

# INTERNATIONAL HUMAN RIGHTS LAW

## I. INTRODUCTION

In 2013, New Zealand continued its wide-ranging engagement with the United Nations treaty and Charter based bodies. As regards human rights treaty bodies, New Zealand met with the Committee on the Elimination of Racial Discrimination to discuss New Zealand's 18th to 20th combined periodic reports and subsequently received that Committee's concluding observations under the International Convention on the Elimination of All Forms of Racial Discrimination. New Zealand also submitted its initial report to the Committee on the Rights of Persons with Disabilities. New Zealand was an active observer State of the Human Rights Council. At the domestic level, the Human Rights Commission continued with its work on the advancement of international human rights law in New Zealand. This note reviews these and other aspects of New Zealand's state practice in the area of human rights in 2013.

## II. PERIODIC REPORTS TO HUMAN RIGHTS TREATY BODIES

### *A. Concluding Observations of the Committee on the Elimination of Racial Discrimination*

In February 2013,<sup>1</sup> the Committee on the Elimination of Racial Discrimination (the Committee) considered New Zealand's combined 18th to 20th reports, covering the period from 1 January 2006 to 22 December 2011<sup>2</sup> on the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>3</sup> The report was accompanied by a series of shadow reports from NGOs including Peace Movement Aotearoa, the Robson Hanan Trust and Child Advocacy, as well as a Report by the New Zealand Human Rights Commission in its capacity as a National Human Rights Institution (NHRI).

In its concluding observations, the Committee welcomed the open dialogue with the New Zealand delegation and the latter's efforts to provide comprehensive responses and supplementary replies to issues raised by Committee members.<sup>4</sup> On a positive note, the Committee expressed its appreciation at the numerous legislative and policy developments, that took

1 CERD *Summary records of the 2221st meeting* CERD/C/SR.2221, (2013) and *2222nd meeting*, CERD/C/SR.2222, (2013).

2 CERD *18th-20th Periodic Report by New Zealand*, CERD/C/NZL/18-20, (2012).

3 International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969).

4 CERD *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, CERD/C/NZL/CO/18-20 (2013) at [2].

place during the reporting period, to combat racial discrimination, including the Immigration Act 2009 which removed barriers for foreign national children to access education and limited the situations in which asylum seekers may be detained; the implementation of the Health Housing Programme seeking to alleviate overcrowding in housing among Pasifika peoples; and the publication of the new Equality and Diversity Policy for the Public Service. The Committee also welcomed the ratification of the Convention on the Rights of Persons with Disabilities<sup>5</sup> and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.<sup>6</sup> The Committee also welcomed New Zealand's official endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>7</sup> noting the Supreme Court's reliance on UNDRIP in *New Zealand Māori Council v Attorney-General* [2013] NZSC 6.<sup>8</sup>

The Committee welcomed the numerous initiatives aimed at improving ethnic relations and awareness-raising with regard to racial discrimination, integration, tolerance and multiculturalism.<sup>9</sup> Although it welcomed the contributions of the Race Relations Commissioner, the Committee expressed concern that the Human Rights Amendment Bill would negatively affect the role of the Commissioner and recommended that the Commissioner continue its independent designation so as to undertake its mandate effectively.<sup>10</sup> The Committee noted New Zealand's lack of a current comprehensive national human rights action plan, calling for the adoption of such a plan in line with the Durban Declaration and Programme of Action (Durban Declaration).<sup>11</sup> The Committee commended New Zealand on its legislation to combat incitement to racial disharmony under the Human Rights Act but called for the development of a comprehensive legislative framework to address the problem of incitement to racial hatred on the Internet in conformity with art 4 of ICERD.<sup>12</sup> The Committee expressed its concern at an instance of political racist speech but welcomed subsequent strong Government criticism

5 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008).

6 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2171 UNTS 217 (opened for signature 25 May 2000, entered into force 18 January 2002).

7 UN General Assembly *United Nations Declaration on the Rights of Indigenous Peoples* A/RES/61/295 (2007).

8 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6 at [3]. See Fleur Adcock "Year in Review: Indigenous Peoples Rights under International Law" (2013) 11 NZYIL (this volume) for a fuller discussion of the Committee recommendations in relation to Māori.

9 CERD *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, CERD/C/NZL/CO/18-20 (2013) at [4].

10 At [6].

11 At [8]. See United Nations *Durban Declaration and Plan of Action, Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence* (8 September 2001) [Durban Declaration].

