aware of existing legal protections. It concluded: "There must be no doubt that trans people are protected from discrimination under the HRA, and that section 21(1a) should be amended to state clearly that sex includes gender identity. That recommendation has not been adopted because, based on Crown Law advice, the Attorney-General has concluded that gender identity is already included under the prohibited ground of sex.

However, the implications of this legal interpretation have not yet been tested. In the absence of a specific reference to gender identity, the full protection of gender minorities from discrimination remains uncertain.

The inquiry recommended changes to the "physical conformation" threshold in section 28 of the BDMRRA to include anyone who "has taken decisive steps to live fully and permanently" in their new gender identity. Subsequently, the Family Court ruling in Re Michael clarified that is not always necessary for trans people to have had all gender-reassignment surgeries before the court will grant a declaration amending sex details on birth records. The Commission understands that this decision has simplified the process and threshold for a number of trans men making Family Court applications. It is important that clear information is available to trans people about the Family Court process and, in particular, the criteria for demonstrating that they have taken "decisive steps to live fully and permanently in the gender identity of the nominated sex".

As a result of this court decision, some government agencies have indicated that the inquiry's recommended change to the physical conformity threshold in section 28 of the BDMRRA is no longer necessary. However, the Family Court decision focussed in part on irreversible chest surgery undertaken by the man concerned. Given that many trans women do not undergo an equivalent irreversible surgical procedure prior to genital surgery, the Commission considers that it is unclear whether the threshold has improved for trans women.

New Zealand law does not clearly state that trans people do not need to undergo medical or surgical steps that result in sterilisation in order to change sex details on official documents. Currently, under New Zealand law, a trans person may or may not be required to undergo sterilisation in order to change the sex on their birth certificate. [66] In the Re Michael decision, the applicant was able to obtain a male birth certificate without having undergone a hysterectomy. However, the Commission has been informed of other decisions where trans women have been required to show evidence of full sex-reassignment surgery. Emerging international standards, including a June 2010 recommendation from the World Professional Association of Transgender Health, state that sterilisation should never be required before someone can change sex details on official documents. [67]

While not all trans people wish to have all available surgeries, for others it is an essential step – it is very important that continued efforts are made to improve access to surgery for trans people.

Priority areas where considerably more work is needed to implement the Transgender Inquiry recommendations include:

- amending the HRA to state explicitly that discrimination on the grounds of gender identity is prohibited under the ground of sex

64 Accessed 13 August 2010 from http://www.hrc.co.nz/transgenderinquiry

65 Information about the 'Gender-Reassignment Health Services for Trans People within New Zealand' project. Accessed 13 August 2010 from http://www.healthpoint.co.nz/default,180057.sm

66 The legal test combines a mix of subjective and objective elements, of which physical conformation is only one component.

67 Accessed 16 July 2010 from http://www.wpath.org/

- amending the physical conformity threshold in section 28 of the BDMRRA 1995
- sharing best practice so that trans students' right to education is fully protected
- building on the Counties Manukau District Health Board project to develop standards of care and treatment pathways for trans people wishing to physically transition.

The inquiry process and subsequent advocacy by trans people have demonstrated what can be achieved through the use of a human rights approach. The momentum created by the inquiry is ensuring that trans people are able to participate in matters that affect them and use the human rights framework as leverage for change.

INTERSEX PEOPLE

> **Sometimes it's nice to have a label – sometimes it just gets in the way.**
>
> Intersex roundtable participant, July 2009.

Terminology remains an issue when discussing the human rights of intersex people or those with an intersex medical condition. As already noted, some people are uncomfortable with the term 'intersex' itself.

There is very little data on intersex people in New Zealand. Data gathered overseas suggests that between one in 1500 and one in 2000 babies are born with intersex medical conditions. [68] Intersex issues are distinct from sexual orientation and gender identity, although there are some overlaps, particularly for those intersex people seeking to reverse previous medical interventions.

The Commission's Transgender Inquiry received submissions from intersex people which raised significant human rights issues. Priority concerns were about medical procedures performed on children and young people with intersex conditions. In addition, limited access to medical records compounded the invisibility, secrecy and shame that many intersex people experienced.

In 2009 and 2010, the Commission brought together intersex people, their families, health professionals, government agencies and others to discuss the issues raised by the Transgender Inquiry and international developments. [69] These meetings highlighted work already being done in New Zealand, including:

- Intersex Trust of Aotearoa NZ provides information, education and training for organisations and professionals who provide services to intersex people. The trust has worked with the Commission to run public education programmes, including alongside the Assume Nothing exhibition.
- CAHNZ Trust provides support to people in New Zealand about Congenital Adrenal Hyperplasia, including an information kit for parents.
- A neonatal nurse specialist has created a brochure for parents when their baby's gender is uncertain at birth.
- A small number of universities and medical schools provide training on intersex issues to midwifery and medical students.
- Medical students in Auckland are given a lecture on intersex issues.
- The Ministry of Social Development contributed to raising awareness among government agencies and community groups.
- The Commission has worked with Intersex Trust Aotearoa New Zealand to run public education programmes, including alongside the Assume Nothing exhibition.

Other challenges include creating a safe environment for reaching more intersex people, in a context in which discrimination and stigmatisation remain prevalent. The ongoing impact of past medical interventions on the lives of intersex people was also emphasised, as well as the need to take into account the experiences of adult intersex people when making an 'evidence-based' decision about a child's sex.

> **How do we as individuals, as communities, as whānau, as families deal with difference?**
>
> **How do we create safe spaces to talk about genitals, sex, gender, difference, shame, fear and trauma?**

68 Blackless M, Charuvastra A, Derryck A, Fausto-Sterling A, Lauzanne K and Lee E (2000), 'How Sexually Dimorphic Are We? Review and Synthesis', *American Journal of Human Biology* 12, pp 151–166. Accessed 15 November 2010 from http://www.isna.org/faq/frequency

69 Intersex roundtable minutes (2010), accessible online at http://www.hrc.co.nz/home/hrc/humanrightsenvironment/actiononthetransgenderinquiry/intersexpeople.php

How do we repair the damage from the past?

How do we gather up all this knowledge and move forward, in a way that is rich, safe and powerful for all of us?

Intersex dialogue, Northland, 2010

Over the past year, significant media attention has been paid to the participation of intersex people in public life – for example, South African runner Caster Semenya being required to undergo medical tests after winning a gold medal at the 2009 world championships. This has highlighted the vulnerability of exposing someone's intimate personal details, resulting in public discussion about whether that person is intersex. Such debates deny an individual's right to privacy and to choose their own identity.

In New Zealand, the issue provided a focal point for advocacy by intersex people. It has now been confirmed that Caster Semenya is legally entitled to compete as a woman.[70] It is crucial that intersex people are able to participate in the development of international sporting standards. The purpose of such standards should be to ensure that intersex people can participate fully and fairly at all levels of sport and enjoy their right to privacy.

Other roundtable suggestions for improving protection of the human rights of intersex people in New Zealand included:

- ensuring that intersex health issues are part of curriculum studies and integrated into training for a wide range of health professionals, including doctors, social workers, nurses and midwives
- developing standards of care and consensus guidelines, and an emphasis on providing holistic healthcare services
- providing transition from paediatric health care to ongoing healthcare for intersex people, in order to address the health complications that may arise later in life
- avoiding any surgical interventions until the child is old enough to give informed consent, except in those very limited circumstances where surgical intervention is necessary to preserve life
- improving understanding around informed consent and the rights of children and their parent(s), and ensuring that parents and competent young people are made aware of the differing views about medical or surgical interventions before making any decisions[71]
- increasing availability and quality of information and support for families
- improving data collection and ongoing monitoring of issues affecting intersex people
- increasing resourcing available for the work done by intersex organisations, and continuing to raise awareness among government agencies of the needs of intersex people.

SECURITY

Security and safety remain important issues for sexual and gender minorities, particularly trans and intersex people. A significant development in the past decade has been deeper understanding of gender-based violence – namely violence based on actual or perceived sex, gender, gender identity or sexual orientation.[72] Gender-based violence includes, for example, violence against men who are, or are perceived to be, effeminate or homosexual or otherwise not to conform to social expectations of male roles or behaviour. The use of violence against people based on their actual or perceived sexual orientation, gender identity or sex is frequently grounded in misogyny and what it means to be a 'real' man or woman. Understanding this rationale exposes why, for example, the use of provocation as a defence to a murder charge has been so repugnant to sexual and gender minorities.[73]

70 International Association of Athletics Federation (2010), 'Caster Semenya May Compete'. Accessed 16 July 2010 from http://www.iaaf.org/aboutiaaf/news/newsid=57301.html

71 Right 6 of the Code of Health and Disability Services Consumer's Rights requires that every consumer is given an explanation of the options available, including an assessment of the risks, side-effects, benefits and costs of each option.

72 Violence against women is dealt with in the chapter on human rights and women.

73 For example, see Herkt D (2009), '"Our Sophie" vs that horny old fag', gaynz.com, 4 August. Accessed 13 August 2010 from http://www.gaynz.com/articles/publish/5/article_7757.php

The high New Zealand levels of family violence and violence against women have been commented on in successive international human rights reports. The levels of reported violence have increased and remain persistently high, despite proactive public-awareness campaigns and legislative initiatives. More than a quarter of submissions to the Transgender Inquiry raised concerns about the harassment, security and safety of trans people. These included examples of trans people who had been violently assaulted and hospitalised because of their gender identity.

Some progress has been made in removing legal barriers to protection of sexual and gender minorities with the repeal of the defence of provocation in 2010. Challenges remain, including the continuing lack of data about the use of provisions in the Sentencing Act 2002 that enable a court to take into account whether offending was motivated by a victim's sexual orientation or gender identity. In developing this report, the Commission received submissions calling for the extension of sections 61, 63 and 131 of the HRA to cover hate speech against sexual and gender minorities.

New Zealand Police has 'police diversity liaison officers', whose role includes liaison with queer and trans communities. The Human Rights Commission has worked with the police on developing suitable policies for searching trans people. The Commission has also engaged in dialogue with the Department of Corrections as a first step in implementing the inquiry recommendation to "bring together government agencies to share best practices for the search, detention and imprisonment of trans people".

Safety and security is a particular issue for young people, especially those who identify as queer or belonging to other sexual minorities. The Youth 2007 Survey analysed responses from more than 8000 secondary-school students about outcomes for same-sex-attracted and both-sex-attracted students. The survey revealed high levels of resilience and vitality among queer youth, and some health improvements since 2001. However, it also revealed higher levels of bullying, depression and suicide attempts experienced by these students compared with opposite-sex-attracted students. [74] The survey included no data on trans youth.

There is limited New Zealand research about the level of harassment and bullying of trans and intersex students. However, overseas studies and submissions to the Transgender Inquiry suggest that levels are at least as high as those for same-sex-attracted and both-sex-attracted students. Trans and intersex students face additional barriers linked to their gender identity or sex diversity. These may include not being able to participate in sex-specific activities (such as sport), use sex-segregated facilities (such as toilets), or express their sex/gender identity (for example, through using the appropriate name and pronoun on school rolls or wearing the appropriate school uniform).

The cumulative impact of discrimination, harassment and barriers on trans/gender-variant and queer youth can be serious, and may be linked to the high levels of depression and suicide found in the Youth 2007 survey. Young people who identify as queer or trans may also be more vulnerable to violence at school and at home. Responses to these safety issues have to move beyond individual students and their families and towards effective policies, training and resources within schools. At the moment, non-government organisations such as Rainbow Youth are addressing these needs without adequate resources to do so.

Improved sexual-health education and provision in schools could reduce stigma against sexual minorities. A priority area for further action is ensuring that all children and young people have access to high-quality comprehensive sexuality education. This education should address identity-based discrimination and incorporate a universal approach to sexual and reproductive rights.

Conclusion
Whakamutunga

New Zealand generally complies with international human rights standards that provide for non-discrimination and equal treatment of sexual and gender minorities.

74 Denny S and Grant S (2009), *Youth '07: The Health and Well-being of Secondary School Students in New Zealand: Results for Young People Attracted to Same Sex or Both Sexes* (Auckland: University of Auckland)

Significant progress has been made towards better protection of the rights of sexual and gender minorities in New Zealand. Since 2004, 1876 civil unions have been registered, many of which were same-sex unions. Efforts have been made to improve co-ordination and delivery of government services to sexual and gender minorities. Some progress has been made towards addressing concerns and gaps in relation to data collection.

The Commission's inquiry into the experiences of transgender people identified key areas for improvement, and the Ministry of Justice was directed to oversee government progress in addressing the inquiry recommendations. Significant progress has been made in implementation of these recommendations. In 2009 and 2010, the Commission hosted roundtable discussions about the human rights issues affecting intersex people, at which areas of progress were also identified.

Gaps and uncertainties remain around rights to found and form a family, protection from discrimination on the basis of gender identity, and the legal ability for trans and intersex people to change sex details on official documents. Challenges also remain in relation to implementation and practice, including promoting public understanding of sexual and gender diversity, combating discrimination and harassment, official data collection and improving safety.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance the rights of gay, lesbian, bisexual, trans and intersex people:

Legal equality

Completing the legislative steps required for formal legal equality, including rights to found and form a family, regardless of sexual orientation or gender identity.

Data collection

Continuing to work with Statistics New Zealand, and commencing working with other producers of official statistics, to address the need for sexual orientation statistics through the Census and population-based surveys.

UN reporting

Addressing human rights in relation to sexual orientation and gender identity in all New Zealand country reports to United Nations human rights treaty bodies and in other human rights reports.

Rights of trans people

Continuing to improve the human rights of trans people through implementation of the Transgender Inquiry recommendations, with particular focus on legal recognition, the rights to education and health, and explicit protection under the Human Rights Act.

Gender-based violence

Taking steps to reduce gender-based violence.

Children and young people

Improving the safety of same-sex-attracted and both-sex-attracted, trans and intersex children and young people in schools.

Intersex people

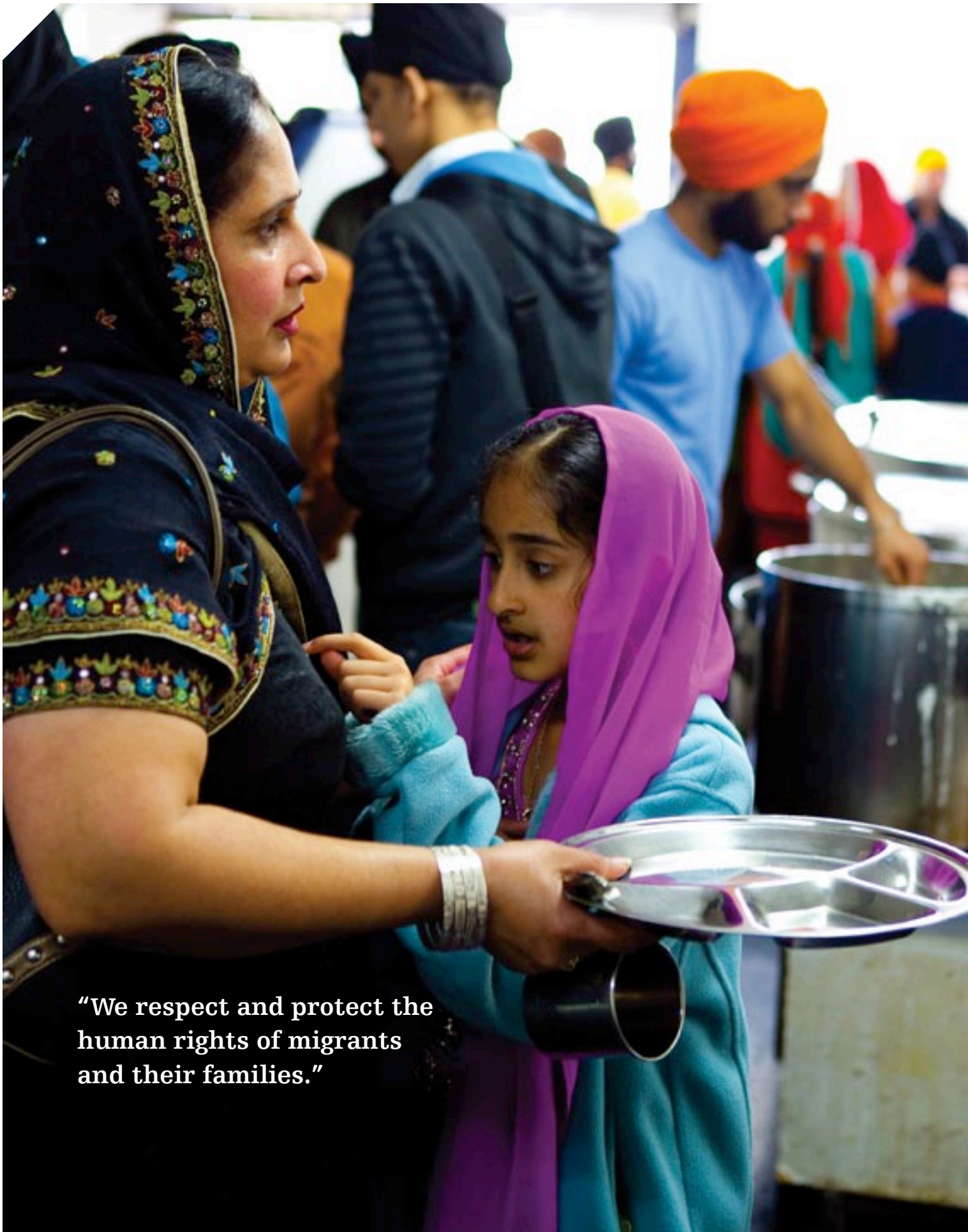
Building understanding about the specific human rights issues faced by intersex people.

Health needs of intersex people

Using a human rights-based framework to develop best practice for meeting the health needs of intersex people, with a particular focus on infants with intersex medical conditions.

20. Rights of Migrants

Tikanga o ngā Tāngata Kaiheke



"We respect and protect the human rights of migrants and their families."

We respect and protect the human rights of migrants and their families.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 7

Introduction
Tīmatatanga

More people live outside their country of birth today than at any other time in history. The number of people moving across international borders is expected to continue to rise in the future. While people have a right to leave a country, there is no automatic right to enter or reside in another country. Governments may exercise their national sovereignty to decide who to admit into their territory. Once an individual has entered a country, the national government is responsible for the protection of his or her rights. All persons, regardless of their nationality, race, legal or other status, are entitled to fundamental human rights and basic labour protections.

Since the Commission's review of human rights in 2004, new immigration legislation has been enacted. The Immigration Act 2009, which came into force in 2010, governs immigration in New Zealand. The Immigration Advisers Licensing Act 2007 provides for the regulation of persons who give immigration advice.

The adoption of the Recognised Seasonal Employers Scheme (RSE) in 2007 and the introduction of the Supplementary Seasonal Employment (SSE) permit in 2009 provide workers from the Pacific with access to the New Zealand labour market and aim to better protect the rights of these workers.

Since 2004, there has also been an increased emphasis on successful settlement and providing more support to migrants through central and local government and the voluntary sector. This has included the development of a national settlement strategy and action plan and regional settlement strategies in Auckland and Wellington; the establishment of a settlement support network; the opening of migrant resource centres; and the launch of local newcomers networks.

International context
Kaupapa ā taiao

Three fundamental notions characterise the protections in existing international law for migrants and their families:

- Migrants and nationals receive equal treatment [2]
- Core universal human rights apply to all migrants, regardless of status [3]
- International standards providing protection in treatment and conditions at work – safety, health, maximum hours, minimum remuneration, non-discrimination, freedom of association, maternity, etc – apply to all workers. [4]

Migrants' rights are set out in two sets of international instruments:

- the core human rights treaties, whose provisions apply universally and thus protect migrants
- the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention) and the International Labour Organisation (ILO) conventions, which specifically apply to migrant workers.[5]

1 Most of New Zealand's human rights obligations are summarised in Ministry of Foreign Affairs and Trade (2008), Handbook on International Human Rights (3rd edition) (Wellington: MFAT). The international human rights instruments are accessible online at the website of the Office of the UN High Commissioner for Human Rights, http://www.ohchr.org

2 It is noted, however, that certain social services, such as New Zealand Superannuation, have residence requirements.

3 This was established implicitly and unrestrictedly in ILO Convention 143 on Migration for Employment (Supplementary Provisions) (1975), and later delineated explicitly in the International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families (1990).

