

HUMAN RIGHTS AND SOCIAL POLICY IN NEW ZEALAND

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Abstract

This article aims to facilitate debate about the implications for New Zealand social policy making of taking a rights-based approach. It does so by exploring the sources and scope of New Zealand's international human rights obligations, particularly in relation to economic, social and cultural rights. It identifies a range of constraints on social policy making deriving from these obligations and suggests that explicit and systematic attention to these constraints constitutes the essence of a rights-based approach to social policy making. Finally, the article comments on the adequacy of existing processes and structures of New Zealand government for giving effect to a rights-based approach and makes some suggestions for how these might be modified.

INTRODUCTION

New Zealand has entered into extensive international commitments with respect to the protection and promotion of human rights. Those commitments are binding on New Zealand as a matter of international law. They encompass both "civil and political" rights (CP rights) and "economic, social and cultural" rights (ESC rights). The latter category in particular has profound implications for social policy.

Over the last few years there has been increased interest from both within and outside government in the impact of human rights on the policy-making process. There is, however, considerable uncertainty about what a rights-based approach to social policy might require. That uncertainty derives in particular from the difficulties that attend any attempt to establish with precision the scope and effect of New Zealand's obligations with respect to ESC rights.

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Generally speaking, ESC rights have not been subject to the same extensive degree of standard setting that has attended the international regulation of CP rights and, accordingly, the language in which they are cast is often imprecise (Craven 1995:25–26). As well, the obligation placed on states under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (the ICESCR) is cast in relative rather than absolute terms. It requires the state to “take steps” to realise the rights “progressively” and “to the maximum of its available resources”. As a consequence, the precise extent of the state’s obligations with respect to ESC rights is both contestable and controversial. This problem is compounded by the absence of an established tradition of judicial or quasi-judicial elaboration of ESC rights, either in the domestic or the international setting (Chapman 1996:30–31).

In 2003 the Human Rights Commission commissioned the authors, through the New Zealand Centre for Public Law, to produce an issues paper on the implications of applying a rights-based analysis to the development of social policy in New Zealand (Geiringer and Palmer 2003). This article is a revised and abbreviated version of that paper. It aims to facilitate debate about the implications for New Zealand social policy making of taking a rights-based approach.

Following a brief description of the New Zealand social policy environment, the article embarks on a conceptual discussion of what a “human right” is and how a “rights-based” focus might thus differ from a focus on, say, human need. Against that background, the article explores the sources and scope of New Zealand’s international human rights obligations as they relate in particular to social policy. The article then develops a particular focus on ESC rights, dissecting the nature of the state’s protective obligation under the ICESCR and identifying a range of constraints on social policy, some substantive and some procedural. Finally, the article reviews the adequacy of existing processes and structures of government for giving effect to human rights and makes some suggestions for how these might be modified.

We do not attempt in this article to justify from first principles the legitimacy or utility of using a rights-based framework to conceptualise the state’s responsibilities. We are spared the necessity of engaging with the issues on that level by the simple fact that a rights-based approach to the development of social policy is required of the New Zealand government as a matter of binding international law. It is thus incumbent on New Zealand policymakers to engage with the content of relevant treaties and to address the rights contained in them in the process of policy formation. Quite simply, this article aims to provide assistance with, and to provoke discussion of, how to do so.

SOCIAL POLICY MAKING IN NEW ZEALAND

In this article, social policy is understood to be the principles and mechanisms by which government seeks to affect the development of society, particularly in relation to health, education and welfare. This definition is somewhat narrower than the definition used by the Ministry of Social Development in *The Social Development Approach* (2001:1), in which social policy is defined to include “all policy that has an influence on desirable social outcomes”. We do not, however, consider that the difference has material implications for the analysis that follows, nor that it is necessary in this context to attempt to resolve the vexed question of what, precisely, “social policy” means (see Baldock et al. 2003:4).

There has been a recent movement within New Zealand government from a “social welfare” to a “social development” approach to social policy (Shaw and Eichbaum 2005 Chapter 15). This shift was signalled by the release of the government statement *Pathways to Opportunity: From Social Welfare to Social Development* in June 2001 (New Zealand Government 2001) and of an associated social policy framework in August 2001 (Ministry of Social Development 2001). Key elements of this framework were that it:

- followed the Royal Commission on Social Policy (1988) in using the notion of “wellbeing” to formulate desirable social outcomes that are the goals of social policy
- noted that goals of social policy are about improving both the level and distribution of wellbeing
- noted that “The New Zealand literature is marked by a strong assertion that an important aspect of the goals of social policy is a guarantee of some adequate level of wellbeing for all people”, and that the Royal Commission had concluded that social, legal and political freedoms as well as aspects of culture and identity are relevant dimensions of an adequate level of wellbeing
- used a “social investment” approach to social policy that considers the impact of government policies and interventions on social policy goals, including the impact on all desired outcomes.

The Ministry’s framework is comprehensive and identifies a wide range of aspects of “wellbeing”, relevant goals and desirable social outcomes. It includes reference to a principle regarding the “distribution” of wellbeing: “that all individuals enjoy some basic minimum level of wellbeing” (paragraphs 21–24, citing Sen 1999).

What is not explicit in the Ministry’s framework is use of the language or perspective of human rights. That is not to say that a human rights approach is completely absent from the New Zealand policy environment. Since the enactment of the New Zealand

Bill of Rights Act 1990, government officials have increasingly been forced to confront the implications of human rights commitments for policy making, and this is reflected in Cabinet's decision-making processes (which are further discussed below, under the subheading "Executive Government"). Despite this, there remains considerable uncertainty within government as to what a rights-based approach to social policy might require and how it might differ from an approach that focuses on, for example, "wellbeing" (Human Rights Commission 2005: paragraph 7.4). This uncertainty attaches in particular to the policy implications of ESC rights, which are not protected by the Bill of Rights Act 1990 and, for the reasons already given, raise particular difficulties of scope and application.