12 CERD *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, CERD/C/NZL/CO/18-20 (2013) at [9].

thereof, as well as parliamentary reaffirmation of New Zealand's commitment to preserving an inclusive multi-ethnic society and it urged New Zealand to intensify its efforts to promote ethnic harmony.<sup>13</sup>

The Committee noted New Zealand's efforts to address the overrepresentation of Māori in the criminal justice system but remained concerned at the disproportionately high rates of incarceration and the overrepresentation of Māori and Pasifika at every stage of the criminal justice system. It recalled both its previous concluding observations<sup>14</sup> and general recommendation No 31 (2005) and urged New Zealand to intensify its efforts to address the problem.<sup>15</sup> The Committee welcomed New Zealand's recognition that structural discrimination is partly responsible for the persistent poor outcomes for Māori and Pasifika in the fields of employment, health and the administration of criminal justice but expressed its concern at the ongoing high levels of school absenteeism and high dropout rates among Māori and Pasifika pupils. It recommended that existing structural discrimination be addressed and also recommended that New Zealand consider strengthening its special measures to increase the level of educational attainment of Māori and Pasifika children.<sup>16</sup> The Committee also recommended that New Zealand take specific measures aimed at preserving the Māori and Pasifika languages as well as community languages.<sup>17</sup>

The Committee was concerned at reports of persistent discrimination against migrants, particularly those of Asian origin, in the labour market and recommended the full and effective enforcement of the measures taken to protect Asian migrants from such discrimination.<sup>18</sup> The Committee expressed its concern at the treatment of asylum seekers under the Immigration Amendment Bill 2012. It urged New Zealand to ensure that the Bill met international standards in the treatment of persons in need of international protection so that it did not unfairly and arbitrarily discriminate against asylum seekers who may fall within the Bill's definition of 'mass arrival'.<sup>19</sup> The Committee welcomed the decision to admit 150 asylum seekers from Australian off-shore refugee detention centres but urged New Zealand to refrain from sending asylum seekers to such facilities until the conditions therein met international standards.<sup>20</sup> The Committee also called upon New Zealand to ratify international treaties,<sup>21</sup> the Migrant Workers Convention<sup>22</sup>

13 At [10].

14 CERD/C/NZL/CO/17 (2007) at [21].

15 At [11].

16 At [15].

17 At [17].

18 At [16].

19 At [20].

20 At [21].

21 At [22]-[23].

22 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 2220 UNTS 3 (opened for signature 18 December 1990, entered into force 1 July 2003).

and ILO Convention No 169 on Indigenous and Tribal Peoples,<sup>23</sup> and to give to effect to the Durban Declaration.<sup>24</sup> The Committee noted the failure to ratify the optional declaration provided for in art 14 of ICERD and invited New Zealand to make the declaration as soon as possible.<sup>25</sup>

The Committee called for follow-up information on the recommendations contained in paragraphs 8, 9, 14 and 17.<sup>26</sup> It noted the importance of the recommendations in paragraphs 10, 15, 18 and 19 and requested New Zealand to provide detailed information in its next periodic report on concrete measures taken to implement these recommendations.<sup>27</sup> Finally, the Committee recommended that New Zealand submit its twenty-first and twenty-second periodic reports in a single document by 21 December 2015 addressing all the points raised in the present concluding observations.<sup>28</sup>

### *B. New Zealand's Initial Report to the Committee on the Rights of Persons with Disabilities*

In October 2013, New Zealand submitted its initial report to the Committee on the Rights of Persons with Disabilities.<sup>29</sup>

## III. HUMAN RIGHTS COUNCIL

New Zealand was an active participant in the Human Rights Council in 2013. In the 22nd regular session, in addition to participating in debates on general agenda items,<sup>30</sup> New Zealand participated in debates on human rights mainstreaming,<sup>31</sup> the rights of persons with disabilities<sup>32</sup> and the rights of the child.<sup>33</sup> It sponsored a resolution on the work and employment of persons with disabilities.<sup>34</sup> New Zealand also co-sponsored draft resolutions on: the promotion of reconciliation and accountability in Sri Lanka;<sup>35</sup> birth registration and the right of everyone to recognition everywhere as a person

23 ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries 28 ILM 1382 (adopted 27 Jun 1989, entered into force 5 September 1991).

24 *Durban Declaration*, above n 11.

25 CERD *Concluding Observations of the Committee on the Elimination of Racial Discrimination* CERD/C/NZL/CO/18-20 (2013) at [24].