4 This notion was upheld in an opinion issued by the Inter-American Court in 2003 (Corte Interamericana de Derechos Humanos: *Condición Jurídica y Derechos de los Migrantes Indocumentados*. Opinion Consultativa OC-18/03 de 17 de Septiembre de 2003, solicitada por los Estados Unidos de Mexico). In its conclusions, the court decided unanimously that "the migrant quality of a person cannot constitute justification to deprive him of the enjoyment and exercise of his human rights, among them those of labour character. A migrant, by taking up a work relation, acquires rights by being a worker that must be recognized and guaranteed, independent of his regular or irregular situation in the state of employment. These rights are a consequence of the labour relationship."

Sarab jit kaur Basra and her daughter Davinder kaur Basra share a communal meal held every weekend for the Sikh community at Sri Dasmesh Darbar Sikh Temple, Papatoetoe.

CORE HUMAN RIGHTS TREATIES

The human rights and fundamental freedoms of all migrants, regardless of their immigration status, are protected by the:

- Universal Declaration of Human Rights (UDHR)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Rights of the Child (UNCROC)
- Convention on the Rights of Persons with Disabilities (CRPD)
- Vienna Convention on Consular Access, which respects the right of all migrants to consular access and protection
- various International Labour Organisation (ILO) conventions. [6]

Migrants' rights in the most extreme situations (e.g. war, genocide or crimes against humanity) are protected under international criminal law and international humanitarian law.

CONVENTIONS THAT APPLY SPECIFICALLY TO MIGRANT WORKERS

Historically, the ILO has led the way in defining and enforcing workers' rights. While the early United Nations conventions do not make reference to migrant workers, the ILO has addressed migrant labour rights through specific conventions and recommendations. The 1998 Declaration on Fundamental Principles and Rights at Work, which binds all ILO members, protects all migrant workers regardless of status.[7] The two key ILO conventions are 97, on Migration for Employment (1949), and 143, on Migrant Workers (supplementary provisions) (1975).

ILO convention 97 provides the foundations for equality of treatment of nationals and regular migrants,[8] in areas such as recruitment procedures, living and working conditions, access to justice, tax and social security regulations. It sets out details for contract conditions and the participation of migrants in job training or promotion, and deals with provisions for family reunification and appeals against unjustified termination of employment or expulsion, as well as other measures to regulate the entire migration process.

ILO Convention 143 was adopted at a time when concern about irregular migration (including smuggling and trafficking) was growing. It sets out requirements for respecting the rights of migrants with an irregular status, while providing for measures to end clandestine trafficking and penalise employers of irregular migrants.

Other ILO conventions that protect migrant labour include:

- Forced Labour (29)
- Freedom of Association and Protection of the Right to Organize (87)
- Equal Remuneration (100)
- Discrimination (Employment and Occupation) (No. 111)
- Minimum Age (138).

Continuing international concern about the rights of migrant workers led to the adoption by the United Nations of the Migrant Workers Convention in 1990. The convention brings together the rights that already protect migrants (including irregular workers) and that have already been accepted by most states through 'core' human rights treaties. The convention is based on concepts and language drawn from ILO conventions 97 and 143. It considerably extends the legal framework for migration, the treatment of migrants and the prevention

5 The term 'migrant worker' is used internationally to refer to a "person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a state of which he or she is not a national" (Article 2(1) of the Migrant Workers Convention).

6 For further information on the international human rights protections, see the chapter on the International Human Rights Framework.

7 The ILO conventions are accessible online at http://www.ilo.org/ilolex/english/convdisp1.htm

8 A regular migrant is a migrant who is lawfully entitled to be present in a country.

of exploitation and irregular migration,[9] and identifies some further rights, including the right to family reunification.

Family reunification of migrants is the social and legal process of reuniting migrants with their families in the host state.
There are two basic prerequisites: the legal (regular) residence of the principal in the host State; and the subsequent (post-principal) entry of the principal's family members from the country of origin into the host state, following appropriate authorisation by the host state.

A right to family reunification is found in Article 9 of the CRC and the Migrant Workers Convention. According to Article 44 of the Migrant Workers Convention, states are required to "take appropriate measures to ensure the protection of the unity of the families of migrant workers", and "take measures that they deem appropriate and that fall within their competence to facilitate the reunification" of the migrant workers' families.[10]

The socio-political significance of migrant family reunification has been stressed by the ILO:

> **Uniting migrant workers with their families living in the countries of origin is recognised to be essential for the migrants' well-being and their social adaptation to the receiving country. Prolonged separation and isolation lead to hardships and stress situations affecting both the migrants and the families left behind and prevent them from leading a normal life. The large numbers of migrant workers cut off from social relations and living on the fringe of the receiving community create many well-known social and psychological problems that, in turn, largely determine community attitudes towards migrant workers.**[11]

There has been considerable controversy over the promotion, ratification and implementation of the ILO conventions and the Migrant Workers Convention, highlighting the tension between a human rights approach to social protection and the increasingly deregulated, globalised use of labour. Although there has been relatively widespread ratification of convention 97, there has been less ratification of convention 143. Only 42 countries have so far ratified the Migrant Workers Convention, which entered into force on 1 July 2003. An additional 16 states have signed but not ratified it, and no industrialised host countries have ratified it.

New Zealand context
Kaupapa o Aotearoa

LAW AND POLICY

Civil and political rights are guaranteed under the New Zealand Bill of Rights Act 1990 (BoRA).[12] Generally, rights and freedoms contained in the BORA apply equally to all persons in New Zealand, irrespective of their immigration status.

The Human Rights Act 1993 (HRA) prohibits discrimination on the grounds of race, colour, and national or ethnic origins, and the incitement of racial disharmony and racial harassment. Section 392 of the Immigration Act 2009, which governs immigration in New Zealand, prevents the Human Rights Commission from investigating alleged discrimination in the Immigration Act and under policy developed pursuant to that act. Only complaints of alleged discrimination in New Zealand Immigration Service (NZIS) delivery can be accepted. This is based on the argument that immigration law and policy is, by its nature, discriminatory. The act does provide for the Commission to make public statements in relation to groups of persons who are in or may be coming to New Zealand and who are or may be subject to hostility,

9 It emphasises that the rights contained in the convention apply to 'all' migrant workers, irregular as well as regular, by obliging state parties to ensure that "migrant workers are not deprived of any right by reason of any irregularity in their stay or employment" (Article 25(3)).

10 A secondary (i.e., derivative) right to family reunification may be argued to be a clear outcome of the primary right to found a family that is expressly recognised in contemporary human rights law.

11 The Government has considered the right to family reunification to be one of the barriers to ratification of the Migrant Workers Convention.

12 Although not all the rights contained in the ICCPR are given explicit domestic legal expression or protection, BoRA affirms New Zealand's commitment to the ICCPR.

or have been or may be brought into contempt on the grounds of race, colour, ethnic origin or other grounds of discrimination listed in the act.

The Immigration Act 2009 governs immigration in New Zealand. In general, all persons other than New Zealand citizens (including the people of Niue, Tokelau and the Cook Islands, who are New Zealand citizens) must hold a visa to travel to or be in New Zealand. Australian citizens are exempt by regulation from the requirement to hold a visa, as are persons covered by diplomatic privileges and immunity and certain other classes of person. There are a number of visa categories: permanent resident, resident, temporary, limited, interim and transit.

The Immigration Advisers Licensing Act 2007 aims to "promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice". [13] The act describes immigration advice as "using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward". [14] Under this act, anyone giving immigration advice about New Zealand must be licensed, unless they are exempt. [15] Licences must be renewed annually, can only be held by individuals, not organisations, and cannot be transferred to anyone else. It is an offence to knowingly provide immigration advice without a licence, and this may be punishable by a fine of up to NZ$100,000 and/or as much as seven years in prison.

The Citizenship Act 1977 deals with New Zealand citizenship. Citizenship can be acquired by birth, descent or grant. Non-New Zealand citizens are defined as "aliens" for the purposes of the Act, with the exception of Commonwealth citizens (British subjects), British 'protected persons' and Irish citizens. To be granted citizenship, an applicant is generally required to have been legally resident in New Zealand for a period of five years; be entitled under the Immigration Act 2009 to be in New Zealand indefinitely; be of good character; have sufficient knowledge of the responsibilities and privileges attached to New Zealand citizenship; have sufficient knowledge of the English language; and intend to continue to reside in New Zealand or work for the Government, for an international organisation of which New Zealand is a member, or for a New Zealand employer overseas.

The Employment Relations Act 2000, the Health and Safety in Employment Act 1992, the Minimum Wage Act 1983 and the Holidays Act 2003 ensure minimum national employment condition norms are upheld in all sectors.

INSTITUTIONS

The New Zealand Immigration Service (NZIS), a part of the Department of Labour, operates under the Immigration Act 2009, issuing visas for people travelling to New Zealand to visit, work, study or live. The NZIS provides policy advice to the Government and is responsible for ensuring compliance with New Zealand's immigration laws. The NZIS's operational policy is set out in the NZIS Operational Manual. [16] The manual is subject to regular adjustment to reflect changes in policy.

The Department of Labour has the lead role in providing initial settlement activities that help migrants settle quickly and adjust to life in New Zealand.

The Department of Internal Affairs administers the Citizenship Act 1977, including issuing citizenship and passports.

The Ministry of Social Development, through Family and Community Services, delivers the Settling In programme, which works with migrant and refugee communities to develop social services that meet their needs.

The Office of Ethnic Affairs is responsible for minority ethnic communities. It provides advice to the

13 Immigration Advisers Licensing Act 2007, section 3

14 Immigration Advisers Licensing Act 2007, section 7

15 Lawyers and members of parliament are exempt

16 The manual is accessible online at http://www.immigration.govt.nz/opsmanual/index.htm

Government; works with ethnic communities and service providers, to promote community development, better services to ethnic communities and better access to information; manages the Language Line telephone interpreting service, enabling non-English speakers to have equal access to services; promotes understanding of ethnic issues in the wider community; encourages discussion; and promotes and supports the development of intercultural competence.

A number of other government departments, including the Ministry of Education, the Ministry of Health and the New Zealand Police, work closely with migrant communities and provide migrant-specific services.

COMPLIANCE WITH INTERNATIONAL TREATIES

New Zealand has ratified the core human rights conventions. New Zealand has a reservation against the CRC that reserves the right to distinguish between persons according to the nature of their immigration status in New Zealand. The Government is working towards removing this reservation.

New Zealand has ratified ILO Convention 97. It has not ratified ILO Convention 143 or the Migrant Workers Convention, but successive governments consider that New Zealand law and practice is in compliance with the principles that underlie them. In its response to the Universal Periodic Review in May 2009, the Government said:

> **At present, New Zealand is not considering ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. New Zealand has various laws to adequately protect all workers in New Zealand, including migrant workers, on an equal basis.**

New Zealand generally complies with the provisions of ILO Convention 97. However, it does not comply with a number of aspects of ILO Convention 143 or the Migrant Workers Convention. For example, migrants continue to experience discrimination and harassment, and have difficulty accessing educational services, pre-settlement information and social services. Migrants continue to face barriers to employment and, when employed, are subject to adverse working conditions. In addition, New Zealand does not fully support the right to family reunification.[17] For example, because of changes made to immigration policy in 2009, migrant workers on supplementary seasonal employment [18] are not eligible to support their partner and children for permits under visitor, student or work policies.

Some of these issues could be addressed through changes specifically relating to migrants, while others would require changes that would affect all citizens.

INSTITUTIONAL MECHANISMS AND PRACTICAL MEASURES

Recent immigration policy changes have placed greater emphasis on successful settlement of migrants. These changes include the establishment of migrant resource centres, and co-ordinated planning at the regional level between government departments, local councils, and employer, migrant and community groups.

Persons approved for residence have to pay a migrant levy, in addition to the standard visa/permit application fees, before they receive their residence visa.

The purpose of the migrant levy is to contribute to the funding of programmes intended to assist the successful settlement of migrants. For instance, the levy funds help with costs related to the Language Line telephone interpreting service, the Migrant Employment Assistance service, and the Citizens Advice Bureau Language Link service. The levy also includes a contribution towards English for Speakers of Other Languages (ESOL) tuition for adults and children.

The New Zealand Settlement Strategy (NZSS) provides a whole-of-government framework aimed at achieving a consistent nationwide approach to settlement-related policies and services. Following its launch in 2004, it was then revised in 2006. The NZSS seeks to promote a society in which the local and national integration of newcomers is supported by responsive services, a

17 For example, Article 44 of the Migrant Workers Convention requires states to "take appropriate measures to ensure the protection of the unity of the families of migrant workers" and "take measures that they deem appropriate and that fall within their competence to facilitate the reunification" of the migrant workers' families.

18 Department of Labour (2009), Quota Refugees in New Zealand Approvals and Movements [1999–2008]. Accessible online at http://dol.govt.nz/publications/research/quota-refugees/quota-refugees.pdf

welcoming environment and a shared respect for diversity by:

- ensuring migrant and refugee families have equitable access to the support and choices they need to be secure and able to reach their full potential in all aspects of social and economic life
- promoting understanding and acceptance of cultural diversity – migrants, refugees and their families have a sense of place and belonging in New Zealand, while maintaining their cultural identities that contribute to New Zealand's social and cultural vibrancy.

Regional settlement strategies have been completed for Auckland (2006) and Wellington (2008). These strategies have been developed in partnership with the Government and local bodies, non-government organisations and other stakeholders with settlement-related interests, including migrants and refugees.

The Wellington Regional Settlement Strategy addresses the importance of migrants building a relationship with Māori. Two actions in the strategy focus on welcoming manuhiri/newcomers to the Wellington region and providing information about the Treaty of Waitangi, regional history and environment.

The Department of Labour has the lead role in providing initial settlement activities that help migrants settle quickly and adjust to life in New Zealand. Settlement activities funded by the department's Settlement Division cover:

- settlement information for migrants at the pre-arrival and initial settlement stages
- information that supports employers to recruit and retain skilled migrants
- co-ordination support, through management of the Settlement Secretariat, for cross-agency activities that contribute to settlement outcomes.

The Department of Labour supports 19 regional settlement support offices. These help provide access to settlement information and co-ordinate service delivery to support migrants and their families in their first two to three years in New Zealand. In 2008–09, settlement support offices provided services to 9400 migrants and 887 local service providers.

In addition, the Department of Labour funds a variety of settlement programmes, which support newcomers' access to orientation and settlement information, and support employers to secure and retain the skills that workplaces need. [19]

The Ministry of Social Development's 'Settling In' programme works directly with refugee and migrant communities to help them find solutions to meet their own needs. It was established in 2003 to build relationships between refugee, migrant and host communities, and ensure that government policy affecting them is developed in a collaborative way. The programme aims to:

- identify social service needs in refugee and migrant communities
- purchase services where available
- develop capacity, skills and knowledge within the refugee and migrant communities
- work across government, NGO and community sectors.

There have been a number of initiatives by employer and professional groups and education providers to assist migrants in overcoming barriers to employment. For example, Opportunities for Migrant Employment in Greater Auckland (OMEGA) matches migrants with professionals who share the same skills and industry knowledge, in occupation-specific mentoring. The Auckland Chamber of Commerce operates the New Kiwis website for onshore migrant job-seekers and a recruitment-focussed website for prospective migrants offshore. [20] The Canterbury Chamber of Commerce's Employment Programme assists work-ready migrants to find employment and help relieve the skills shortage in the Canterbury region.

For non-English speaking migrants, the most immediate educational need is English for Speakers of Other Languages (ESOL). The Government provides funding for some ESOL programmes. The Ministry of Education administers a number of programmes to improve learning outcomes for migrants.

19 For example, Auckland Regional Migrant Services (ARMS), CAB Multilingual Information Service, Relationship Services – Relating Well in New Zealand, Chinese New Settlers Services Trust (Auckland), PEETO (Christchurch), Christchurch Resettlement Services, Auckland Chamber of Commerce New Kiwis programme, Wellington Chamber of Commerce, Canterbury Employers Chamber of Commerce

20 http://www.newkiwis.co.nz/

English Language Partners New Zealand is New Zealand's largest organisation working with migrants and refugees. It operates in 23 locations throughout the country, delivering English language tuition and settlement support to adult refugees and migrants.[21]

The Government, through the Tertiary Education Commission, funds other migrant-specific courses and bridging programmes, such as the Workplace Communication for Skilled Migrants programme run by Victoria University of Wellington, which aim to develop appropriate communication skills and improve cultural understanding of New Zealand workplaces among skilled migrants. Funding for these adult community education programmes, which provide a building block for people who would not otherwise be engaged in education, was reduced in 2009.

Local councils administer a number of programmes for migrants. For example, the Migrant and Refugee Work Experience Programme helps migrants and refugees gain useful local work experience in roles with Wellington City Council.

New Zealand today
Aotearoa i tēnei rā

The global economic turndown has had a significant impact on migration flows worldwide and poses new challenges for migrants. It is having repercussions on migrants' earnings, the remittances they send home and their ability to gain residence.[22]

In New Zealand, while the demand for temporary workers has decreased, export education (international students) continues to increase and expand into new markets.

Concerns about protection of the rights of migrants in New Zealand have been raised by treaty bodies, including CERD and CEDAW, and by the Human Rights Committee in monitoring the ICCPR and ICESCR. Migrant workers' rights were raised in the context of New Zealand's Universal Periodic Review in 2009. It was recommended that New Zealand ratify or consider ratifying the Migrant Workers Convention. One of the themes of the 2009 Durban Review Conference was protecting the rights of migrant workers. The Race Relations Commissioner identified this as one of five themes relevant to New Zealand.

DISCRIMINATION

While discrimination on the grounds of race, colour, and ethnic and national origins is unlawful in a range of public contexts under the Human Rights Act 1993, migrants report that they continue to experience it.[23] Statistics New Zealand's 2008 General Social Survey found that 10 per cent of New Zealanders experience discrimination. The most common grounds were nationality, race, ethnic group or skin colour. Asians experienced the most discrimination.

CHILDREN

Some children migrate to New Zealand with their families and some come independently as international students. Child migrants (defined as those under 18 years of age) are covered by the UNCROC and are entitled to the protection, provision and participation rights it confers, unless they fall within the reservation.[24]

Until recently, children of migrants whose parents' immigration status was unclear were unable to receive early childhood, primary or secondary education. This was changed in the Immigration Act 2009. However, certain practical barriers remain, such as the fear of being identified as being unlawfully in New Zealand.

INTERNATIONAL STUDENTS

The results of a 2007 survey of international students, for the Ministry of Education and Department of Labour, found that although experiences of discrimination were infrequent, three-quarters of respondents said they had experienced some discrimination on campus by other students. Approximately 50 per cent had experienced discrimination by teachers, administrative or support staff and other international students.

21 For example, the Home School Partnership

22 Some temporary workers on the work-to-residence scheme have failed to gain residence due to employers giving preference to New Zealand workers.

23 Further information on discrimination can be found in the chapter on Equality and Freedom from Discrimination.

24 The UNCROC is considered in more detail in the chapter on Rights of Children and Young People.

The number of international students approved to study in New Zealand in 2008–09 was 73,926. In 2009, there was a 6 per cent increase in international fee-paying student enrolments compared with 2008.

In 2009 15,462 international students were enrolled in primary, intermediate and secondary schools, making up approximately 16 per cent of all international students in New Zealand. [25] The majority of these students are under 18 years of age, and are therefore protected by the rights set out in the UNCROC, including the right to be raised by their parents or legal guardians, to be protected from harm, and to preserve their identity. Concerns have been raised about the quality of care and protection afforded to young international students. The recent revision of the Code of Practice for the Pastoral Care of International Students is a welcome development. However, pressures from schools to allow enrolment of young children and the desire of parents to access a New Zealand education for their children risk compromising the rights and overall well-being of young international students.

In 2009, Human Rights Commissioners at the annual Australia-New Zealand Race Relations Roundtable noted that the human rights of international students were a major issue in both countries. They viewed recent instances of racial harassment, abuse and violence directed at international students as symptoms of a range of human rights issues that need to be addressed. These include rights to non-discrimination; equality of treatment; security of the person; access to justice, housing, and information; freedom of religion and culture; and labour rights.

TEMPORARY/SEASONAL WORKERS

Complaints to the Human Rights Commission since 2005 suggest that some seasonal workers continue to face discrimination, difficult work conditions (which sometimes fall below minimum standards) and difficulty accessing social services. Temporary workers are also often unable to bring their families to New Zealand.

The Recognised Seasonal Employer (RSE) policy was introduced in 2007 to meet labour shortfalls in the fruit picking sectors, generate income for Pacific Island countries and discourage overstaying. The policy allows employers in the horticulture and viticulture industries to recruit temporary workers from Pacific Island countries if there are no New Zealand workers available for these positions. In 2008–09, 7617 RSE applications were approved – almost double the 4426 approvals in the first year the scheme operated.

In 2010 the Department of Labour commissioned an evaluation report of the RSE scheme. [26] It identified the following positive impacts from the scheme for employers:

- Employers in the horticulture and viticulture industries have access to a reliable and stable seasonal workforce
- Labour supply crises pre-RSE have been avoided and employers can now plan and manage their business with confidence
- Significant productivity gains for employers began to emerge in the second season.

The following positive impacts for RSE workers were identified in the RSE evaluation report:

- Workers were able to develop skills.
- Workers were generally satisfied with the amount they earned over 4–7 months, as this was more than they could earn in their home countries.
- Workers from Vanuatu, Tonga and Samoa benefited financially from working in New Zealand.
- Workers' earnings enhanced the wellbeing of their families and enabled individuals and communities to pursue business ventures.
- Many workers engaged with the local community through church, sports, and cultural activities.

Although steps have been taken to address some early issues with the scheme, key issues previously identified are raised again in the RSE evaluation report. These

25 Ministry of Education (2010), *International student enrolments in New Zealand 2003–2009* (Wellington: MoE), May. Accessible online at http://www.educationcounts.govt.nz/publications/international/15260/76293

26 Evalue Research (2010), *Final Evaluation Report of the Recognised Seasonal Employer Policy (2007–2009)* (Wellington: DoL), accessible online at http://www.dol.govt.nz/publication-view.asp?ID=327

include accommodation, particularly costs and overcrowding; lack of awareness and understanding of rights and obligations; fears of adverse consequences of complaining; and unfavourable reactions from the host community.

As a result of changes made to immigration policy in 2009, migrant workers on supplementary seasonal employment (SSE) [27] are not eligible to support their partner and children for permits under visitor, student or work policies.

The global economic downturn and a rise in unemployment have put pressure on the Government to limit the flow of migrant workers. A key policy principle for temporary work is protecting opportunities for New Zealanders. Many temporary workers have not been able to renew their permits, despite already being employed, because their employers must first prove that suitable New Zealand workers are unavailable.

Some migrants on work-to-residence visas and permits have been unable to fulfil their employment obligations and achieve residence. The work-to-residence scheme allows people wanting to live in New Zealand to test their skills against the local labour market. If they cannot find work, they are required to leave. Immigration New Zealand issued 2261 work-to-residence visas and permits in 2009, despite 44 per cent of those migrants already in New Zealand on such visas failing to find employment.

EDUCATION

In 2009, the Government announced funding cuts that will adversely impact on migrants' ability to access educational services. For example, the 'migrant study grant' has been abolished from 2010. This allowed courses such as the Workplace Communication for Skilled Migrants programme to operate, and opened tertiary study opportunities to migrants. Funding for adult community-education classes, which provide a building block for people who would not otherwise be engaged in education, has been dramatically reduced.

In 2010, the Government announced that it was considering implementing a two-year stand-down period before new permanent residents can access student loans to fund tertiary studies in New Zealand. This would create a significant barrier to migrants accessing tertiary education services.

QUALIFICATIONS

A third of new migrants have university qualifications. [28] However, many highly skilled migrants (in particular those from non-English-speaking backgrounds) continue to face serious problems finding a job because their qualifications are not accepted in New Zealand.

ASTRONAUT MIGRATION

'Astronaut' migration [29] is a migration pattern first identified in the 1980s. It refers to migrants who, after taking up residence, spend lengthy periods out of New Zealand.

Typically, astronaut migrants return to their country of origin to work or do business, leaving their spouses and children in New Zealand. The small amount of research literature available suggests that astronaut migrants tend to be from North Asia and that the practice is a consequence of an array of factors, including migrants' inability to find suitable employment in New Zealand.

Astronaut families may face particular issues with language barriers, barriers to employment, loneliness and isolation. In Christchurch in 2010, a Korean astronaut family of four committed suicide. It is understood that isolation and the effect of the economic downturn were significant factors in this tragedy.

EXPLOITATION OF 'ILLEGAL' MIGRANT WORKERS

While trafficking and exploitation of illegal migrant workers constitute serious criminal offences, there is no

27 SSE policy allows employers to supplement their workforce with workers from overseas at times when their labour demand is greater than can be met by the available New Zealand workforce.

28 Waikato District Health Board (2008), Waikato District Health Board Health needs assessment and analysis (Hamilton: WDHB), HNA 2008, http://www.hiirc.org.nz/page/16383/waikato-district-health-board-health-needs/?tab=827&contentType=167

29 Also referred to as 'Goose' or' Satellite' migration

systematic process for identifying these issues.[30] Where they have been uncovered, it has mostly been in the horticulture, hospitality and sex industries.

Conclusion
Whakamutunga

Migrants in New Zealand represent a rich diversity of people and backgrounds. They come to New Zealand for a variety of reasons, including work, marriage, family and education. Most adjust well to their new home. In 2010, the Department of Labour's 'Longitudinal Immigration Survey' showed that new migrants adjusted well, and that more than 90 per cent were very happy with life and settled after 18 months of living in New Zealand.[31]

However, for some migrants settlement continues to be a difficult process. As strangers to a new society, they may be unfamiliar with the national language, laws and practice and thus be less able than others to know and assert their rights. They may face discrimination and be subjected to unequal treatment and unequal opportunities at work and elsewhere. 'Astronaut' migrants also face significant settlement issues, including language barriers, barriers to employment and isolation.

Since 2004, two major developments have impacted on the rights of migrants in New Zealand: an increased emphasis on successful settlement support through the central, local government and voluntary sectors; and the enactment of new immigration legislation.

The Immigration Act 2009 introduces a universal visa system that aims to maintain flexibility in managing people's travel to, and stay in, New Zealand. The act also provides alternatives and safeguards around the use of detention. While these are positive aspects, the act also gives rise to a number of human rights concerns, which will require close monitoring. These include:

- widening of the information that can be deemed classified and allowing its use in immigration determinations
- continuation of the exemption from the Human Rights Act of immigration law, policies and practices.

The Government has taken a number of positive steps to support migrant settlement, including:

- the adoption of National and Regional Settlement Strategies and Action Plans
- the introduction of the 'Settling In' programme
- the establishment of 19 settlement-support offices
- the continuation on a permanent basis of Language Line.

A number of migrant resource centres and newcomers' networks have been established by local communities.

The adoption of the Recognised Seasonal Employers Scheme (RSE) in 2007 and the introduction of the Supplementary Seasonal Employment (SSE) permit in 2009 provide workers from the Pacific with access to the New Zealand labour market and aim for better protection of the rights of these workers.

The rights of migrants are generally well protected under New Zealand law and policy. Employment laws protect the rights of migrant workers and there are effective enforcement mechanisms.

Nevertheless, there continue to be a number of significant challenges facing migrants, such as discrimination and harassment, particularly against international students and Asians in New Zealand; barriers to employment; employment conditions, particularly for some temporary migrant workers; access to education; access to social services; and access to justice.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to advance the rights of migrants:

Public awareness

Promoting public awareness of the economic, social and cultural contributions made by migrants.

Employment

Addressing barriers to the employment of migrants, and ensuring the rights of temporary, seasonal and

30 Cases are dealt with by the police and immigration authorities when they come to light.

31 Department of Labour (2009), New Faces, New Futures: New Zealand (Wellington: DoL). Accessible online at ww.dol.govt.nz/publications/research/lisnz/index.asp

rural workers and those on work-to-residence visas are respected.

Discrimination
Countering the relatively high incidence of discrimination and harassment experienced by international students and Asian migrants.

Education
Increasing access to ESOL and bridging programmes for migrants.

Children
Protecting the rights of migrant children – both those who migrate to New Zealand with their families and those coming to New Zealand as international students.

Immigration act
Monitoring the implementation of the new Immigration Act 2009.

21. Rights of Refugees

Tikanga o ngā Tāngata Rerenga

Everyone has the right to go to another country and ask for protection if they are being mistreated or are in danger.

Universal Declaration of Human Rights, Article 14

Introduction
Timatatanga

The human rights of refugees are specified in the 1951 United Nations Convention Relating to the Status of Refugees (the Refugee Convention) and its 1967 protocol. The International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment 1984 (CAT) also contain provisions relevant to refugees. New Zealand has ratified all three treaties and they are reflected in a variety of domestic legislation. For example, the Crimes of Torture Act 1989 was enacted as a precursor to New Zealand's ratification of the CAT; the New Zealand Bill of Rights Act 1990 (BoRA) affirms New Zealand's commitment the ICCPR; and the Immigration Act 1987 was amended in 1999 to ensure that New Zealand met its obligations under the Refugee Convention.[1]

Since the Commission's review of human rights in 2004, new immigration legislation has been enacted. The Immigration Act 2009 came into force in 2010. One objective of the act is to ensure compliance with New Zealand's 'immigration-related' international obligations.[2] Therefore, the act not only continues the csonvention regime introduced in 1999, but also codifies certain obligations under CAT and the ICCPR.

Article 1(a2) of the Refugee Convention defines a refugee as:

> **[A person who] … owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.**

In the New Zealand context, refugees fall into a number of categories: quota or mandated refugees, spontaneous refugees or asylum seekers, and family members of refugees resident in New Zealand. Spontaneous refugees are people who claim refugee status on arriving at the border or after entering New Zealand. Typically, people in this situation arrive without papers, or claim refugee status before or after the expiry of a temporary permit. They can be divided into those awaiting a decision on their refugee status and those who have already been granted refugee status (when they become known as convention refugees).

Quota refugees are recognised as refugees by the United Nations High Commissioner for Refugees (UNHCR). They are chosen by the New Zealand Government for resettlement in New Zealand while still overseas. They are selected on the basis of need and come from a variety of backgrounds: some having spent time in refugee camps, others coming to New Zealand from their home countries or an initial country of resettlement. New Zealand is one of only 21 countries which accept an annual quota of refugees for resettlement.[3] New Zealand is one of 10 countries considered by UNHCR as core resettlement countries.[4]

A small number of people are also accepted annually as New Zealand residents under the Refugee Family Support category. This came into effect in 2007, replacing the Refugee Family Quota (RFQ) policy which operated on a 'ballot' system. The current policy allows some former refugees without family members in New Zealand (subject to certain criteria) to apply to sponsor relatives to settle in New Zealand. Up to 200 places are available per year.

1 The convention is appended as schedule 1, Immigration Act 2009

2 section 3(2d), Immigration Act 2009

3 Since 1970, New Zealand has accepted more than 20,800 quota refugees.

4 Australia, Canada, Denmark, Finland, the Netherlands, New Zealand, Norway, Sweden, the United Kingdom and the United States currently accept 99 per cent of the refugees who are annually resettled.

Jayne Bright, (left front) gives advice on the best way to plant potatoes at the community garden set up in the grounds of the Refugees as Survivors building in Mangere, Auckland.

In addition, former refugees have the same rights as other residents and citizens to access places under the general immigration residence policy, such as the 'Family Sponsored Stream'. These people are not technically refugees, but rather relatives of refugees who have already settled in New Zealand. The cost of their resettlement is met by their families and/or sponsors.

One group unable to claim refugee status under the convention, because they do not meet the definition of refugee, are those fleeing environmental disasters. [5] Nevertheless, these people still need international protection. Such displacement is becoming more common with the impact of climate change. It is likely to have increasing significance for New Zealand, as a number of Pacific countries face the threat of losing land to rising sea levels as a result of climate changes.

International context
Kaupapa ā taiao

Rights in the international human rights treaties apply to everyone, without exception. The two main treaties are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The ICCPR requires ratifying states to protect the civil and political rights of people in their jurisdiction, without discrimination.[6] It includes the right of aliens lawfully in a state that is party to the covenant not to be expelled, other than by a lawful process and only after their case has been heard by a competent authority.[7] It also reinforces the right to life and not be subjected to cruel and unusual punishment.

The CAT requires that a ratifying state shall not refoule (expel, return or extradite) a person to another state where there are substantial grounds for believing that they would be in danger of being tortured. This includes not sending a person at risk of torture to a country where, although they may not be immediately at risk, they might be sent on to a country where they would be. The Convention on the Rights of the Child (UNCROC) stipulates that a child should not be separated from their parents, except when determined by competent authorities. [8] New Zealand ratified the CAT in 1989 and UNCROC in 1993.

Although New Zealand has a credible record of ratifying human rights treaties, it has not ratified the Convention relating to the Status of Stateless Persons.[9] A stateless person is one who is not considered a national by any state under the operation of its law. [10]

The Refugee Convention provides a mechanism for recognising the legal status of refugees. [11] It prohibits the return of refugees to countries where they will be in danger of persecution (the concept of non-refoulement) and requires that refugees are provided with social and economic rights on a non-discriminatory basis. Refugees should therefore be able to access rights such as work, housing and education on the same basis as other citizens.

Depending on the right involved, the Refugee Convention defines the non-discriminatory treatment of refugees as:

- being accorded the same treatment as nationals of a country in relation to rationing, elementary education, public relief and social security

5 UNHCR (2009), Climate Change Natural Disasters and Human Displacement: A UNHCR Perspective, Environment, 14 August. For further UNHCR comment on climate change, see www.unhcr.org/climate

6 New Zealand ratified the ICCPR and the ICESCR in 1976.

7 Also Article 32(2) of the Refugee Convention

8 Article 3 of UNCROC provides that the best interests of the child must be a primary consideration in administrative decisions affecting the rights of the child.

9 The New Zealand Government acceded to the Convention on the Reduction of Statelessness in 2006.

10 The Citizenship Act prevents people born in New Zealand to stateless persons from being stateless and provides for a grant of citizenship in special cases. New Zealand refugee jurisprudence specifically recognises an overlap between the grounds in the 1954 Convention and the Refugee Convention. If a stateless person is at risk of persecution because of one of the reasons in the Refugee Convention, they are recognised as a refugee.

11 A grant of refugee status is not the same as citizenship. It is recognition of a temporary status pending a durable solution. See Kinley D (editor), (1998), Human Rights in Australian Law: Principles, Practice and Potential, The Federation Press, Sydney

- being treated no less favourably than aliens generally in relation to employment, housing and education.

This limits the protection against discrimination to the basic minimum. This distinction is largely theoretical in the New Zealand context, since people who have been granted refugee status (and subsequently permanent residence) have the same rights as other citizens. The situation is less satisfactory for asylum seekers who are not formally recognised as refugees - including those in the process of appealing their status determination. These refugees often receive only the minimal support necessary to meet convention requirements (for example, access to emergency medical treatment, but not to specialist services).

In addition to the treaties, the United Nations High Commissioner for Refugees (UNHCR) was established in 1950.[12] The executive committee of the UNHCR issues authoritative interpretations of the Refugee Convention and the accompanying protocol ('Excom Conclusions'). The executive committee also produces guidelines on the standards of treatment that apply to refugees (for example, in relation to conditions of detention).

The UNHCR, in its guidelines, states that there should be a presumption against detention of asylum seekers.[13] Decisions about detention must be made in a non-discriminatory way and be subject to judicial or administrative review. This is to ensure that detention continues only where necessary, with the possibility of release where no grounds for its continuation exist. Conditions of detention are dealt with in the UNHCR guidelines. These include the opportunity to receive appropriate medical treatment and psychological counselling, access to basic necessities (for example, beds, shower facilities and basic toiletries) and access to a complaints mechanism. The guidelines also contain specific provisions relating to children, women and vulnerable persons.

New Zealand context
Kaupapa o Aotearoa

The Immigration Act 2009 aims to manage immigration in a way that balances the national interest and the rights of individuals. It seeks to strengthen border control while ensuring compliance with immigration-related international obligations, particularly those under the Refugee Convention, CAT and the ICCPR.

Part 5 of the act ensures that New Zealand meets its obligations under the Refugee Convention.[14] The changes include the creation of a new Immigration and Protection Tribunal. This replaces four other bodies: the Refugee Status Appeals Authority, the Removal Review Authority, the Residence Review Board and the Deportation Review Tribunal. The tribunal will have jurisdiction over claims under Article 3 of CAT and Articles 6 and 7 of ICCPR. Other features include the discretion to refuse a claim if the person has, or could have sought, protection elsewhere;[15] a statutory requirement to apply the internal protection alternative; and exclusion of claims based on the absence of medical treatment facilities in the country of origin.[16]

The act also continues the formalisation from the 1987 act of an advance passenger-screening process. This reflects the global move towards increased national security measures. The screening process is used to identify persons who present a risk and those who do not meet immigration requirements, before they board a flight to New Zealand.This process has led to people being refused permission to board if their documentation is incorrect or incomplete. In 2010 the Government, in its reply to the list of issues to be taken up in connection with the consideration of New Zealand's fifth periodic report under the ICCPR, stated:

> **The systems are not designed to impede or circumvent the asylum and protection**

12 UNGA Res.428(V) (1950)

13 ExCom Conclusion 44 UNHCR (1999)

14 For more on the relationship between the Refugee Convention and the new complementary protection regime, see Haines R QC (2009), 'Sovereignty under challenge – the new protection regime in the Immigration Bill 2007, *NZ Law Review*, Part 2, p 149

15 The Immigration Act 2009 provides that this can occur only where there is an international agreement to this effect.

16 Haines (2009), p 170

process. Rather they facilitate efficient and effective processing of all passengers on entry to, and through, New Zealand.[17]

However, the advance passenger screening process has contributed to a dramatic drop in the number of people claiming asylum in New Zealand. It arguably contravenes the principle of non-refoulement if the country where they were trying to board the flight is not a party to the Refugee Convention, the ICCPR or CAT.

In 2007, the Convention on the Elimination of Racial Discrimination (CERD) committee recommended that New Zealand put an end to the practice of detaining asylum seekers in correctional facilities.[18] In 2009, the CAT committee noted "with concern" that asylum seekers and undocumented migrants continued to be detained in low security and correctional facilities.[19] In 2010, the UN Human Rights Committee criticised New Zealand for permitting the detention of asylum seekers or refugees in correctional facilities, together with convicted prisoners.[20]

The 2009 act significantly restricts the situations in which refugees or protected persons can be detained.[21] It removes the ability of foreign nationals to challenge their detention through the District Court, but allows habeas corpus writs to challenge the legality of their detention.

Asylum seekers and protected persons will be able to be held in correctional facilities only under very specific conditions, and they must be treated in accordance with Article 10 of the ICCPR.[22] This is achieved by regulations made under section 200(1d) of the Corrections Act 2004, which apply to people detained in prisons under the Immigration Act. Under Regulation 184, Immigration Act detainees are to be treated the same as accused persons (for example, they are to be allowed visits and phone calls, wear their own clothes, and be separated from other prisoners where practicable).

The most recent legislation intended to address the threat of terrorism – the Terrorism Suppression Amendment Act 2007 – has been criticised as incompatible with aspects of the ICCPR. In particular, there has been criticism of the introduction of provisions which will allow courts to receive or hear classified information against groups or individuals designated as terrorist entities in their absence.[23] The Immigration Act 2009 allows for the use of classified information in refugee determinations, and has widened the type of information which can be deemed to be classified. Even with the protection of a 'special advocate' mechanism, this is particularly problematic in the refugee context, given the potential source of the information. The CAT committee expressed concern that the use of classified information to detain asylum seekers and undocumented migrants could result in violation of their right to due process and expose them to removal to countries where they may be at risk of torture.[24] The UNHCR prohibits the use of classified information when considering refugee determinations.