26 At [27].

27 At [28].

28 At [29].

29 CRPD *Initial reports submitted by State parties under article 35 of the Convention: New Zealand* CRPD/C/NZL/1 (2013).

30 Human Rights Council *Report of the Human Rights Council on its twenty-second session* A/HRC/22/2 (2013).

31 At [23(a)].

32 At [87(b)].

33 At [96(a)].

34 Human Rights Council *The work and employment of persons with disabilities* A/HRC/22/L.4 (2013) at [175].

35 Human Rights Council *The promotion of reconciliation and accountability in Sri Lanka* A/HRC/22/L.1/Rev.1 at [71].

before the law;<sup>36</sup> the promotion and protection of human rights in the context of peaceful protests;<sup>37</sup> the panel on the human rights of children of parents sentenced to the death penalty or executed;<sup>38</sup> the high-level panel discussion on the question of the death penalty;<sup>39</sup> and freedom of religion or belief.<sup>40</sup> It also co-sponsored draft resolutions on the situation of human rights in the Democratic People's Republic of Korea,<sup>41</sup> and in the Islamic Republic of Iran<sup>42</sup> and on assistance to the Republic of Mali in the field of human rights.<sup>43</sup> New Zealand participated actively in the interactive dialogue with the Commission of Inquiry on the situation of human rights in the Syrian Arab Republic,<sup>44</sup> as well as engaging with the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea<sup>45</sup> and the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran.<sup>46</sup>

In the 23rd session, New Zealand continued with its wide-ranging participation in general debates<sup>47</sup> and specific issues such as the urgent debate on the deteriorating situation of human rights in the Syrian Arab Republic,<sup>48</sup> co-sponsoring a draft resolution on the matter.<sup>49</sup> New Zealand participated in the Working Group on the issue of discrimination against women in law and in practice<sup>50</sup> and engaged with the Special Rapporteur on violence against women, its causes and consequences.<sup>51</sup> New Zealand sponsored a draft resolution on the situation in Belarus<sup>52</sup> and co-sponsored resolutions on: the role of freedom of opinion and expression in women's empowerment;<sup>53</sup> the independence and impartiality of the judiciary, jurors and assessors, and

36 Human Rights Council *Birth registration and the right of everyone to recognition everywhere as a person before the law* A/HRC/22/L.14/Rev.1 at [190].

37 Human Rights Council *The promotion and protection of human rights in the context of peaceful protests* A/HRC/22/L.10 at [201].

38 Human Rights Council *The panel on the human rights of children of parents sentenced to the death penalty or executed* A/HRC/22/L.18 at [205].

39 Human Rights Council *The high-level panel discussion on the question of the death penalty* A/HRC/22/L.28 at [220].

40 Human Rights Council *Freedom of religion or belief* A/HRC/22/L.9 at [228].

41 Human Rights Council *The situation of human rights in the Democratic People's Republic of Korea* A/HRC/22/L.19 at [281].

42 Human Rights Council *The situation of human rights in Iran* A/HRC/22/L.22 at [293].

43 Human Rights Council *Assistance to the Republic of Mali in the field of human rights* A/HRC/22/L.5 at [925].

44 At [262(a)].

45 At [265(b)].

46 At [274(b)].

47 Human Rights Council *Report of the Human Rights Council on its twenty-third session* A/HRC/23/2 (2013) [HRC Twenty-third session].

48 At [27].

49 Human Rights Council *The deteriorating situation of human rights in the Syrian Arab Republic* A/HRC/23/L.1 at [30].

50 At [120(b)].

51 At [129(b)].

52 Human Rights Council *The situation in Belarus* A/HRC/23/L.18 at [235].

53 Human Rights Council *The role of freedom of opinion and expression in women's empowerment* A/HRC/23/L.5 at [157].

the independence of lawyers;<sup>54</sup> the negative impact of corruption on the enjoyment of human rights;<sup>55</sup> the acceleration of efforts to eliminate all forms of violence against women;<sup>56</sup> and national policies and human rights.<sup>57</sup> It also co-sponsored resolutions on the deterioration of the situation of human rights in the Syrian Arab Republic,<sup>58</sup> as well as the provision of assistance to Somalia in the field of human rights.<sup>59</sup> New Zealand also participated in discussion on the outcomes of the Universal Periodic Review (UPR) process held from 21 January to 1 February 2013, making a number of comments in relation to Tonga's submission.<sup>60</sup>