The act also removes the right to appeal many decisions by the minister or an immigration officer. The removal of such checks and balances has the potential to result in a system where injustices can not be challenged and fundamental rights are breached. Section 187(2d) removes the right to appeal when the minister or officer determines that a person submitted false or misleading information or withheld relevant information that was

17 CCCPR/C/NZL/Q/5/Add.1, 27 January 2010, para 107

18 CERD/C/NZL/CO/66, 10 August 2007, para 24

19 CAT/C/NZL/CO/5, 14 May 2009, para 6

20 CCPR/C/NZL/CO/5, 25 March 2010, para 16

21 Detention is possible only if the person is liable for deportation under section 164(3) IA 2009, because Articles 32.1 or 33 of the Refugee Convention apply, or where a protected person can be sent to a country where they are not in danger of torture or death. Even this has led to criticism by the UN Human Rights Committee (CCPR/C/NZL/CO/5 25 March 2010).

22 See also the case of Chief Executive of the Department of Labour v Hossein Yadegary & Anor [2008] NZCA 295 for exceptional circumstances that would permit continued detention.

23 CCPR/C/NZL/CO/5, 25 March 2010, para 13

24 Haines (2009), para 6

potentially prejudicial. This section fails to take into account the realities of the refugee situation, where information is often scarce, and where claimants are often wary of authorities, remain fearful of persecution and fear for the safety of their family.

It remains unclear what the impact of this new legislation will be. The practical implications of the Immigration Act 2009 and its corresponding policies will need to be monitored over time.

The right to freedom from discrimination is protected by the BoRA and the Human Rights Act 1993 (HRA). Section 19 of the BoRA makes it unlawful for the public sector to discriminate on any of the prohibited grounds in the HRA (unless the restriction can be justified under section 5 BoRA). Part 2 of the HRA makes it unlawful to discriminate in certain areas of public life (including employment, provision of goods and services, accommodation, and access to public places and educational institutions).

Section 392 of the act continues to exempt the act and immigration regulations and instructions made pursuant to it from the Human Rights Act and the jurisdiction of the Human Rights Commission. Section 392(3) explains that "immigration matters inherently involve different treatment on the basis of personal characteristics".

In 2010 the Human Rights Committee recommended, in its concluding observations relating to New Zealand's fifth periodic review under the ICCPR, that the Government should "consider extending the mandate of the New Zealand Human Rights Commission so that it can receive complaints of human rights violations related to immigration laws, policies and practices and report on them".[25]

New Zealand today
Aotearoa i tēnei rā

New Zealand is one of only 21 countries that provide for an annual quota of refugees. New Zealand accepts 750 refugees a year under its quota programme. The number of refugees accepted annually has remained static since 1987. Of the countries which have quota programmes, the United States and Canada accept the most refugees. However, New Zealand has one of the highest rates of acceptance in the world proportionate to population.

New Zealand's quota programme generally focusses on the needs and priorities identified by the UNHCR under the Women at Risk, Medical/Disabled, and UNHCR Priority Protection subcategories. A portion of the quota is allocated to family-linked cases. These cases may be better dealt with under other immigration policy focussed on family reunification, allowing the quota to be entirely focussed on those refugees identified as being at greatest need of protection.

From 1999 to 2008, 7843 people from 56 countries were approved for New Zealand residence through the Refugee

TOP FIVE COUNTRIES OF ORIGIN FOR QUOTA REFUGEES 2004–09

2004–05	2005–06	2006–07	2007–08	2008–09
Afghanistan	Burma/Myanmar	Burma/Myanmar	Burma/Myanmar	Burma/Myanmar
Sudan	Iran	Afghanistan	Bhutan	Bhutan
Burundi	Republic of Congo (Brazzaville)	Democratic Republic of Congo	Eritrea	Iraq
Ethiopia	Iraq	Sudan	Iraq	Democratic Republic of Congo
Somalia	Afghanistan	Rwanda	Afghanistan	Colombia
Bhutan				

Human Rights Commission, Race Relations Report 2010

25 CCPR/C/NZL/5, 4

NATIONALITIES OF REFUGEES SETTLED IN NEW ZEALAND (1944–2009)

1944	Polish children and adults
1949–1952	Displaced persons from Europe
1956–1958	Hungarian
1962–1971	Chinese (from Hong Kong and Indonesia)
1965	Russian Christian 'Old Believers' (from China)
1968–1971	Czechoslovakian
1972–1973	Asian Ugandan
1974–1991	Bulgarian, Chilean, Czechoslovakian, Hungarian, Polish, Romanian, Russian Jewish, Yugoslav
1977–2000	Cambodian, Lao and Vietnamese
1979–1989	Iranian Baha'i
1991	El Salvadorian, Guatemalan
1985–2002	Iraqi
1992–2006	Afghan, Albanian, Algerian, Assyrian, Bosnian, Burundi, Cambodian, Chinese, Congolese, Djibouti, Eritrean, Ethiopian, Indonesian, Iranian, Iraqi, Kuwaiti, Libyan, Khmer Krom (Cambodian Vietnamese), Liberian, Burmese/Myanmarese, Nigerian, Pakistani, Palestinian, Rwandan, Saudi, Sierra Leone, Somali, Sri Lankan, Sudanese, Syrian, Tanzanian, Tunisian, Turkish, Ugandan, Vietnamese, Yemeni, Yugoslav
2006–2007	(main nationalities) Afghan, refugees from Republic of Congo (Congo-Brazzaville) and Democratic Republic of Congo, Burmese/Myanmar
2007–2009	Same as previous period plus Iraqi, Colombian, Eritrean, Ethiopian, Bhutan, Indonesian, Nepalese

Quota Programme. The largest number of quota refugees over this period came from Afghanistan, Myanmar and Iraq.[26]

RESETTLEMENT

In line with international obligations, effective resettlement support is required to ensure that refugees enjoy every opportunity to lead a full life and contribute to New Zealand's future prosperity. Successful resettlement also requires community understanding of cultural and belief systems, the backgrounds of refugees and the challenges they face in settling into their new homeland.

Convention refugees

Settlement support is vital for all refugees. Convention refugees (asylum seekers) and family members of refugees resident in New Zealand do not receive the same level of settlement support as quota refugees. A minimal level of advice and assistance is provided through Settlement Support New Zealand. Immigration NZ has produced a settlement booklet, available in several languages, designed for convention refugees. This is in contrast to

26 Department of Labour (2009), *Quota Refugees in New Zealand Approvals and Movements* [1999–2008], Wellington:DoL, p 3. Accessible online at http://dol.govt.nz/publications/research/quota-refugees/quota-refugees.pdf

quota refugees, who receive significant and ongoing settlement support.

Quota refugees

Quota refugees receive the following support:

- volunteers, trained by Refugee Services Aotearoa, assigned to families and available for the first year of settlement.
- access to a 'resettlement grant' (convention refugees are entitled to this only if refugee status has been granted within one year of their arrival in New Zealand)
- an orientation programme at the Mangere Refugee Resettlement Centre, which includes language and literacy tuition
- automatic eligibility for Housing New Zealand housing on leaving the Mangere Reception Centre.

On arrival in New Zealand, quota refugees undergo a six-week orientation programme at the Mangere Refugee Resettlement Centre in Auckland. Information is provided about living in New Zealand and the settlement services available outside the reception centre. The Government funds the provision of education, health and social support services at the centre. The Department of Labour manages the centre and the orientation programme to ensure that quota refugees are linked into the appropriate follow-up services after they leave. The AUT University's Centre for Refugee Education, located in the Mangere centre, provides an education programme. Students are given the opportunity to develop English-language, literacy and other skills. Health and counselling services are also provided.

Refugee Services Aotearoa New Zealand (Refugee Services) is the key NGO contracted by the Department of Labour to deliver services to quota refugees for the first year after they leave the centre. Refugee Services provides advice, information and advocacy, crisis intervention, home-based family support, community orientation and referrals services, through social workers, cross-cultural workers and trained volunteers. Refugee Services also works with Housing New Zealand to find housing for quota refugees.

The Ministry of Social Development provides a weekly allowance for resettled refugees. When refugees leave the Mangere centre, they are eligible to receive an emergency benefit at the same rate as benefits provided to unemployed New Zealanders. A re-establishment grant is provided for assistance with purchasing of household items.

Since 1997, the Wellington Community Law Centre has co-ordinated a Refugee and Immigration Legal Advice Service (RILAS), which provides information, advice and assistance to refugee and migrant communities seeking reunification with family members. Over the last decade, RILAS has undergone substantial growth, with hundreds of clients seen each year. In partnership with refugee communities and community organisations (such as the Refugee Family Reunification Trust, Refugee Services, Refugees as Survivors and Changemakers Refugee Forum), RILAS is run by Wellington-based lawyers and law students.

A large part of the work of RILAS is assisting former refugees with family reunification applications, via either UNHCR or Immigration New Zealand processes.

Volunteer advocates assist refugee families to untangle complex policy criteria to determine whether family members can join them in New Zealand. Applications can cost in excess of NZ$2000 (fees, medical certificates, passports, courier costs, translations etc), so advocates also help to ensure that applications meet requisite deadlines and contain the evidence required to verify family relationships.

Volunteer solicitors provide support for refugee families by negotiating with Immigration NZ, support clients to find other avenues when applications are declined, and assist with appeals.

REFUGEE VOICES

In recent years the Department of Labour has supported a number of initiatives to "strengthen refugee voices" in order to provide opportunities for refugees to offer their perspectives on government services. Each year the department funds four regional refugee-resettlement forums of government, non-government and community stakeholders to discuss successes and challenges for refugee resettlement in the region. These forums are jointly organised by Refugee Services Aotearoa and the Auckland Refugee Community Coalition, the Waikato Refugee Forum, the Wellington Changemakers Refugee Forum and the Canterbury Refugee Council. Issues that cannot be resolved regionally and that require a response from government agencies are raised at the annual National Refugee Resettlement Forum, hosted by the Department of Labour. The two-day forum involves international agencies (UNHCR, the International Organisation for Migration (IOM) and the Red Cross), government agencies, NGOs and a large number of refugee community members from the regions.

Apart from these regional groupings, a New Zealand National Refugee Network was established in 2009 by existing refugee groups to create a stronger national voice, with the policy of "nothing about us, without us".

The second Refugee Health and Wellbeing Conference took place in November 2009 – 21 years after the first. It provided an opportunity to review developments and achievements since then, to identify the gaps and to determine what needs to happen next. Six key themes were identified at the conference:

- **There needs to be a single vision and policy for refugee resettlement, with national goals and standards by which to measure success.**
- **Resettlement support should be the same for all types of refugees.**
- **Services must be delivered on a whole-of-government basis in a nationally consistent manner.**
- **Policies and services must be rights-based rather than needs-based.**
- **Refugees need to be at the centre of policy development and service delivery.**
- **Government and non-government agencies need to go through a process of transformational change to fully include refugees in their decision-making processes and service delivery, and to work in genuine partnership with refugee communities.**

Ongoing settlement support

Since 2004, the Government has taken a number of steps to enhance support for migrant and refugee resettlement across agencies under the New Zealand Settlement Strategy. Regional settlement strategies[27] have been developed in the Auckland (2006) and Wellington (2008) regions as collaborations between the Government and local bodies, with contributions from non-government organisations and other stakeholders with settlement-related interests.

The Wellington Regional Settlement Strategy addresses the importance of migrants and refugees building a relationship with Māori. It focusses on welcoming manuhiri (newcomers) to the Wellington region and providing information about the Treaty of Waitangi, regional history and the environment.

The Department of Labour's recently established Catalyst Project aims to produce a cross-sector Refugee Resettlement Strategy for effective selection, orientation, placement and longer-term resettlement delivery. The scope of the strategy will include both asylum seekers and the potential requirement to house mass boat arrivals, and will guide improvements in refugee resettlement. An initial framework is to be agreed by November 2011.

The Ministry of Social Development's Settling In programme works with refugee and migrant communities to help find solutions to meet their needs. The programme was established in 2003 to build relationships between refugee, migrant and host communities, and ensure government policy affecting them is developed in a collaborative way. It aims to:

- identify social-service needs in refugee and migrant communities
- purchase services where available
- develop capacity, skills and knowledge in refugee and migrant communities
- work across government, NGO and community sectors.

The Wellington refugee health and wellbeing action plan has been developed in partnership with the Government and local bodies, non-government organisations and the community to address refugee needs.

For non-English speaking refugees, the most immediate educational need is English for Speakers of Other Languages (ESOL). The government provides funding for some ESOL programmes, and the Ministry of Education administers programmes to improve learning outcomes for refugees. [28]

Refugee communities are increasingly providing settlement support in their own right, including, for example, social work and homework groups. In the knowledge that settlement is more successful and sustainable where refugee communities are involved in the resettlement process, there has recently been increased involvement of communities in government-mandated resettlement activities. For example, refugee community leaders are taken to the Mangere Refugee Resettlement Centre by Refugee Services as part of the orientation programme.

SETTLEMENT CHALLENGES

A number of challenges continue to face refugees settling in New Zealand. These include access to education, respect for different values (including dress codes); access to health; housing; barriers to employment; and family reunification.

Health

Apart from difficulties that also apply to the wider population (such as the length of waiting lists), many refugees experience difficulties with gaining access to interpreters and health professionals trained to respect customary practices. Asylum- seekers not formally recognised as refugees face an extra difficulty in this regard. While they have access to public health doctors, they cannot access specialist services, such as dentists, mental health professionals or optometrists. [29]

The Ministry of Health funds comprehensive health screening for quota refugees and asylum seekers. However, there is no established system for the screening of family members of refugees resident in New Zealand.

There is a need for more mental health services and trained professionals to deal with experiences unique to refugees, such as trauma resulting from torture or anxiety over family reunification. Although various organisations provide services to meet the health needs of refugees, their facilities are often underutilised, as many refugees lack adequate information about such services. Recently some community general practitioners have been closing their books, meaning that newly resettled refugees are unable to access primary health services within their community.

Education

In 2009, the Government announced significant funding cuts that will adversely impact on refugees being able to access educational services. For example, the 'refugee study grant', which has been a significant success as a bridge into tertiary education for refugees, has been abolished from 2010. Funding for adult community education classes, which provide a building block for people who would not otherwise be engaged in education, has been severely reduced.

Employment

Refugees continue to face serious problems finding a job, because their qualifications are not accepted in New Zealand. Other barriers to employment include language; adapting to different work cultures; and employers'

28 For example, migrant and refugee education co-ordinators aim to assist schools in engaging migrant and refugee families in their children's learning; and the 'Computers in Homes' initiative also assists refugees.

29 This is in contrast to many countries – even less affluent EU countries – which guarantee full access to both asylum seekers and refugees. See Danish Refugee Council (2000), *Report on Legal and Social Conditions for Asylum seekers and Refugees in Western European Countries*. Accessible at http://www.english.doc.dk/publications

reluctance to either employ someone from a different cultural background or take a 'risk' with someone they know little about (little documentation of work history). [30]

Housing

Affordable housing of a reasonable standard, in a safe and supportive neighbourhood and accessible to public transport, remains an issue. Refugees and recent migrants may be unaware of relevant laws such as the Residential Tenancies Act 1986 and avenues for complaint if they have concerns about the quality or adequacy of accommodation.

Refugees tend to stay in Housing New Zealand houses 2.5 times longer than non-refugees. Of particular concern is the lack of adequate housing options for refugees, resulting in overcrowding particularly where family reunification has been successful.

Legal aid

Legal aid is available for people claiming refugee status and for immigration matters relating to a refugee's claim or status. However, there is a shortage of legal aid lawyers experienced in refugee matters. [31] As a result of the Immigration Act 2009, legal aid will also be available for foreign nationals in warrant hearings. This is a change from previous immigration legislation, where some legal aid could not be granted to foreign nationals unlawfully or temporarily in New Zealand unless they were refugee status claimants [32]

Family reunification

Family reunification is a fundamental principle of refugee protection. It derives directly from the right of the family to protection by society and the State. [33] The family unit has a better chance than individual refugees of successfully integrating in a new country. In this respect, protection of the family is not only in the best interests of the refugees themselves but also of states. The Department of Labour noted in its publication *Refugee Voices*: [34]

Family reunification is generally a high priority for all refugees. When in a new country of resettlement, refugees often feel a sense of responsibility for those family members still in the former country (or in refugee camps). From the perspective of refugees coming to New Zealand, having family already here can greatly assist the resettlement process. The facilitation of refugee family reunion has the potential to improve resettlement outcomes and reduce adjustment costs for refugees by reducing the emotional and financial strain that results from being apart from family members.

Family reunification continues to be a major concern for refugees in New Zealand. In the past 10 years there have been decreasing avenues available for refugee family reunification, with both the removal of the humanitarian category and stricter requirements under general immigration policy, such as job offer requirements.

The UNHCR refugee quota programme of 750 refugees annually includes a subcategory for 300 family reunion and emergency referrals. The 300 family reunification places are limited to declared spouses and dependent children of refugees who arrived in New Zealand under previous quota intakes and UNHCR referred family-linked cases. Other than between 2003–04 and 2004–05, when relatives of the 'Tampa' refugees arrived, the family reunification subcategory of the quota has not been fully utilised. [35]

A large proportion of refugees settled in New Zealand during 1990–2003 were from East African countries. Since then additional refugees have arrived from Iraq, Cambodia and Afghanistan, and more recently from Myanmar and Bhutan. There is no specific allocation in the Government's latest proposed quota for refugees from East African counties, Cambodia or Afghanistan.

30 The recent economic downturn has resulted in some employers hiring New Zealand applicants over migrants or refugees.

31 Legal Aid Review (2009), Bazley, *Transforming the Legal Aid System, Final Report and Recommendations*, November 2009. Accesible at http://www.justice.govt.nz/publications/global-publications/t/transforming-the-legal-aid-system/

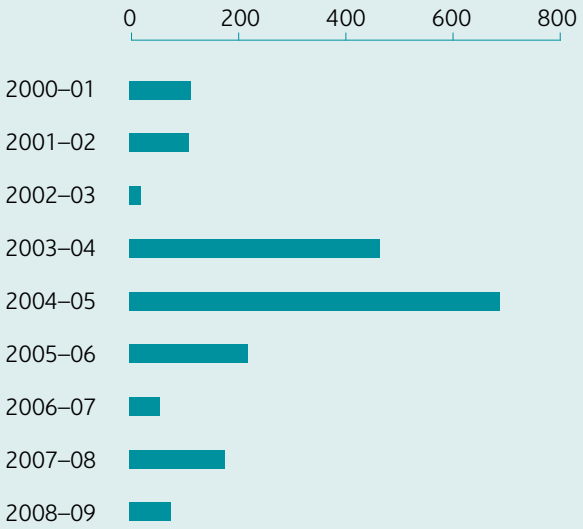
32 Government response to CAT questions (2009): CAT/C/NZL/Q5/Add.1, at paras 46 and 47

33 Article 23 of the ICCPR

34 Department of Labour (2004), *Refugee Voices, A Journey towards Resettlement* (Wellington:DoL), pp 145–146

35 Department of Labour (2009), Presentation at the National Refugee Resettlement Forum, Wellington. 27 May 2009

FAMILY UNION COMPONENT OF THE ANNUAL UNHCR REFUGEE QUOTA PROGRAMME



Groups of people selected under past quotas should be able to complete reunification of family members. This is especially important in light of the limited general immigration policy options for bringing family members to the country, and the reality that the cost of applying under normal immigration policy is often prohibitive for people in this situation.

Former refugees have the same rights as other residents and citizens to access places under the general immigration residence policy, such as the 'Family Sponsored' stream. The 'Sibling and Adult Child' category requires the principal applicant to have an acceptable offer of employment in New Zealand, with minimum income levels. For a person coming from a refugee situation, meeting this requirement is likely to be impossible.[36]

The abolition in 2001 of the 'Humanitarian' category for permanent residence remains of concern. This category enabled former refugees with family members who did not meet normal immigration policy, but who were in circumstances of extreme humanitarian concern, to apply for residence. The eligibility criteria for other categories are very narrow and do not reflect the family reunion realities for refugees, nor do they allow for any assessment of humanitarian need in the determination of residence.

While government immigration policy emphasises nuclear or immediate family relationships, the definitions and understandings of family in many cultures include a wider and more diverse group. The parameters around who could be included in a wider definition of family were examined by the Department of Labour in 1999–2000. The department decided not to expand the definition of family in immigration policy for the following reasons:

- There were limits on New Zealand's resource capacity to respond to the desire for family reunification, especially for extended kinship and clan networks.
- The ability to bring in potentially large family groups would place additional pressure on sponsors and publicly funded services.
- The policy would have to be so flexible to allow for individual family circumstances that it would be difficult to draw any boundaries to the definition.
- Verifying familial links, dependencies and periods spent living together would be extremely resource intensive, lengthy and expensive.
- There was potential for applicants to misuse increased flexibility to bring in as many family members as possible, rather than only close or dependent family.

However, the continued reliance on a narrow definition of 'family' is artificial and precludes a number of refugees from being reunited with their family. The reality of wider family interdependence needs to be acknowledged.[37]

An increasing number of refugees have no options available to them to bring their family members to New Zealand. This is particularly the case for those who came to New Zealand either under the former humanitarian policy or under normal immigration policy (for example, as a spouse or sibling). Under the current system, these people have become effectively 'second-class' refugees, even though their circumstances may be exactly the

36 Many refugees face difficulties in accessing employment, even after they have been living in New Zealand for some time. The most vulnerable family members are also often women who are caring for children on their own.

37 It is common for three generations of family members to live together in very interdependent relationships.

same as refugees coming to New Zealand through other avenues.

The burdensome nature of the immigration process results in significant time delays for refugees between being resettled in New Zealand and being reunified with their families. This contributes to the social and health issues that resettled refugees face, requiring government and community support.

The Department of Labour is undertaking scoping work on improving operational aspects of the family reunification policy, such as procedures that would allow for onshore lodgement of Refugee Family Support category applications, as well as policy and procedures that would allow for requesting medical tests for refugee category applicants once all other criteria have been assessed favourably.

Conclusion
Whakamutunga

The number of quota refugees accepted annually has remained static since 1987. At the same time there has been a dramatic drop in the numbers of asylum seekers. This is due at least in part to the advance passenger-screening process.

Since 2004, two major developments have impacted on the rights of refugees and asylum seekers in New Zealand: development of the New Zealand Settlement Strategy, and the related national and regional action plans and enactment of the Immigration Act 2009.

Quota refugees receive significant and ongoing settlement support. Convention refugees (asylum seekers) and family members of refugees resident in New Zealand receive only a minimal level of advice. Non-government organisations and volunteers make a major contribution to the successful settlement of refugees and provide essential support to asylum seekers.

Refugee communities are asserting a stronger voice, through capacity-building programmes, regional and national forums, and networks. Refugee communities are increasingly providing settlement support in their own right. Recognising that settlement is more successful and sustainable where refugee communities are involved in the resettlement process, involvement of communities in government-mandated resettlement activities has increased.

A number of challenges continue to face refugees settling in New Zealand. These include access to education; health and housing; respect for different values (including dress codes); barriers to employment; and family reunification. The economic recession has further intensified difficulties in some areas, with funding cuts to some programmes.

The Immigration Act 2009 incorporated specific references to obligations under the International Covenant on Civil and Political Rights, the Refugee Convention and the Convention against Torture. The act also significantly restricts the situations under which asylum seekers and protected persons may be detained. While these are positive aspects, the act also gives rise to a number of human rights concerns which will require close monitoring. These include:

- the advance passenger-screening process
- widening of the information that can be deemed classified and allowing its use in refugee determinations
- removal of some previously available appeal rights
- continuation of the exemption from the Human Rights Act of immigration law, policies and practices.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter and has identified the following areas for action to advance the rights of asylum seekers and refugees in New Zealand:

Comprehensive strategy

Completing a comprehensive whole-of-government resettlement strategy for convention refugees, quota refugees and family reunification members, with agreed standards by which to measure the effectiveness of refugee resettlement.

Equal support

Providing asylum seekers and family reunification refugees with similar support and conditions to those provided to quota refugees.

Partnership

Developing a partnership model with government in order to enable refugee communities to fully engage in the development of policy and service delivery.

Family reunification

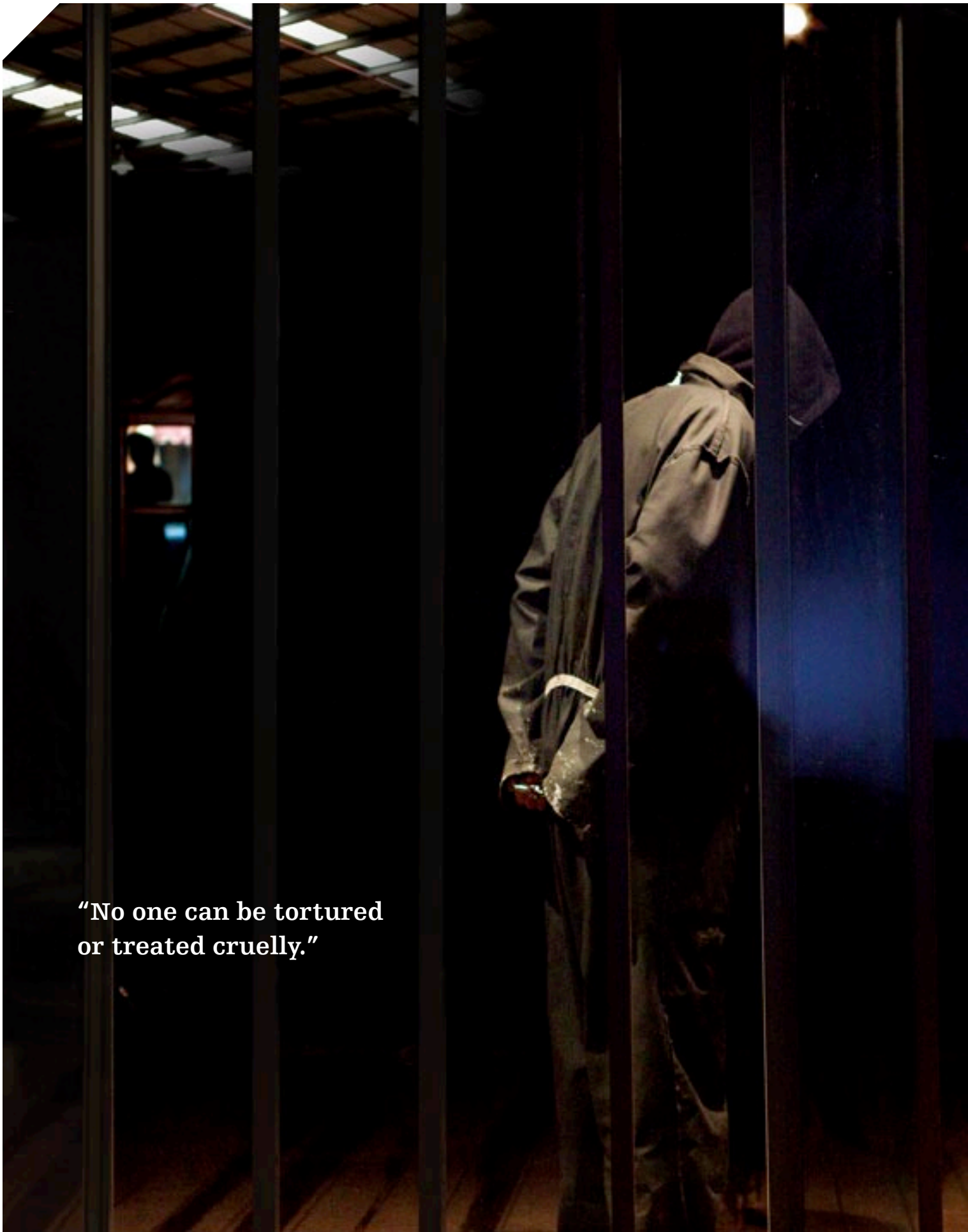
Undertaking a comprehensive review of the Family Reunification Policy.

Immigration Act

Monitoring the implementation of the new Immigration Act 2009.

22. Rights of People Who Are Detained

Tikanga o ngā Tāngata Mauhere



"No one can be tortured or treated cruelly."

No one can be tortured or treated cruelly.

Universal Declaration of Human Rights, Article 5

Introduction
Tīmatatanga

Detention occurs where a person is not free to leave a particular place. In New Zealand, people may be detained in a range of contexts, including prisons, police custody, military detention, mental health facilities, secure care facilities for people with intellectual disabilities, or children and young persons' residences.

The Commission's 2004 review of human rights found that the vulnerability of people in detention was one of New Zealand's most pressing human rights issues. The report found that while New Zealand legislation complies in most respects with international standards, issues of concern were apparent, particularly in relation to the capacity demands on facilities, the safety of detainees, the use of segregation, the need for external monitoring, and the lack of data collection and reporting.

International context
Kaupapa ā taiao

INTERNATIONAL STANDARDS

The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT), the Convention on the Rights of the Child (UNCROC), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention relating to the Status of Refugees (Convention on Refugees) all make provisions for the rights of people in detention, including the following: [1]

- Everyone has the right to liberty and security of the person. [2]
- No one shall be deprived of his or her liberty except in accordance with law. [3]
- Everyone, including refugees, [4] has the right to freedom of movement. [5]
- No one shall be subject to arbitrary arrest or detention. [6]
- Following arrest, a range of rights are recognised in the ICCPR, including the right to be informed of the reason for the arrest and the right to test the lawfulness of any arrest or detention. [7]
- All persons deprived of liberty shall be treated with humanity and respect for the dignity of the human person. [8]
- Accused persons (i.e. remand prisoners) shall, except in exceptional circumstances, be kept separate from convicted persons and be treated in a manner appropriate to their status. [9]
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [10]

1 International human rights instruments are accessible online at the website of the Office of the High Commissioner for Human Rights, http://www.unhchr.ch/. Many of New Zealand's human rights obligations are summarised in Ministry of Foreign Affairs and Trade (2003), *Handbook on International Human Rights* (2nd ed, Wellington: MFAT).

2 UDHR, Article 3; ICCPR, Article 9(1); CRPD, Article 14

3 ICCPR, Article 9(1); UNCROC, Article 37(b); CRPD, Article 14(1)(b)

4 United Nations Convention Relating to the Status of Refugees, Articles 26 and 31 – Note that the latter Article requires that restrictions be placed on the movements of refugees only as necessary.

5 UDHR, Article 13; ICCPR, Article 12(1) (though this Article limits the right of movement to those lawfully within the state territory). Also see CERD, Article 5(d)(i), and CRPD, Article 18.

6 UDHR, Article 9; ICCPR, Article 9(1); UNCROC, Article 37(b); CRPD, Article 14(1)(b)

7 ICCPR, Articles 9(2)–(5); UNCROC, Article 37(d); CRPD, Article 14(2)

8 ICCPR, Article 10(1); CAT, Article 16(1); UNCROC, Article 37(c)

9 ICCPR, Article 10(2)(a)

10 UDHR, Article 5; ICCPR, Article 7; CAT, Article 16(1); UNCROC, Article 37(a); CRPD, Article 15

The Human Rights Commission is the central national preventive mechanism engaged in ensuring New Zealand meets its international responsibilities under the Optional Protocol to the Convention Against Torture (OPCAT).

- No one shall be subjected without his or her free consent to medical or scientific experimentation. [11]
- The State must take all effective legislative, administrative, judicial and other measures to prevent acts of torture. [12]
- The existence of a disability shall not justify a deprivation of liberty. [13]
- The arrest, detention or imprisonment of children shall be used only as a last resort and for the shortest appropriate period of time. [14]
- The State must take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical and mental violence, injury, abuse, neglect and maltreatment by those who have the care of children. [15]
- Young persons accused of criminal offences shall be separated from adults. [16]
- Children who are detained shall be treated in a manner that takes into account the needs of persons of their age and shall have the right to maintain contact with their family. [17]

NON-BINDING INTERNATIONAL STANDARDS

The principles that underpin the instruments discussed above are (subject to any reservation) binding upon New Zealand. In addition to these binding instruments, there are other instruments that provide important guidance on various detention issues.

Relevant international instruments include:

- Standard Minimum Rules for the Treatment of Prisoners
- Basic Principles for the Treatment of Prisoners
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Rules for the Protection of Juveniles Deprived of their Liberty
- Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules')
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Code of Conduct for Law Enforcement Officials
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. [18]

New Zealand context
Kaupapa o Aotearoa

RATIFICATION OF INTERNATIONAL STANDARDS

New Zealand is a party to the ICCPR, CAT, UNCROC and other key human rights treaties, but has made several reservations to the conventions that apply to detention. These concern the mixing of juvenile and adult prisoners; ex gratia payments to people who suffer a miscarriage of justice by being punished, following conviction that is later reversed, or a pardon; and compensation for torture. While work has been undertaken towards removing these reservations, they remain in place.

Optional Protocol to the Convention Against Torture (OPCAT)

The OPCAT entered into force in 2006. It provides for regular, independent visits to all places of detention, with the aim of ensuring that conditions and treatment meet human rights standards, as well as preventing torture and other forms of cruel, inhuman or degrading treatment or

11 ICCPR, Article 7; CRPD, Article 15(1)

12 CAT, Articles 2(1) & 5(1)(a); CRPD, Article 15(2)

13 CRPD, Article 14

14 UNCROC, Article 37(b). See also Article 40(4).

15 UNCROC, Article 19(2)

16 ICCPR, Articles 10(2)(b), 10(3). New Zealand has made a reservation to these Articles. See also UNCROC, Article 37(c).

17 UNCROC, Article 37(c)

18 These documents are accessible online at http://www2.ohchr.org/english/law/index.htm#core

punishment. New Zealand ratified the OPCAT in 2007 and, following the enactment of amendments to the Crimes of Torture Act 1989, established national preventive mechanisms (NPMs) to give it effect.

The Ombudsmen, the Independent Police Conduct Authority (IPCA), the Children's Commissioner and the Inspector of Service Penal Establishments have each been designated as NPMs to inspect and monitor specific categories of places of detention. The Human Rights Commission has been appointed to a co-ordinating role as the designated 'central national preventive mechanism'.

International review

New Zealand has recently been examined by the United Nations Human Rights Council and several other UN treaty bodies on its implementation of its human rights obligations.

The New Zealand Government appeared before the Human Rights Council to present its first report under the Universal Periodic Review mechanism in 2009. The over-representation of Māori in prison (and in the criminal justice system) was one of the issues highlighted in the review and recommendations. [19] Other recommendations related to ensuring the humane treatment of prisoners if prisons become privately managed, and ensuring that all juvenile offenders are held in separate facilities from adults.

In 2009, the Committee Against Torture commented positively on the reviews of corrections and policing legislation which have resulted in improvements to the law in those areas. [20] The committee also welcomed New Zealand's ratification of the CRPD and OPCAT. A range of challenging issues were also highlighted, including: high imprisonment rates and over-representation of Māori in prison; detention of asylum seekers; youth justice issues; investigation and prosecution of complaints; detention conditions; the use of Tasers; human rights training; and data collection.

A number of these issues were reiterated when the UN Human Rights Committee examined New Zealand's compliance with the ICCPR in March 2010. [21] The committee's recommendations included that New Zealand should:

- withdraw its reservations to the ICCPR regarding the mixing of adult and young offenders
- consider stopping the use of Tasers while such weapons remain in use, intensify efforts to ensure that stringent guidelines are adhered to, and undertake research on the effects of Tasers
- closely monitor any measures of privatisation of prisons to ensure that the State's responsibility for guaranteeing the rights of people detained is met
- strengthen efforts to reduce over-representation of Māori in prisons; and increase efforts to prevent discrimination against Māori in the administration of justice
- ensure that asylum seekers and refugees are not detained in prisons or with convicted prisoners.

LEGISLATION

The New Zealand Bill of Rights Act 1990 (BoRA) contains protections for those detained. Section 22 provides that everyone has the right not to be arbitrarily arrested or detained. Section 23 sets out the rights of those who are arrested or detained. In respect of detention, these include the right to be treated with humanity and with respect for the inherent dignity of the person. Section 9 of the BoRA provides the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment. Section 27(1), which provides for the right to natural justice (including fair procedure), and Section 21, which provides protections in relation to search and seizure, are also relevant to the issue of detention.

The UN Committee against Torture has expressed concern that the BoRA is not a supreme law that takes higher

19 Human Rights Council (2009), Report of the Working Group on the Universal Periodic Review: New Zealand (12th session: A/HRC/12/8/Add.1). Accessed 22 November 2010 from http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-8-Add1.pdf

20 UN Committee Against Torture (2009), Concluding Observations of the Committee against Torture: New Zealand, (42nd session: CAT/C/NZL/CO/5)

21 Human Rights Committee (2010), Concluding observations of the Human Rights Committee: New Zealand, (98th session: CCPR/C/NZL/CO/5)

status than other domestic law. This "may result in the enactment of laws that are incompatible with the convention". [22]

The Crimes of Torture Act 1989 also applies to all forms of detention. In 2006, the act was amended to meet the requirements of the OPCAT. A new part 2 of the act was inserted to provide for visits by the United Nations subcommittee and for the designation of NPMs and a central NPM.

Other legislation and policy relating to particular forms of detention are discussed further below.

PRISONS

There are currently 20 prisons under the remit of the Department of Corrections. The 17 men's prisons and three women's prisons can accommodate up to 10170 prisoners. On average they hold around 8500 prisoners.

Source: Department of Corrections www.corrections.govt.nz

New legislation

The Corrections Act 2004, which came into force on 1 June 2005, repealed and replaced the Penal Institutions Act 1954. Positive features of the new legislation include:

- the explicit reference in the act's purpose statement (Section 5) to compliance with the United Nations Standard Minimum Rules for the Treatment of Prisoners and the inclusion of prisoners' minimum entitlements in the legislation
- the clear reference to the role of the corrections system in providing rehabilitation and reintegration
- the expansion of complaints provisions and their elevation to primary legislation
- improvements to the disciplinary offence regime
- more regular review of decisions to segregate prisoners for security or protection reasons.

The Corrections Act also ended contractual arrangements that allowed for the private management of prisons, which had been a matter of concern to the UN Human Rights Committee when it examined New Zealand's compliance with ICCPR in 2002. [23] However, this issue has since been revisited, with legislation enacted in 2009 to once again enable prison management to be contracted to private parties. The Corrections (Contract Management of Prisons) Amendment Act 2009 includes requirements that contractors comply with relevant international obligations and standards. They must also report regularly to the chief executive of the Department of Corrections on a range of matters, including staff training, prison programmes, prisoner complaints, disciplinary actions, and incidents involving violence or self-inflicted injuries. Contract management is to be implemented at Mt Eden/Auckland Central Remand Prison, with tendering processes under way in 2010 and the transfer of management to the successful contractor to take place in 2011. In April 2010, the Government announced that a proposed new prison in Wiri, in the former Manukau City, is to be designed, constructed and operated under a public–private partnership (PPP).

Other recent changes to the Corrections Act have included the Corrections Amendment Act 2009, which prohibits the use of 'electronic communication devices' by prisoners, provides for the detection and interception of radio communications, and expands search powers. The Corrections (Use of Court Cells) Amendment Act 2009 enables court cells to be used to temporarily house prisoners during accommodation shortages.

A further amendment to the Corrections Act through the Corrections (Mothers with Babies) Amendment Act 2008 extended the period that children of female prisoners may be accommodated with their mothers for the purposes of breastfeeding and bonding – extending the upper age limit from six to 24 months. The act does not come into force until appropriate facilities are available. Pending the upgrading of facilities (expected to take place in 2011–12), a change to the Corrections Regulations (regulation 170) has enabled children up to the age of nine months to remain with their mother in prison.

The Prisoners' and Victims' Claims Act 2005 deals with the awarding of compensation to prisoners for breaches

22 UN Committee Against Torture (2009), para 4

23 Human Rights Committee (2002), Concluding Observations of the Human Rights Committee: New Zealand, (75th session: CCPR/CO/75/NZL). Accessible online at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.75.NZL.En?Opendocument

of their rights under the BoRA, the Human Rights Act 1993 (HRA) and the Privacy Act 1993. The Prisoners' and Victims' Claims Act restricts compensation awards so they are reserved for exceptional cases and used only if, and only to the extent that, they are necessary to provide effective redress. If compensation is awarded, the act requires it to be paid to the Secretary for Justice, and subject to deduction of legal aid, reparation and victims' claims. A 'sunset clause' limiting the duration of the act's provisions dealing with prisoners' claims has been extended,[24] while further legislation is planned by the Government to make the regime permanent.