During the 24th session, New Zealand continued to participate in general debates. It also engaged with the Special Rapporteur on the human right to safe drinking water and sanitation<sup>61</sup> and participated in the panel discussions on the human rights of children of parents sentenced to the death penalty or executed<sup>62</sup> and on the rights of indigenous peoples<sup>63</sup> respectively. New Zealand co-sponsored draft resolutions on: the rights to freedom of peaceful assembly and of association;<sup>64</sup> the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;<sup>65</sup> freedom from arbitrary detention;<sup>66</sup> equal political participation;<sup>67</sup> human rights and indigenous peoples regarding the mandate of the Special Rapporteur;<sup>68</sup> and human rights and indigenous peoples.<sup>69</sup> Other resolutions co-sponsored by New Zealand included those on preventable mortality and morbidity of children under five years of age as a human rights concern;<sup>70</sup> the role of prevention in the promotion and protection of

54 Human Rights Council *The independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers* A/HRC/23/L.9 at [170].

55 Human Rights Council *The negative impact of corruption on the enjoyment of human rights* A/HRC/23/L.19 at [179].

56 Human Rights Council *The acceleration of efforts to eliminate all forms of violence against women* A/HRC/23/L.28 at [208].

57 Human Rights Council *National policies and human rights* A/HRC/23/L.16 at [783].

58 Human Rights Council *The deterioration of the situation of human rights in the Syrian Arab Republic* A/HRC/23/L.29 at [250].

59 Human Rights Council *The provision of assistance to Somalia in the field of human rights* A/HRC/23/L.11 at [796].

60 HRC *Twenty-third session*, above n 47, at [340].

61 Human Rights Council *Report of the Human Rights Council on its Twenty-fourth session* A/HRC/24/2 (2013) [HRC *Twenty-fourth session*] at [60(b)].

62 At [83(b)].

63 At [90(b)].

64 Human Rights Council *The rights to freedom of peaceful assembly and of association* A/HRC/24/L.7 at [110].

65 Human Rights Council *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health* A/HRC/24/L.8 at [116].

66 Human Rights Council *Freedom from arbitrary detention* A/HRC/24/L.15 at [120].

67 Human Rights Council *Equal political participation* A/HRC/24/L.18/Rev.1 at [123].

68 Human Rights Council *Human rights and indigenous peoples regarding the mandate of the special rapporteur* A/HRC/24/L.21 at [127].

69 Human Rights Council *Human rights and indigenous peoples* A/HRC/24/L.22 at [130].

70 Human Rights Council *Preventable mortality and morbidity of children under 5 years of age as a human rights concern* A/HRC/24/L.27 at [134].

human rights;<sup>71</sup> conscientious objection to military service;<sup>72</sup> civil society space;<sup>73</sup> and on efforts to prevent and eliminate child, early and forced marriage.<sup>74</sup> New Zealand also co-sponsored resolutions on the continuing grave deterioration of the human rights and humanitarian situation in the Syrian Arab Republic<sup>75</sup> and on the provision of assistance to Somalia in the field of human rights,<sup>76</sup> as well as cooperation with the United Nations, its representatives and mechanisms in the field of human rights,<sup>77</sup> and the enhancement of technical cooperation and capacity-building in the field of human rights.<sup>78</sup>

New Zealand co-sponsored a draft discussion during the panel discussion on the safety of journalists<sup>79</sup> and joined the sponsors of draft decisions on the identification of good practices in combatting female genital mutilation<sup>80</sup> and technical assistance to the Central African Republic in the field of human rights.<sup>81</sup> New Zealand participated in the interactive dialogues with: the Commission of Inquiry on the Syrian Arab Republic;<sup>82</sup> the Commission of Inquiry on the Democratic People's Republic of Korea;<sup>83</sup> Special Rapporteur on the situation of human rights in Cambodia;<sup>84</sup> and the human rights situation in the Central African Republic.<sup>85</sup>

Evidence of New Zealand's participation in the UPR, held from 21 May to 4 June 2012, can be seen in Tuvalu's responses to New Zealand's recommendations,<sup>86</sup> and more particularly in New Zealand's welcoming of Tuvalu's constructive engagement with the UPR.<sup>87</sup>

71 Human Rights Council *The role of prevention in the promotion and protection of human rights* A/HRC/24/L.14/Rev.1 at [157].