A range of amendments have also been made to bail, sentencing and parole legislation. Significant among these was the introduction of the new community sentences under the Sentencing Amendment Act 2007. This saw a slowing in growth of the prison population, but placed pressure on the Department of Corrections Community Probation and Psychological Services. The Parole Amendment Act 2007 introduced changes, including establishing residential restrictions that may be imposed on all offenders subject to parole or release; monitoring of offenders' compliance with release conditions; powers to issue summons for information and evidence; implementation of confidentiality orders; and the ability of the Commissioner of Police to make a recall application.

The Sentencing and Parole Reform Act 2010 introduced a new three-stage regime for repeat violent offending, in relation to specified qualifying offences. On a first conviction for a qualifying offence, the court issues a first warning. Offenders convicted of a second qualifying offence receive a final warning and must serve the sentence without parole. Offenders convicted of a third qualifying offence must receive the maximum sentence and, unless it would be manifestly unjust, serve the sentence without parole.

Policy framework

The 'Prison Service Operation Manual' sets out policies from induction to release, covering: security (including searches); prisoner movements; prisoner property, finances and activities; communication; visits; disciplinary processes; and complaints.

POLICE DETENTION

Detention in police cells

There are more than 400 police stations in New Zealand. They contain 525 overnight cells and 38 holding cells. Of these, 474 police station cells are open 24 hours a day. [25]

In 2009, 177,933 people were held in police cells following arrest, while on remand after sentence pending hearings, or while on transfer. [26]

Police cells are used for detaining people following arrest, people on remand and some sentenced prisoners in certain locations. People who are intoxicated may also be detained in certain circumstances, for their own or others' protection.[27]

Legislation and policy

The Policing Act 2008 replaced the Police Act 1958. This followed a major review of policing legislation in 2006 to 2008, involving significant public consultation. The UN Committee Against Torture commented positively on the review, noting that it has resulted in improved human rights provisions.

Positive developments were the inclusion of a set of principles in the new Policing Act, including the principle that "policing services are provided in a manner that respects human rights", and the subsequent development of a code of conduct for all police employees.

The Corrections Act 2004 confers a general duty of care upon the Police Commissioner to ensure the "safe custody and welfare of prisoners detained in police jails".[28] It sets out minimum entitlements to beds and bedding, food and

24 Prisoners' and Victims' Claims (Expiry and Application Dates) Amendment Act 2010

25 Independent Police Conduct Authority (2009), *Annual Report 2008–2009* (Wellington: IPCA)

26 NZ Police (2009), *Annual Report 2009* (Wellington: NZP)

27 Policing Act, section 36

28 Corrections Act, section 9

drink, access to legal advisors, medical treatment and access to statutory visitors. [29]

Police general instructions, policies and guidelines contain further provision for the treatment of those in custody, including in relation to searches, interviewing, treatment and rights of prisoners. They also contain measures to prevent harm to persons in custody, such as custodial suicide risk management and the separation of certain prisoners. [30]

Monitoring

Independent monitoring of the police has been enhanced through the amendment in 2007 of the Independent Police Conduct Authority Act 1988. The amendments included expanding membership of the the Independent Police Conduct Authority (IPCA) from a single person to a board of up to five people; and providing the IPCA with the same powers as commissions of inquiry, including powers to receive evidence, examine documents and summon witnesses.

These changes, along with the IPCA's designation as an NPM, have expanded and strengthened the powers and capacity of the IPCA to conduct its own independent investigations and monitoring of police.

HEALTH AND DISABILITY DETENTION

Disabled people may be detained for any of the reasons noted in this chapter, if they meet the criteria for detention under the applicable legal frameworks.

Two key areas are the focus of this section. The first relates to people detained as a result of, or for the treatment of, mental disorder under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MH(CAT) Act). The detention of any person within a mental health institution is for the purpose of treatment and the assurance of safety, not for any punitive reasons. It should be noted that only a minority of people being treated for a mental illness are detained. This section also considers the detention of people with a mental or intellectual disability who have been the subject of criminal proceedings.

Legislation

Legislation establishes powers of detention in clearly defined circumstances. The key pieces of legislation include:

- Mental Health (Compulsory Assessment and Treatment) Act 1992
- Criminal Procedure (Mentally Impaired Persons) Act 2003
- Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

Other relevant legislation relating to the quality and safety of health services, training and competency of health professionals, and rights of service users includes the Health and Disability Commissioner Act 1994, the Health and Disability Commissioner (Code of Health and Disability Consumer Rights) Regulations 1996, the Health and Disability Services (Safety) Act 2001 and the Health Practitioners Competence Assurance Act 2003. [31]

Mental Health (Compulsory Assessment and Treatment) Act 1992

The MH(CAT) Act provides the State with significant powers to deprive people of their liberty should they be found to be mentally disordered and a danger to themselves or others. It defines the circumstances and the conditions under which people may be detained and subjected to compulsory assessment and treatment. People can be detained for initial assessment to determine whether they are mentally disordered and require compulsory treatment. If they require further treatment, then the MH(CAT) Act allows a Family Court or District Court judge to make a compulsory treatment order (CTO). It also provides comprehensive procedures of review and appeal of decisions about the patient's condition and legal status, and establishes a procedure for the review of the detention of people under CTOs.

The rights of individuals detained under the act are defined. These include rights to respect for cultural identity, treatment, be informed, independent psychiatric

29 Correction Act, section 69. Section 69(3) allows for prisoners held in police jails to be denied some minimum entitlements – to exercise, mail, phone calls, visitors, information and education – if their provision is not practicable in light of available facilities and resources.

30 New Zealand Government (2007), Fifth Periodic Report of the New Zealand Government on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/NZL/5). Accessible online at http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.NZL.5.pdf

31 See also the chapter on the right to health.

advice, legal advice, company and seclusion, and the right to complain about breaches of these rights; as well as rights relating to visitors, letters and telephone calls. [32]

The MH(CAT) Act was developed in line with the international human rights standards that existed at the time. Unlike the previous legislation, the act includes a presumption that treatment will be delivered in the community wherever possible. This is seen as the least restrictive intervention in individuals' rights and freedoms. Compulsory treatment can take place in hospital where appropriate.

Section 71(2) defines the conditions under which compulsory patients can be placed under seclusion. Seclusion involves isolating patients in secure rooms for a period of time. Under the MH(CAT) Act, seclusion is seen as a 'treatment' or form of protection for other patients. [33] It is not legal to use seclusion as a punishment, [34] and all facilities are required to keep a seclusion register. [35]

The Director of Mental Health can apply to the court for any patient who is under a CTO to be made a restricted patient. [36] A restricted patient is one who presents special difficulties because of the danger he or she poses to others. [37] This category is subject to the same restrictions as apply to 'special patients' (see below). [38]

The MH(CAT) Act provides for clinical, judicial and tribunal review of the condition and status of persons detained for mental health reasons. Under section 16, patients can apply for a review of their condition by a District Court judge when they are detained under the act for assessment. The process is inquisitorial and designed principally to review the patient's mental condition. [39]

Section 84(3) confers on a High Court judge the power to consider the legality of a patient's detention. The power is potentially very broad and designed to provide a protective and supervisory function for people detained in hospital. A judicial inquiry under section 84 does not preclude the availability of a writ of habeas corpus. [40]

The act also provides for the appointment of district inspectors. [41] These are lawyers who can inspect hospitals, wards or any place in which psychiatric treatment is given, at any time they wish. They also investigate complaints by patients about breaches of their rights and can instigate wider inquiries if necessary.

Criminal Procedure (Mentally Impaired Persons) Act 2003

The Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP(MIP) Act), together with the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act) regulates the management of intellectually disabled and mentally disordered offenders. It sets out the procedures whereby persons who are the subject of criminal proceedings may be found unfit to stand trial or acquitted on the grounds of insanity, and the consequences of such a finding or acquittal.

Under the CP(MIP) Act, the court can order people involved in criminal proceedings to be assessed and treated under the MH(CAT) Act, [42] including those acquitted by reason of insanity. [43] In addition, individuals may be transferred from penal institutes for assessment

32 MH(CAT) Act, sections 64 to 76

33 MH(CAT) Act, section 71(2)(a)

34 section 71(2)(a) states that seclusion can only be used where it is "necessary for the care or treatment of the patient, or the protection of other patients".

35 MH(CAT) Act, section 129(1)(b)

36 MH(CAT) Act, section 54

37 MH(CAT) Act, section 55(3)

38 MH(CAT) Act, section 55

39 Re BWA [mental health] (1994) 12 FRNZ 510; [1994] NZFLR 321

40 MM v D-G of Mental Health Services [1998] NZFLR 900(CA)

41 MH(CAT) Act, section 94

42 CP(MIP) Act, sections 24, 25, 31 and 34

43 CP(MIP) Act, section 24

and possibly treatment in a forensic bed within a mental health facility.[44] A 'special patient' is someone detained under the mental health legislation who has come into the mental health service via the criminal justice system, as an offender or alleged offender.[45] For treatment purposes, special patients are required to be given the same care as patients subject to CTOs,[46] and therefore the provisions of the MH(CAT) Act apply.

The CP(MIP) Act provides a framework for the protection of the rights of individuals subject to the act. These include general rights to information, respect for cultural identity, independent health and disability advice, legal advice, rights to send and receive mail, and rights as set out in the Code of Health and Disability Services Consumers' Rights.

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003

The IDCCR Act provides for the compulsory care and rehabilitation of people with intellectual disabilities who have been charged with or convicted of an offence. It is intended to ensure that intellectually disabled offenders are provided with appropriate compulsory care and rehabilitation while recognising and safeguarding their rights.

The act contains statutory powers to require care recipients to comply with their care order and to seclude, restrain and medicate under certain circumstances.

Policy on seclusion

Along with the Ministry of Health's guidelines to the MH(CAT) Act,[47] national guidelines on seclusion have been developed to assist mental-health services interpret the provisions of the act and identify best practice.[48] Revised Health and Disability Services Standards 2008 and Restraint Minimisation and Safe Practice[49] standards have also been issued. The latter cover the actual conditions in which seclusion can be used and mostly reflect international best practice: seclusion is to be used for safety rather than therapeutic reasons, its use should be regularly reviewed, and it should be used only as a last resort.

MILITARY DETENTION

The primary facility for detention of military personnel is the Services Corrective Establishment (SCE) located in Burnham Military Camp, south of Christchurch. In addition, there are a number of holding cells in each of the more significant defence-force base or camp facilities, which are used to confine members of the armed forces for short periods. The SCE is in a purpose-built facility, with the capacity to detain up to eight people at any one time.

The New Zealand Defence Force (NZDF), which includes the army, navy and air force, has close to 10,000 regular forces personnel.[50] The administration of discipline and justice within the NZDF is provided for under the Armed Forces Discipline Act 1971 and Court Martial Act 2007.

Recent changes to the legislation reflect the results of a major review of the military justice system. The review was commissioned by the Chief of Defence Force in 2002, and aimed at modernising the system to take into account developments such as the BoRA. The new system was introduced on 1 July 2009. Key changes relate to: the summary trial system (now across all three services), rights of appeal and the establishment of a permanent, independent court martial.

The Court Martial Act 2007 provides for the appointment of an Inspector of Service Penal Establishments (ISPE),

44 MH(CAT) Act, section 46

45 MH(CAT) Act, section 2

46 MH(CAT) Act, section 44

47 Ministry of Health (2000), *Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992* (Wellington: MoH).

48 Ministry of Health (2010), *Seclusion under the Mental Health (Compulsory Assessment and Treatment) Act 1992* (Wellington: MoH).

49 New Zealand Standard: Restraint Minimisation and Safe Practice, NZ 8131:2008.

50 NZDF (2010) Personnel statistics, in *Statement of Intent*, accessed 3 November 2010 from http://www.nzdf.mil.nz/public-documents/soi/2010/section-8/personnel-stats.htm

whose role includes acting as an NPM under the OPCAT. Establishment of the post of ISPE to monitor NZDF detention facilities is a significant development, as prior to OPCAT ratification, military facilities were not subject to regular external monitoring or review. The ISPE visits the SCE regularly – up to eight times per year – and without advance notice.

DETENTION OF CHILDREN AND YOUNG PEOPLE

Legislation and policy

The Children, Young Persons and their Families Act 1989 (CYPF Act), is the key piece of legislation relating to detention of children and young people. The CYPF Act has two main parts; one deals with care and protection and the other with youth justice. Under the CYPF Act, children and young people can be removed and detained for their care and protection in various circumstances. [51] They can be placed into the custody of Child, Youth and Family (CYF). [52]

Proposed changes through the Children, Young Persons and their Families Amendment Bill (No 6) (2007) would extend the protection measures under the CYPF Act to include 17-year-olds. However, progress of the Bill through the legislative process has stalled, despite urging from the UN that the law change be adopted. [53]

The CYPF Act makes a distinction between children (those aged 10–13) and young persons (aged 14–16). Offending by children (aged 10–13) is generally dealt with by the Family Court under the act's care and protection provisions, while young people (aged 14–16) are subject to the act's youth justice provisions and are dealt with by the Youth Court.

The passage of the Children, Young Persons and their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010 extended the Youth Court's jurisdiction to cover 12- and 13-year-olds in relation to certain serious offences. This effectively lowered the age of criminal responsibility, in contrast to UN committee's recommendations that the age in New Zealand should be raised.

The CYPF Act deals with the issues of when and where children and young people who are accused or convicted of committing criminal offences can be detained. Part 4 of the CYPF Act lists guiding principles, one of which is that a child or young person who commits an offence should be kept in the community so far as is practicable and consonant with the need to ensure the safety of the public. [54] Following arrest, they can be detained by police [55] or given into the custody of others, including CYF. [56]

A child or young person can be sentenced by the Youth Court to supervision with residence requirement. [57] Children and young persons who are sentenced to imprisonment can be detained in a residence approved by CYF, or in certain circumstances, if the court considers there is no other suitable option, a prison. [58] In prisons, young people are accommodated separately from adults, although the mixing of prisoners under 18 with those aged 18 or 19 may be approved where it is safe to do so and in the best interests of the prisoners concerned. [59] A 'test-of-best-interest' has been developed for this purpose.

When a child or young person is detained for their care and protection, their welfare and interests are the first

51 CYPF Act, sections 39, 40, 42

52 CYPF Act, sections 78, 101, 67

53 UN Committee Against Torture (2009), para 8

54 CYPF Act, section 208; there is also a presumption in section 15 of the Bail Act 2000 that young offenders will be allowed bail rather than remanded in custody.

55 Criminal Justice Act 1985 (CJA), section 142(2A)

56 CYPF Act, sections 234–236

57 CYPF Act, sections 283(n), 311

58 CJA, section 142A. A memorandum of understanding between the Department of Corrections and CYF also makes it clear that young offenders should be remanded or serve their sentence in a prison only as a last resort.

59 Corrections Regulations 2005, Regs 179–180

and paramount consideration.[60] When they are detained under the youth justice provisions, guiding principles in the CYPF Act require that they be dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial and socially acceptable ways.[61]

The Children, Young Persons, and their Families (Residential Care) Regulations 1996 provide comprehensive rules for the treatment of children and young people detained in CYF residences, and require a high standard of professional care.[62] These include limitations on powers of punishment and discipline, and processes for inspections and review, including the functions of an independent grievance panel. Corporal punishment or other physical force is prohibited, as is discipline or treatment that is cruel, inhuman, degrading or humiliating, or is likely to induce an unreasonable amount of fear or anxiety.[63] The regulations are also supplemented by standard operating procedures and practice frameworks.[64]

CHILD YOUTH AND FAMILY RESIDENCES

Eight residences have been established under Section 364 of the CYPF Act – four youth justice residences (including a newly opened residence in Rotorua), and four care and protection residences.

Care and protection residences:

- **Whakatakapokai in South Auckland – up to 20 young people**
- **Epuni in Lower Hutt near Wellington – up to 10 young people**
- **Te Oranga in Christchurch – up to 10 young people**
- **Puketai in Dunedin – up to eight young people.**

Youth justice residences:

- **Korowai Manaaki in South Auckland – up to 40 young people**
- **Lower North in Palmerston North – up to 30 young men**
- **Te Puna Wai o Tuhinapo in Christchurch – up to 40 young people**
- **Te Maioha o Parekarangi in Rotorua – up to 30 young people.**

There is also a specialist unit for young people who have displayed sexually inappropriate behaviour. Te Poutama Arahi Rangatahi (TPAR) in Christchurch is a 12-bed unit operated by Barnardos under a contract with CYF.

New Zealand today
Aotearoa i tēnei rā

PRISONS

Growth in prisoner numbers

The Commission's 2004 report highlighted the need to upgrade and increase the capacity of prisons and alternatives to prisons. Since that research was undertaken, the prison population has risen by a further 30 per cent approximately, despite some initiatives which have attempted to curb New Zealand's high imprisonment rate. At 185 per 100,000, New Zealand's rate of imprisonment per head of population is one of the highest in the OECD.[65]

The increase in the prison population has been linked to a rise in some recorded crime rates, particularly with regard to serious drug offending and family violence; increased

60 CYPF Act, section 6

61 CYPF Act, section 4(f)

62 Reg 3

63 Regs 20 and 21

64 Accesible online at http://www.practicecentre.cyf.govt.nz/index.html

65 The imprisonment rate of 185 per 100,000 population is high compared with Australia (about 126 per 100,000), England and Wales (153 per 100,000) and many European states (with rates under 100 per 100,000). See International Centre for Prison Studies [n.d.], World Prison Brief. Accessible online at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/

police officer numbers; trends in the denial of bail; the use of longer sentences; and the "tightening of parole release decisions".[66]

Several pieces of new legislation make detention more likely. The Bail Act 2000 increased the numbers of people serving time on remand; the Sentencing Act 2002 altered minimum non-parole periods in relation to a number of offences and abolished the former presumption against imprisonment for property offences; and recent amendments to the Parole Act 2002 established release on parole as a privilege, and not a right.[67] The dominance of custody is also asserted in new legislation, such as the Sentencing and Parole Reform Act 2010.

Sentencing statistics show a general trend of increasing use of imprisonment over the past decade. Although growth is predicted to slow slightly over the next eight years,[68] there are expected to be 10,314 prisoners by 30 June 2017 – a 23 per cent increase from 30 June 2009.

Four new prisons have been opened in the past five years to try to meet the growth in prisoner numbers. Further, there is a proposal to build a new 1000-bed prison in Wiri, South Auckland. The development of a 'container unit' at Rimutaka Prison and increased use of cell sharing ('double bunking') has also been implemented. The Corrections (Use of Court Cells) Amendment Act 2009 enables court cells to be more readily used to house prisoners temporarily during accommodation shortages.

While these responses focus on trying to accommodate the rising prison population, there have also been some attempts to address the high imprisonment rate itself.

In 2007, the 'Effective Interventions' package was introduced. The sentences of home detention, community detention and intensive supervision were introduced in October 2007, with the passage of the Sentencing Amendment Act 2007 and the Parole Amendment Act 2007. In 2009, they accounted for about 8 per cent of all sentences.[69] While placing increased strain on the

Total number of correction facilities:	**20**
Total number of prisoners as at 30 June 2010:	**8816**
Percentage of male prisoners:	**93.6%**
Percentage of female prisoners:	**6.3%**
Percentage of Māori prisoners:	**50.9%**
Percentage of Pacific prisoners:	**11.5%**
Average remand prisoner population (2009–10):	**1828**
Average sentenced prisoner population (2009–10):	**6587**
Average youth prisoner population (2009–10):	**76**

Source: Department of Corrections www.corrections.govt.nz

Community Probation Service, these sentences have had some effect in slowing the growth of the prison population. In 2005, 11 per cent of all offenders were sentenced to periods of imprisonment; by 2008 this had decreased to 8 per cent. The Department of Corrections also noted that the implementation of these new community-based sentences was estimated to have reduced the prison population by around 700.[70]

In April 2009, the Minister of Justice and Associate Minister of Corrections convened a meeting on the 'Drivers of Crime' to identify and suggest ways of addressing the causes of crime. There was general agreement that the key solution lay in early intervention, and that this required a co-ordinated approach across a range of government sectors, rather than the justice sector alone. The Government has since announced an

66 Department of Corrections (2008), *Briefing for the Incoming Minister,* November 2008 (Wellington: Department of Corrections), p 11

67 section 28(1AA) was inserted by section 17 of the Parole Amendment Act 2007.

68 This is due partly to improved court processing times, which are expected to reduce the duration of remands in custody. See Ministry of Justice (2010), 2009–2017 *Criminal Justice Forecast Report* (Wellington: MoJ).

69 Ministry of Justice (2010), Conviction and Sentencing 2000 to 2009. Updated bulletin, accessible online at http://www.justice.govt.nz/publications/global-publications/c/conviction-and-sentencing-2000-to-2009

70 Department of Corrections (2008)

approach aimed at improving services for those at risk of being the offenders or victims of the future and their families. There is increased focus on addressing the issues that lead to the high number of Māori who are apprehended, convicted and imprisoned. The Government has identified four priority areas for cross-government action: [71]

- antenatal, maternity and early parenting support
- programmes to address behavioural problems in young children
- reducing the harm caused by alcohol
- alternative approaches to managing low-level offenders and offering pathways out of offending.

The impact of these initiatives is to be monitored by the Ministry of Justice, and a review of progress will be carried out in 2011.

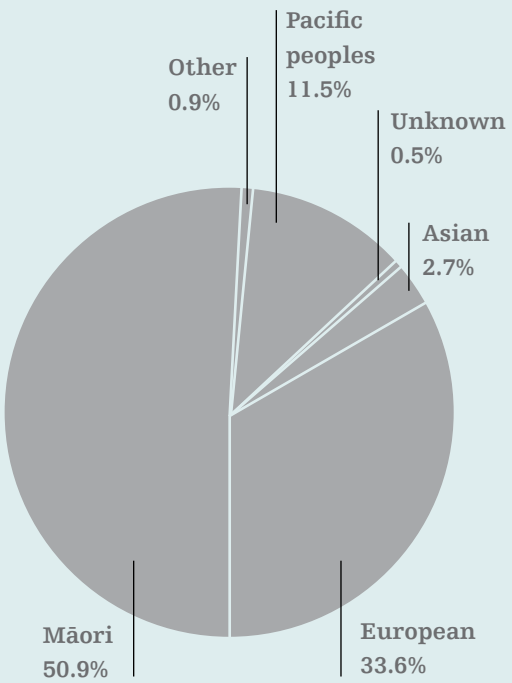
Disparities in imprisonment rates

Māori make up approximately 12.5 per cent of the general population aged 15 and over, but account for over half of the male prison population and around 60 per cent of the female prison population. The Department of Corrections recently noted: "Research shows that more than 30 per cent of all Māori males between the ages of 20 and 29 years have a record of serving one or more sentences administered by the Department of Corrections; the corresponding figure for non-Māori is around 10 per cent." [72]

The over-representation of Māori within the prison system has been the subject of much international comment. The UN Human Rights Council, the Committee Against Torture and the Committee on the Elimination of Racial Discrimination have each recommended that New Zealand focus its attention on combating over-representation and discrimination within the criminal justice system.

Recent research by the Ministry of Justice on bias in the criminal justice system [73] notes that the key elements of disproportionate representation are differential involvement in offending, direct discrimination, and indirect discrimination in the criminal justice system. All three may operate together to result in disproportionate outcomes.

ETHNICITY OF PRISONERS (JUNE 2010)



Source: Department of Corrections, 'Prison Facts and Statistics', http://www.corrections.govt.nz/about-us/facts_and_statistics/prisons/march_2011.html

The research identified features of successful responses, which include:

- involvement of the disproportionately affected groups in programme design, implementation and governance
- a holistic approach that addresses broader structural inequalities (beyond the criminal justice system)
- inclusion of cultural components
- monitoring, while recognising that positive changes may take time to emerge
- addressing the different aspects of the problem (offending and reoffending, direct discrimination and indirect discrimination).

71 'Drivers of Crime: a whole of government priority', NZ Government media release, 17 December 2009. Accessed 3 November 2010 from http://www.beehive.govt.nz/release/drivers+crime+whole--government+priority

72 Department of Corrections (2008), p 27

73 Ministry of Justice (2010), *Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research* (Wellington: MoJ)

The research concluded that a comprehensive policy approach should involve:

- addressing the direct and underlying causes of ethnic minority and indigenous offending
- enhancing cultural understanding and responsiveness within the justice sector (including through participation and accountability)
- developing processes that identify and seek to offset the negative impacts of neutral laws, structures, processes and decision-making criteria on particular ethnic groups.

A range of initiatives aim to reduce the rate of Māori imprisonment. The Ministry of Justice has developed initiatives to reduce Māori offending, and the issue has been a focus of the Drivers of Crime initiative. The Department of Corrections has a Māori strategic plan and five Māori focus units, with 300 available beds. A 2009 evaluation report on Māori focus units and Māori therapeutic programmes indicated that the units and programmes had had a positive impact on the likelihood of reconviction and re-imprisonment for those who completed the programmes. [74] In 2010, budget funding was announced for two kaupapa Māori reintegration units, 'Whare Oranga Ake', to be established to provide support prior to release in gaining employment, securing suitable accommodation and improving family and wider social relationships.

Detention conditions

Rising prisoner numbers are a key factor that can potentially undermine many of the advances that have been made. Access to employment, education, health services, treatment programmes, recreation and visitors can all be affected by capacity and staffing pressures. Lack of appropriate facilities may lead to a number of other human rights issues, such as mixing of remand and sentenced prisoners, age mixing and increased lock-down periods.

Despite efforts to upgrade and develop the prison estate, growth in the prisoner population has placed continued pressure on facilities and has meant that old, obsolete or inadequate facilities continue to be used. Measures such as double-bunking and increased lock-down hours have the potential to exacerbate the negative effects of poor conditions.

In 2009, the Committee Against Torture expressed concerns about the forecast growth in prisoner numbers and the risks of violence that could result from overcrowding. In 2010, the Government reported back to the committee that it had taken steps to manage capacity pressures. [75] Those steps include building additional facilities, as well as initiatives to reduce imprisonment rates. [76]

Safety

Rates of assaults and unnatural deaths in New Zealand prisons compare favourably with other jurisdictions. In 2009/10, there were six unnatural deaths in prisons, all apparent suicides. There were 32 serious prisoner-on-prisoner assaults (a rate of 0.36 per 100 prisoners) and two serious prisoner assaults on staff (a rate of 0.02 per 100 prisoners). These figures represent an improvement on the previous year when the assault rate rose slightly, after several years of stable and decreasing assault rates. [77] Though small in number, serious assaults, a number of prisoner deaths in custody and the 2010 death of a staff member have highlighted ongoing concerns of managing violence within prisons.

Following the death in 2006 of a young prisoner while being transported in a prison van and the subsequent Ombudsmen's investigation into the transport of prisoners, [78] the Department of Corrections has introduced a number of measures aimed at preventing prisoner assaults during transport. The Department is in

74 Department of Corrections (2009), *Māori Focus Units and Māori Therapeutic Programmes: Evaluation Report* (Wellington: Department of Corrections)

75 Response of the New Zealand Government to the Committee Against Torture, CAT/C/NZL/CO/5/Add.1, 18 May 2010, pp 1–2. Accessible online at http://www2.ohchr.org/english/bodies/cat/docs/followup/CAT-C-NZL-CO-5-Add1.pdf

76 Such as the Drivers of Crime approach discussed above.

77 Department of Corrections (2008), *Annual Report 2007-2008* (Wellington: Department of Corrections); Department of Corrections (2009), Annual Report 2008–2009 (Wellington: Department of Corrections)

78 Office of the Ombudsmen (2007), *Ombudsmen's Investigation of the Department of Corrections in Relation to the Transport of Prisoners*. (Wellington: OO)

the process of replacing its prisoner transport fleet with new vehicles fitted with single-occupant compartments for prisoners in order to prevent prisoner-on-prisoner violence.

The Department has also introduced waist restraints for use during prisoner transport in multi-occupant compartments. While aimed at preventing assaults during transport, the routine use of such a restrictive measure has itself prompted human rights concerns. [79] In its 2009 report on New Zealand the UN Committee Against Torture expressed concerns regarding the use of restraints and recommended that their use be kept under constant review. [80]

Employment, education and training

Considerable advances have taken place in the increased provision of training and employment in prisons since 2004. There have been significant improvements in numbers of prisoners involved in employment activities, vocational training, literacy and educational courses. There is also an expanded range of units and focussed programmes that specifically attend to the diverse needs of prisoners.

As at March 2010, 55 per cent of sentenced prisoners were engaged in rehabilitation activity and 67 per cent of sentenced prisoners were engaged in employment activity, up from 38 per cent in 2006.

Opportunities for education and training are of particular importance. Many prisoners have poor labour-market attachment and low literacy and numeracy levels. For example, in 2008, 55 per cent of prisoners reported that they had not had a job before they went to prison. [81] Up to 90 per cent of prisoners had low literacy skills, below those needed to participate fully in a knowledge society (compared with around 43 per cent of the general population). Up to 80 per cent of prisoners had low numeracy skills at a similar level (compared with 51 per cent of the general population). [82] Many young prisoners do not have basic literacy skills because of untreated sight or hearing difficulties (e.g. glue ear), or because they could not cope with the school system or have learning difficulties. [83]

Health services

Prisoners are entitled to receive a standard of healthcare that is reasonably equivalent to that available to the general public. [84] The Department of Corrections provides primary healthcare (which includes primary medical, nursing and dental care), while secondary and tertiary healthcare services are provided by district health boards.

Prisoners have a higher number of health-related issues than the general population. Many prisoners enter prison with existing and sometimes chronic health problems, serious mental illnesses or substance-misuse problems. Research undertaken by the National Health Committee (NHC) highlights the comparatively poor health of prisoners and makes recommendations to improve the health of prisoners, their families and whānau, and the wider community. [85]

The report notes that more than half of prisoners have experienced a serious mental-health condition; 64 per cent have had at least one head injury; and 89 per cent have had a substance-abuse disorder at some time in their lives. Many have had infrequent contact with the health system, despite being among those with the highest and most complex health needs. [86]

79 Office of the Ombudsmen (2008), *Annual Report 2007/2008* (Wellington: OO), p 19; Human Rights Commission (2009), 'Comments of the New Zealand Human Rights Commission on New Zealand's Implementation of the United Nations Convention Against Torture'. Accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/18-May-2009_11-04-40_CAT_HRC_comments_Mar_09.doc

80 UN Committee Against Torture (2009), para 9; Human Rights Commission (2009)

81 Department of Corrections (2009), *Prisoner Skills and Employment Strategy* (2009–2012) (Wellington: Department of Corrections). Accessible online at http://www.corrections.govt.nz/news-and-publications/statutory-reports/prisoner-skills-and-employment-strategy-2009-2012.html

82 ibid

83 Baragwanath S (2009), 'Boys in Prison: What about their Education?', in Maxwell G (ed), 'Assessing the Causes of Offending: What is the Evidence?' (Wellington: Institute of Policy Studies)

84 Corrections Act 2004, section 75

85 National Health Committee (2010), *Health in Justice: Improving the health of prisoners and their families and whānau* (Wellington: MoH)

The NHC recommendations include the transfer of responsibility for prison primary healthcare from the Department of Corrections to the health sector. The report also recommends significant additional investment in mental-health, addiction-treatment or other services; changes to minimise the negative effects of incarceration; and improvements to healthcare delivery.

Expansion of drug and alcohol treatment units has increased the number of prisoners who can be treated each year from 500 to 1040.[87] While representing a substantial improvement, these figures still show that a significant number of prisoners are not accessing these programmes. It suggests there is still considerable scope for further expansion and improvement.[88]

The Commission's 2004 report identified issues regarding the conditions for people in prisons who have disabilities or mental illnesses. Among the concerns raised were the availability and accessibility of appropriate facilities and services, and the lack of data on disabled people in prison.

Since then, a mental-health screening tool has been developed and trialled by the Department of Corrections and Ministry of Health. Its implementation will begin in 2011–12, and is expected to significantly enhance the availability of quality data on prisoners' mental health needs.

Rising prisoner numbers have added to pressures on mental health services, and there have been ongoing concerns about the availability of sufficient places in forensic services to meet demand.[89][90][91] Waiting lists for forensic inpatient services can mean some prisoners remain in prison while waiting for specialist mental-health care.

The need for timely access to services has also been highlighted, particularly for those with mild to moderate mental illness, women, those with personality disorders and Māori.[92] It has also been noted that improving access to mental-health services is particularly important, given the potential of the mental-health screening tool to identify more prisoners with mental-health needs.[93]

Staffing

There have been increasing concerns about staff safety. In May 2010, Corrections Officer Jason Palmer was killed at Spring Hill Corrections Facility, in the first fatal attack against a member of prison staff in New Zealand. In 2008–09, there were 11 serious prisoner assaults on staff – a rate of 0.14 per 100 prisoners. This was an increase on the 2007–08 rate of 0.08, against a stable and downward trend over the previous five years. In 2009–10 the number of serious assaults against staff fell to two.

Concerns about prisoner attacks against staff have led to the introduction of new personal protective equipment and tools. These include stab-proof vests, shields, helmets and batons. A pepper spray device is also being tested. In addition, prison staff have been trained in comprehensive tactical-communication techniques to provide the primary means of diffusing difficult prisoner behaviour.

86 ibid. See also "Poor Prisoner Health is a Problem for Everyone', National Health Committee media release, 16 July 2010. Accessible online at http://www.nhc.health.govt.nz/moh.nsf/indexcm/nhc-news-poor-prisoner-health-problem-everyone

87 Online at http://www.corrections.govt.nz/news-and-publications/magazines-and-newsletters/corrections-news/2010/corrections-news-jul-aug-2009/budget-round-up.html

88 A range of factors that may result in lack of engagement in employment, education or rehabilitation programmes include the availability of places on programmes; availability of programmes in certain locations; difficulties in providing programmes for prisoners serving shorter sentences; levels of access across different security classifications and for remand and segregated prisoners; scheduling of programmes and competing priorities on prisoners' time; and the willingness of prisoners to participate.

89 Since 2004, this issue has been raised repeatedly by the Office of the Ombudsmen (OO). See OO (2005), *Ombudsmen's Investigation of the Department of Corrections in relation to the Detention and Treatment of Prisoners*, p 55; OO (2007), *Investigation into Issues involving the Criminal Justice Sector* p 95; OO (2008), *Report of the Ombudsmen 2007/08*, pp 8–9; and OO (2009), *Report of the Ombudsmen 2008–9*, p 31.

90 Controller and Auditor General (2010), *Performance Audits from 2008: Follow-up report* (Wellington: Officer of the Auditor General), pp 28–31; Controller and Auditor-General (2008), *Mental Health Services for Prisoners* (Wellington: Officer of the Auditor General)

91 Simpson S (2008), 'New Zealand Provision of Forensic Mental Health Services', RECAP Newsletter 35, April. Accessible online at http://www.rethinking.org.nz/Print_Newsletters/Issue_35.pdf

92 ibid

93 Controller and Auditor-General (2010), p 31; Controller and Auditor General (2008)

The ongoing growth in the prison population has increased the pressures on staff, and the Department of Corrections has undertaken major recruitment in order to address staffing issues. Staff-to-prisoner ratios have improved slightly since 2004. In 2008–09, the ratio of prisoners to full-time equivalent frontline staff in New Zealand was identified at 2.3:1.

POLICE DETENTION

The review of policing legislation and expansion of the role of the IPCA have strengthened protections for those detained in police custody. There have also been improvements in terms of reducing detention of young people in police cells.

Police cells provide minimum accommodation for people awaiting a court hearing and those on remand. They are suitable for a very short period only. The nature and standard of facilities varies, with some older facilities requiring replacement.

Mental-health pilot initiatives

Placement of mental-health nurses in police stations has been shown to be successful in assisting the police to better manage the risks of those in their custody who have mental health, alcohol or other drug (AOD) problems.

A watch-house nurse (WHN) initiative was piloted in Christchurch central and Counties-Manukau police stations from 2008 to mid-2010. An evaluation found that the WHNs' presence had helped police with the management of detainees with mental health or AOD issues and had lessened the risk of harm to detainees and custodial staff. [94] The initiative was considered to provide timely intervention for detainees with suspected mental health and AOD issues, and had also served to enhance relationships between DHBs and the police. The WHNs checked on detainees and upgraded or downgraded detainees' monitoring regimes, as appropriate. They provided informal training to help custodial staff identify and manage detainees with mental health and addiction disorders. The evaluation noted that WHN coverage would ideally be extended to 24 hours a day, seven days a week, or to provide greater coverage at nights and on weekends.

A similar initiative in Rotorua was regarded as very effective for the timely assessment and facilitation of treatment for detainees, and was thought to have contributed to better outcomes. [95]

Weapons and equipment

The introduction of Tasers in 2008 represented a departure from New Zealand's tradition of a police force that does not routinely carry arms. However, a number of incidents involving the use of firearms against police have renewed public debate on the arming of police. The Police Commissioner is reviewing police access to firearms and is due to report to the Minister of Police by the end of 2010.

In August 2008, the Police Commissioner announced the nationwide introduction of the Taser X26, following a 12-month trial. While the trial evaluation report [96] indicated support for the introduction of Tasers among police and the public, some significant concerns were raised by those who opposed its use. [97] Both the UN Human Rights Committee and the Committee Against Torture have cautioned against the use of Tasers and have stressed the importance of strict monitoring of their use.

In the four months following their nationwide introduction, 648 Tasers had been deployed and Tasers had been discharged 29 times. [98]

A number of other new restraints and technologies have been recently introduced, including restraint boards,

94 Paulin J and Carswell C (2010), *Evaluation of the Mental Health/ Alcohol and Other Drug Watch-house Nurse Pilot Initiative* (Wellington: NZ Police)

95 Paulin J and Carswell C (2008), *Evaluation of the Mental Health Initiative at the Rotorua Police Station* (Wellington: NZ Police)

96 New Zealand Police (2008), Operational Evaluation of the New Zealand Taser Trial (Wellington: New Zealand Police)

97 See, for example, Auckland District Law Society Public Issues Committee, 'Think Twice about Tasers', 14 December 2007; Campaign Against the Taser (2007), *Stun guns in Aotearoa New Zealand? The Shocking Trial* (Wellington: CAT). Accessible online at http://www.converge.org.nz/pma/tasertrial.pdf These concerns were borne out to some extent by the trial data, which indicated that 21 per cent of incidents involved people with mental health issues and 58 per cent involved Māori or Pacific people.

98 Collins J, 'Speech notes to National Party Conference', 18 July 2010. Accessible online at: http://www.beehive.govt.nz/speech/speech+notes+national+party+conference

spitting hoods and leg restraints. Restraint boards are available in 27 overnight holding facilities, for the purpose of restraining people who are at high risk of violence and self-harm.

DETENTION OF PEOPLE WITH DISABILITIES

Compulsory treatment

In the 2008 calendar year, 6424 patients spent time in New Zealand adult mental-health units, and 3921 compulsory treatment orders (or extensions to a compulsory treatment order) were issued. [99]

The Commission's 2004 report noted the need for published, accessible data to be available on a regular basis on people detained under mental-health legislation. Since 2005, the Office of the Director of Mental Health has released annual reports containing data regarding compulsory treatment and the use of seclusion and electroconvulsive therapy (ECT). Data collection and availability has also been improved through the Mental Health Information National Collection. A programme for the integration of mental-health data, under development by the Ministry of Health, will create a single national database of mental-health services and outcomes.

Monitoring

In addition to the role provided by district inspectors, the introduction of the OPCAT monitoring system has strengthened independent monitoring of people detained under health and disability legislation. The Ombudsmen have responsibility for monitoring health and disability facilities.

In the course of these monitoring activities, the Ombudsmen have identified some specific situations involving patients subject to excessive periods of seclusion. Other issues raised by the Ombudsmen have included lack of valid documentation for detention; and some patients being held in secure care for longer than necessary because of a shortage of suitable community-based accommodation.