72 Human Rights Council *Conscientious objection to military service* A/HRC/L.23 at [161].

73 Human Rights Council *Civil society space* A/HRC/24/L.24 at [181].

74 Human Rights Council *Efforts to prevent and eliminate child, early and forced marriage* A/HRC/24/L.34/Rev.1 at [195].

75 Human Rights Council *The continuing grave deterioration of the human rights and humanitarian situation in the Syrian Arab Republic* A/HRC/24/L.38 at [223].

76 Human Rights Council *The provision of assistance to Somalia in the field of human rights* A/HRC/24/L.20 at [990].

77 Human Rights Council *Cooperation with the United Nations, its representatives and mechanisms in the field of human rights* A/HRC/24/L.17/Rev.1 at [239].

78 Human Rights Council *The enhancement of technical cooperation and capacity-building in the field of human rights* A/HRC/24/L.26 at [994].

79 Human Rights Council *Panel discussion on the safety of journalists* A/HRC/24/L.13 at [205].

80 Human Rights Council *The identification of good practices in combatting female genital mutilation* A/HRC/24/L.11 at [208].

81 Human Rights Council *Technical assistance to the Central African Republic in the field of human rights* A/HRC/24/L.39 at [1003].

82 HRC *Twenty-fourth session*, above n 61, at [214(b)].

83 At [218(b)].

84 At [949(b)].

85 At [969(b)].

86 At [402] and [405].

87 At [417].



#### IV. ACTIVITIES OF THE NEW ZEALAND HUMAN RIGHTS COMMISSION

As an “A status” accredited NHRI, the Human Rights Commission is able to provide information on New Zealand’s human rights performance through UN special procedures and to UN treaty bodies, and to assist them in making informed recommendations. The Commission can formally participate in the Human Rights Council.<sup>88</sup> In that regard, it made a submission to the Council regarding New Zealand’s performance as part of the latter’s second UPR.<sup>89</sup>

The Commission released its annual report for the year ended 30 June 2013.<sup>90</sup> It also published its statement of intent detailing its operating intentions between 2013 and 2016 with regards to outcomes such as work and education, housing, health and community, violence and abuse, and human rights mainstreaming.<sup>91</sup> Work is continuing on the Commission’s three-year study of the impact of international human rights instruments on New Zealand law, policy and practice. The Commission released the report of its inquiry into the use and promotion of New Zealand Sign Language as an official language of New Zealand.<sup>92</sup> It also released its annual report of its activities under the Optional Protocol to the UN Convention against Torture.<sup>93</sup>

A notable case from the Human Rights Review Tribunal in 2013 is that of the *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland*.<sup>94</sup> The plaintiffs brought the case after the Bishop of Auckland refused Mr Sisnero’s request to be ordained into the priesthood because he was in an unmarried relationship.<sup>95</sup> Mr Sisnero claimed that he was discriminated against on the basis of either marital status or sexual orientation, both grounds which are prohibited by s 21 of the Human Rights Act 1993. In addition, s 38 prohibits any bodies from making any authorisations (or refusing to do so) on the prohibited grounds of discrimination contained in s 21. However, s 39(1) provides an exception to s 38 so that discrimination is not unlawful where the authorisation is needed for a calling for the purposes of an organised religion and is limited to persons of that religious belief “so as to comply with

88 New Zealand Human Rights Commission *Annual Report 2013* (HRC, Wellington, 2013) at 9.

89 New Zealand Human Rights Commission *18th Session of the Human Rights Council Universal Periodic Review: Report on New Zealand’s Human Rights Performance* (HRC, Wellington, 2013).

90 At 1.

91 New Zealand Human Rights Commission *2013-2016, Statement of Intent* (HRC, Wellington, 2013) at 10.

92 New Zealand Human Rights Commission *A New Era in the Right to Sign* (HRC, Wellington, 2013).

93 New Zealand Human Rights Commission *Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT)* (HRC, Wellington, 2013).

94 *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland* [2013] NZHRRT 36.

95 At [4].



the doctrines or rules or established customs of that religion". In determining that s 39(1) applied to the case, the Tribunal noted that the purpose of s 39(1) in the present context clearly was to preserve the institutional autonomy of organised religions in relation to their decisions concerning the appointment of clergy and ministers<sup>96</sup> so as to balance the general right to be free from discrimination with the collective right to freedom of religious belief.<sup>97</sup> Accordingly, there was no element of unlawfulness under the Act when the Bishop of Auckland refused Mr Sisnero's request regarding ordination into the Anglican priesthood.<sup>98</sup>

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96 At [92].

97 At [95].

98 At [97].