Capacity

The issue of capacity and the tension between compulsory treatment and the right to refuse mental-health treatment, to make an informed choice and to give informed consent were also identified in the Commission's 2004 report.

The CRPD provides that states must recognise that people with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, and that appropriate measures should be taken to provide access to support them in exercising their legal capacity. [100] Safeguards should ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review. [101]

The MH(CAT) Act itself was designed to comply with the UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (MI Principles). For the most part, it meets the necessary standards.

The legislation is silent on the issue of capacity. As the admission criteria under the MH(CAT) Act does not differentiate between people who have capacity and those who do not, people with a mental disorder may be treated against their will despite retaining decision-making capacity. [102] While the clinician may choose not to treat a competent person without their consent, no direct link is established under the MH(CAT) Act between a person's decision-making capacity and their right to refuse treatment.

99 Ministry of Health (2009), *Office of the Director of Mental Health: Annual Report 2008* (Wellington: MoH), pp.17, 21. Of these, 1808 were compulsory community treatment orders and 1397 were compulsory inpatient treatment orders – requiring a person to be detained in a hospital. A combination of compulsory community and compulsory inpatient treatment orders were made for 99 cases.

100 CRPD, Article 12 (2) and (3)

101 CRPD, Article 12 (4)

102 Part 5 of the act affirms the basic principle that a patient can refuse consent to treatment for mental disorder (section 57), and not accept treatment (section 59). However, the act then goes on to limit these rights (sections 57, 59), effectively depriving a person of any power to refuse treatment within the first month of compulsory treatment. While there is a duty on the responsible clinician to seek to obtain the consent of the person to any treatment "wherever practicable" (section 59(4)), if consent is not forthcoming, the responsible clinician may still authorise the treatment.

An examination by the Human Rights Commission [103] of the issue of capacity as a criterion for compulsory treatment found that the MH(CAT) Act is potentially discriminatory in that it singles out people with mental disorder and allows them to be treated differently. The legislation allows mentally disordered individuals to be detained and treated on the basis of 'risk of harm', regardless of their capacity, while members of other groups are not subject to such controls until they breach criminal law. It has been suggested that the MH(CAT) Act should be amended to ensure that it recognises that people with mental disorder do not automatically lose their capacity to consent to treatment.

Seclusion

In the Commission's 2004 report, an issue of concern was the use of seclusion – in particular, indications that many service users were held for lengthy periods with limited freedom of movement, isolated from others and subjected to sensory deprivation.

A report by the Mental Health Commission in 2004 also raised concerns about seclusion practice in New Zealand and recommended that it be reduced, with a view to its eventual elimination. [104]

In 2008, the Human Rights Commission and Mental Health Commission published *Human Rights and Seclusion in Mental Health Services*. [105] The report emphasised that, given the potential for abuse of human rights, the use of seclusion should be restricted to very limited, clearly specified circumstances. It noted that although the wording in the MH(CAT) Act implies that seclusion may be justified as a form of treatment, international comment suggests that it lacks therapeutic value. Therefore, if seclusion is used for treatment at all, this should be only where there is strong evidence of therapeutic benefit, and in other cases only where there is a significant threat to the patient's or others' safety. It also noted the need to increase understanding of the relevant human rights issues and standards.

Revised Ministry of Health guidelines on seclusion were issued in 2010 as part of its ongoing commitment to achieving a decrease in its use. The guidelines identify best practice methods for using seclusion, in line with the New Zealand Health and Disability Services Standards. [106] The guidelines note that seclusion should be used for as short a time as possible, and that the decision to seclude should be an uncommon event, subject to strict review.

Instances of seclusion are now routinely reported on by DHBs, following the introduction of a new reporting template in 2006. National seclusion statistics are now annually reported by the Director of Mental Health. The 2006–08 statistics show a slight decline in overall use of seclusion. [107]

In 2008, 1023 patients in mental-health units were secluded, involving 2946 seclusion events. [108] In addition, 179 people were secluded in forensic units (1366 seclusion events). Duration of seclusion events ranged from two minutes to 365 days, with average duration varying across DHBs from 21 to 50 hours. Use of seclusion varied considerably across different DHBs, with the highest use 13 times the lowest. While there has been an overall decrease in the incidence of seclusion, there is also some evidence that for a very small number of patients, the duration of seclusion has increased.

There have been increasing efforts to reduce the use of seclusion and restraint. A project aimed at reducing the use of seclusion has produced case studies highlighting implementing tools and approaches that can reduce the use of seclusion. [109] One of the aims of the project is to work collaboratively with DHBs to support, pilot and test

103 Human Rights Commission (2008), *Capacity and the Right to Refuse Psychiatric Treatment: A non-discriminatory approach* (Unpublished paper)

104 Mental Health Commission (2004), *Seclusion in New Zealand Mental Health Services* (Wellington: MHC)

105 Human Rights Commission (2008), *Human Rights and Seclusion in Mental Health Services* (Wellington: HRC)

106 Ministry of Health (2010), Seclusion under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (Wellington: MoH)

107 Ministry of Health (2009)

108 ibid

109 For more information, visit the case study site, accessible online at http://www.tepou.co.nz/page/398-Our-projects+Seclusion-Time-for-change

ideas and practices that reduce the use of seclusion. It also has a significant focus on training.

Electroconvulsive therapy

Electroconvulsive therapy (ECT) is used for therapeutic purposes in New Zealand. The conditions under which it can be administered are found in the MH(CAT) Act. Under section 60(a), ECT may be given with the person's written consent. If the person does not consent, ECT may still be administered if it is considered to be in their interest by a psychiatrist appointed by the Review Tribunal. [110] The independence of this second opinion process is intended to provide protection for the patient. However, concerns have been raised about how effective this process is in practice, and whether more stringent controls are required. [111]

There have been two reviews of the administration of ECT, in 2004 and 2007. [112] Their recommendations included that ECT should not be administered to a competent person who objects to it; strengthening guidelines and standards; restricting the use of ECT as treatment of last resort; and ensuring that ECT is administered only with consent or on the basis of a truly independent second opinion.

While not all of these recommendations were accepted by the Government, actions taken in response to the reviews have included publication of annual reports on the use of ECT; amended guidelines to recognise 'advance directives'; publication of an information resource for consumers and their families, dealing with what ECT is and why it is recommended as a treatment option; the informed consent process; and treatments that may be alternatives to ECT. [113] The second opinion required where a patient refuses consent to the administration of ECT must now be obtained from a specialist who practises independently of the clinical team providing the treatment.

A total of 203 people received ECT during the year ending June 2008 (a rate of five per 100,000 population). This represents a continued reduction from 2005 and 2006. [114]

Monitoring and review of IDCCR

Since 2004, a reporting mechanism has been established whereby the Director IDCCR/Chief Advisor Disability Services has a responsibility to monitor and report on the IDCCR Act. District inspectors appointed under the act visit all facilities and report to the Director IDCCR on a quarterly basis.

The Commission's 2004 report noted that under the Act, it is possible to impose indefinite detention for relatively minor offences, on grounds that would not normally be considered relevant in determining the length of a sentence. The act is currently the subject of litigation in relation to the adequacy of statutory direction about what criteria will justify extending an order under the act. [115]

While this may provide an opportunity to examine and clarify aspects of the IDCCR, the IHC has called for a more comprehensive review of how the act is working in practice.

DETENTION OF CHILDREN AND YOUNG PEOPLE

In accordance with international standards, the guiding principles of the CYPF Act emphasise that:

110 MH(CAT) Act, section 60(b)

111 Mental Health Foundation (2008), Submission to the Universal Periodic Review relating to the situation in New Zealand of people living with mental illness, 10 November. Accessible online at http://webcache.googleusercontent.com/search?q=cache:5Ydt3vhoiM4J:www.mentalhealth.org.nz/file/Policy-Advocacy-etc/Documents/Submission-Universal-Periodic-Review-10-November-2008.doc+Health+Select+Committee+on+Electroconvulsive+Treatment+in+2007&cd=1&hl=en&ct=clnk&gl=nz

112 Ministry of Health (December 2004), *Use of Electroconvulsive Therapy (ECT) in New Zealand: A Review of the Efficacy, Safety and Regulatory Controls* (Wellington: MOH); and an inquiry by the Health Select Committee on Electroconvulsive Treatment in 2007. Health Committee (2007), Petition 2007/162 of Helen Smith – Report of the Health Committee, 27 November. Accessible at http://www.parliament.nz/NR/rdonlyres/ECAACD9B-EDAC-49C4-B8AA-5DA1B263C398/69774/DBSCH_SCR_3911_5618.pdf

113 Ministry of Health, *Electroconvulsive Therapy (ECT) in New Zealand: What you and your family and whānau need to know* (Wellington: MoH). Accessible online at: http://www.moh.govt.nz/moh.nsf/indexmh/ect-in-new-zealand

114 Ministry of Health (2009)

115 VM v RIDCA Central HC WN CIV-2009-485-541 [8 December 2009]

- where public interest allows, criminal proceedings should not be used if there is an alternative means of dealing with the matter
- young people should be kept in the community
- sanctions should be the least restrictive possible and should promote the development of the child in the family.

The CYPF Act has played a role in increasing diversion, decreasing the numbers of Youth Court cases, and decreasing the rates of incarceration for young people. The majority of young offenders (approximately 80 per cent) are diverted from the formal court system. [116]

There has been ongoing concern about the under-utilisation of 'supervision with activity' orders, [117] which are an alternative to custodial placement at a youth justice residence. In 2008, 81 young people received supervision with activity, while 152 received supervision with residence. [118] One reason for this has been the unavailability of suitable programmes. However, CYF have recently confirmed funding for 125 'supervision with activity' places for the next four years. [119] The continued development of rehabilitation programmes has been welcomed by the Principal Youth Court Judge, who noted: "These are the programmes that can form the basis of the historically underused supervision with activity sentence. It is the hope of all within the system that supervision with activity orders increase with a consequent reduction in the numbers of supervision with residence orders." [120]

The Children, Young Persons and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010 also provided for a number of new and/or expanded orders that may be imposed by the Youth Court. These include mentoring or rehabilitation programmes.

The introduction of military-style camp programmes among the new sentencing options attracted criticism, in the light of evidence on the limited effectiveness of such programmes, and concern that they represent a move towards a more punitive approach to dealing with young offenders.

There is a growing body of information on what works to address offending and reduce reoffending. Evidence shows that early intervention, wrap-around services and restorative approaches are more likely to effectively address offending by young people, and should remain the focus of New Zealand's youth justice system. [121] A range of positive initiatives, such as Te Kooti Rangatahi / The Rangatahi Court, the Christchurch Youth Drug Court, and the Intensive Monitoring Group operating in Auckland, appear to be working well.

Particular gaps have been identified in the provision of mental-health services, forensic, residential placement, and alcohol-and-drugs services for children and young people. [122] Recent research notes improvements in funding, staffing and access to mental-health services. Despite progress, there is a continued need to broaden the range of services and support available, and to reduce inequalities and improve access to services for Māori and Pacific peoples. [123]

In 2010, the Children's Commissioner released a report on the quality of services provided to children in the care of CYF, including those detained in residential facilities. The report contains an extensive range of recommendations, highlighting the need for improvements in order to better

116 Sturrock F and Preeti C Q (2009), *Effectiveness of Youth Court Supervision Orders: Measures of Re-offending* (Wellington: MSD), p 22

117 CYPF Act, section 283(m)

118 Ministry of Justice (2010), *Identifying and Responding to Bias*

119 Becroft A (2009), Speech to Local Government New Zealand Conference. Accessible online at http://www2.justice.govt.nz/youth/publications/speeches.asp?inline=speeches/local-government-nz-conference.asp

120 Becroft A (2010), Child Youth and Family report on key youth justice objectives after two years of increased funding, Court in the Act 45, February 2010, p 2. Accessible online at http://www2.justice.govt.nz/youth/publications/CIA-Issue-45.pdf

121 McLaren K (2000), *Tough is not Enough – Getting Smart about Youth Crime* (Wellington: Ministry of Youth Development).

122 Office of the Children's Commissioner (2008), *Report on the Implementation of the United Nations Convention on the Rights of the Child in New Zealand* (Wellington: OCC). Accessible online at http://www.occ.org.nz/__data/assets/pdf_file/0009/6894/OCC_UNCtte_211108.pdf

123 The Werry Centre for Child and Adolescent Mental Health Workforce Development (2009), *The 2008 Stocktake of Child and Adolescent Mental Health Services in New Zealand.* (Auckland: The Werry Centre, The University of Auckland)

meet the health, education, recreation and cultural needs of children in care. [124]

Residential capacity

Since 2004, three new residences have been opened. Youth justice beds have increased from 75 to 140, and care and protection beds from 34 to 50.

Detention in police cells

There has been significant improvement in addressing the issue of young people being held in police cells. In 2006, the situation was described as reaching 'crisis point'. [125] The UN Committee Against Torture expressed its continued concern over the detention of young people in police cells.

Considerable efforts made to address this issue have included the increased availability of places in CYF facilities, and close monitoring by the Children's Commissioner, the Principal Youth Court Judge, CYF and the police. The use of supported bail was shown in trials to be successful, particularly when the right community supports were in place. [126] It has been extended and is included as part of the 'Fresh Start' package.

The Children's Commissioner has noted a decline in the number and duration of detentions of young people in police cells since 2006. In 2009, 77 young people were detained in police cells for an average duration of 1.9 days.

Difficulties in obtaining a judge on a Sunday when a young person is arrested on a Saturday evening may be a factor in the length of detention in police cells during weekends. The recent development of CYF-run escort services to take young people from their place of arrest to the nearest residence will help to ensure that young people are not detained in police cells due to lack of transport. [127]

In 2010–11, as part of OPCAT monitoring, the Office of the Children's Commissioner, IPCA and the Human Rights Commission are conducting a joint review of policy and practice in relation to the holding of young people in police detention.

There have also been improvements in relation to preventing age mixing in other detention contexts, particularly in prisons, at the border, under military law and in mental-health facilities. Lack of specialised youth facilities for girls in prison and age mixing in police custody are among the challenges that need to be addressed.

Conclusion
Whakamutunga

Since 2004 there have been some notable developments which provide improved protections for the human rights of people in detention.

Legislation and policy is well developed and generally consistent with international standards, and recent reviews have strengthened human rights protections in corrections and policing legislation.

Ratification and implementation of the preventive monitoring system under the OPCAT provide further national and international scrutiny of places of detention. The preventive monitoring involves a proactive, collaborative approach and has resulted in a number of practical improvements. Establishment of the post of Inspector of Service Penal Establishments to monitor military detention facilities has been a significant development, as military facilities had not previously been subject to regular external monitoring or review.

Prisons

There have been a range of improvements and positive initiatives since 2004. The legal framework has been further strengthened with the enactment of the Corrections Act and Regulations. There have been considerable advances in the provision of training and employment, rehabilitation and drug-and-alcohol treatment. Other positive initiatives in this period – such

124 Atwool A (2010), *Children in Care: A report into the quality of services provided to children in care* (Wellington: OCC). Accessible online at http://www.occ.org.nz/__data/assets/pdf_file/0007/7693/CC_ChildreninCare_09.09.2010.pdf

125 Becroft A, 'Police Cell Remands Reach Crisis Point', *Court in the Act* 19, November 2006

126 Mossman E (2007), *Supported Bail Pilot Programme: Final Research Report* (Wellington: CYF)

127 Children's Commissioner (2010), *Report of the New Zealand Children's Commissioner to the United Nations Committee On The Rights Of The Child 2010* (Wellington: OCC). Accessible online at http://www.occ.org.nz/__data/assets/pdf_file/0005/7682/CC_UNCROCREPORT_02.09.10.pdf

as the 'Mothers with Babies' legislation and a mental-health screening tool – will soon be fully implemented.

New Zealand's imprisonment rate is high by international standards. Ongoing growth in the imprisonment rate is a significant human rights issue, since risks to human rights are raised in environments where there is overcrowding, stretched resources and services, or where staff are overloaded.

The continued growth of the prison population has the potential to undermine advances that have been made. Several pieces of new legislation have made custody more probable.

The Drivers of Crime initiative signals a more holistic approach to trying to reduce offending. The need to reduce the rate of Māori imprisonment is recognised, and is a focus of Drivers of Crime and a number of other initiatives.

People in detention often come from vulnerable sectors of society. Realisation of their rights has not often been a reality prior to their detention. Once they are detained, the nature of the custodial environment and pressures on resources, services and staff pose further risks to the enjoyment of these basic human rights. There is an opportunity, however, to address these issues. It is incumbent upon the State not only to ensure minimum standards are met – prisoners are treated with humanity and dignity and are protected from harm – but also to take additional steps to address the disparities in the enjoyment of rights, such as the right to health, education and work.

Other issues include:

- Despite efforts to upgrade and develop the prison estate, growth in the prisoner population has placed continued demand for facilities and has meant that old, obsolete or inadequate facilities continue to be used.
- Measures such as double-bunking and long lock-down hours have the potential to exacerbate the negative effects of poor conditions, and require safeguards and continued careful monitoring.
- There is a need for continuing efforts to ensure the well-being and safety of prisoners and staff.
- There have been considerable efforts to increase access to employment and training opportunities, opening of new drug-treatment units and expansion of rehabilitation programmes. Despite these gains, there is still scope for further improvement and expansion, including by identifying and addressing potential barriers to access.
- In the light of prisoners' poor health status on entry to prison and their high needs, there is a particular need to further develop prisoner access to healthcare and mental-health services.

Police detention

The review of policing legislation and expansion of the role of the IPCA have strengthened protections for those detained in police custody.

Police cells provide minimum accommodation for people awaiting a court hearing and a remand. They are suitable for a very short period only. The nature and standard of facilities varies widely.

Some positive initiatives to assist police to deal with detainees with mental-health issues and drug or alcohol problems appear to be successful.

A number of new restraints and technologies have been made available to police; these should be subject to monitoring with regard to their use and effects.

Health and disability detention

There have been improvements in reporting and transparency, including closer monitoring and regular publication of data on the use of ECT and seclusion.

New guidelines are part of ongoing efforts to reduce the use of seclusion. There has been a decrease in the incidence of seclusion, although there are still indications that a small number of patients are secluded for lengthy periods. There are also some concerns that safeguards around the use of ECT could be further strengthened.

While mental-health legislation was developed to comply with human rights standards, there are some areas that require review to ensure that it fully reflects the CRPD. There are also issues to be resolved regarding the concept of capacity, and the criteria for continued detention under the IDCCR.

Detention of children and young people

New Zealand legislation relating to when children and young people can be detained is generally consistent with

international standards, including UNCROC. However, further reduction of the minimum age of criminal responsibility during this period represents a retrogressive step. Some remaining inconsistencies – such as the consistent definition of a child as being under 18 years of age, and age mixing – need to be addressed.

The CYPF Act has been successful to a large degree in steering children and young people away from custody and the criminal justice system. There are indications of an increasing focus on adopting a 'therapeutic' approach to dealing with children and young people who offend. There is a growing body of information regarding 'what works' to reduce youth offending, and many positive initiatives – including Te Kooti Rangatahi/The Rangatahi Court, the Christchurch Youth Drug Court, and the Intensive Monitoring Group operating in Auckland. There is evidence that early intervention, wrap-around services and restorative approaches are more likely to effectively address offending by young people and should remain the focus of New Zealand's youth justice system. An ongoing issue has been the availability of appropriate facilities and treatment for young people.

There have been significant improvements in terms of reducing detention of young people in police cells. However, this is an issue that requires continued attention and monitoring to ensure that young people's rights and best interests are protected.

The Commission consulted with interested stakeholders and members of the public on the draft of this chapter. The Commission has identified the following areas for action to advance the rights of people who are detained:

Rate of imprisonment
Committing to a reduction in the rate of imprisonment and addressing the drivers of crime.

Māori imprisonment
Committing to specific targets and timelines for reducing the disproportionate number of Māori in prison. There also needs to be a systematic, comprehensive, long-term approach to addressing entrenched inequalities with explicit targets and clear indicators of progress made.

Young people
Increasing the availability of and access to appropriate mental health, drug and alcohol treatment and services for children and young people.

Legislation
Ensuring international human rights standards are adequately reflected in mental-health legislation, and resolving uncertainty around the criteria for continued detention under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

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