WHAT IS A "HUMAN RIGHT"?

In essence, a rights-based approach to policy is one that ensures that policy is formulated within the parameters set by New Zealand's human rights obligations, as found in domestic and international law. Before examining that body of law, however, it is helpful to think more generally about what is meant by a "human right" and, in particular, how a focus on "rights" might differ conceptually from, for example, the focus on "needs" that is invited by the yardstick of "wellbeing".

Needs-based and rights-based approaches inevitably have much in common. However, the language of "rights" emphasises particular dimensions of the interests, entitlements and duties that are at stake. Thus we say that "John needs food" if we believe that in the absence of food, John's wellbeing will suffer in some way that we regard as fundamental. We are identifying the predicament (neediness) that John will face if deprived of food (Waldron 1996:105). A similar assessment of John's neediness may well also underlie the statement "John has a right to food". The idea of rights, however, complements the idea of neediness in a number of respects.

First, the language of "rights" is the language of demand or entitlement. To say that "John needs food" tells us nothing about the moral or legal obligations of others in relation to John's need. In contrast, the statement "John has a right to food" means that someone else (in the case of international human rights law, the state) has a *duty* to ensure that John's right is protected (White and Ladley 2005:6, Waldron 1996:94).

This also has implications for how we view the rights-bearer. To say that John "needs" food is to present John as a passive victim and potential recipient of charity. To say that John has a "right" to food is to conceptualise John as a holder of entitlements. The language of rights is thus the language of empowerment. John is cast as a self-sufficient and independent rights-bearer whose assertion of rights amounts to a vindication of his autonomy, personhood and dignity (Waldron 1996:96 and 104). Further, John the autonomous rights-bearer does not have to "earn" his right to food. As a "human

right” it is owed to him by virtue of his humanity. The concept of “deserving” and “undeserving” poor is largely absent from human rights thinking.

Finally, the language of rights says something about the priority that is attached to the interest that is at stake. We say that John has a right to food only if we regard John’s individual interest in food as sufficiently compelling to justify the imposition of a duty (to satisfy John’s right to food) on others. John’s “right” to food likewise implies that John’s individual interest in food is too important – too compelling – to be sacrificed to other, lesser interests held by other members of the community or by the community as a whole. John’s “right” is to be given a degree of priority in the process of balancing community interests (White and Ladley 2005:6–7). By creating rules concerning when a right should have such priority, a rights-based approach thus privileges some “needs” over others and provides a tool for allocating between scarce resources.

Against that background, we turn to consider the human rights framework, as it affects the New Zealand social policy environment.

NEW ZEALAND’S HUMAN RIGHTS FRAMEWORK

In New Zealand, human rights are protected in manifold ways throughout the breadth of statute and common law. To use a commonplace example, the criminalisation of murder is one of the ways in which the state protects the right to life.

Generally speaking, such rules of statute or common law can be amended through the ordinary sequence of policy development followed by legislative enactment. By the human rights “framework” we mean those general instruments of human rights protection, deriving from domestic and international law, that stand outside the day-to-day operation of the policy process and constrain it, substantively and procedurally.²

Key Relevant Instruments of Human Rights Protection

The rules governing Cabinet’s decision-making processes (which are further discussed below under the subheading “Executive Government”) require that Cabinet papers advancing policy and legislative proposals should include consideration of several domestic human rights-related instruments: the Bill of Rights Act 1990, the Human Rights Act 1993, the Privacy Act 1993, and the Treaty of Waitangi. They also require consideration of New Zealand’s international obligations.

2 Over time, of course, the policy process can be employed to alter these constraints themselves. This article treats the constraints currently imposed by New Zealand’s human rights framework as exogenous to the policy process.

The binding international human rights obligations entered into by the New Zealand government are principally located in two sets of international treaties: the United Nations (UN) treaty series and the treaties of the International Labour Organisation (the ILO).³

The centrepiece of the UN human rights regime is the collection of international instruments commonly referred to as the “international bill of rights”. This comprises the Universal Declaration of Human Rights (the Universal Declaration), the ICESCR, the International Covenant on Civil and Political Rights (the ICCPR) and two protocols to the ICCPR.

With the exception of the Universal Declaration, these instruments are binding treaties that have been ratified by the New Zealand government. The Universal Declaration was adopted by resolution of the UN General Assembly having no force of law. However, its provisions have been so frequently invoked and relied upon by governmental and non-governmental organisations that some commentators believe that many of the rights contained within it have achieved the status of customary international law (Buergethal et al. 2002:39–43).⁴

The international bill of rights is supplemented by more specific treaties that protect the human rights of particular vulnerable groups or that explore in more detail the state’s obligations with respect to a particular category of human rights. Notable among these are the Convention relating to the Status of Refugees (the Refugee Convention), the Convention on the Elimination of All Forms of Racial Discrimination (the Race Convention), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), the Convention on the Elimination of All Forms of Discrimination Against Women (the Women’s Convention) and the Convention on the Rights of the Child (the Children’s Convention).

The ILO conventions primarily (although not exclusively) concern labour rights. There are 185 such conventions, of which 50 are currently in force for New Zealand. The cornerstone of the ILO treaty regime, however, is the eight “fundamental conventions.” These are grouped into four key areas of concern: forced labour (C29 and C105), freedom of association and the right to collective bargaining (C87 and C98), workforce

3 New Zealand is additionally bound by customary international law. However, the breadth of New Zealand’s human rights treaty obligations is significantly greater than that of the corresponding body of customary international law and so we do not explore the latter.

4 Other theories that the Universal Declaration now has binding force include the suggestion that it amounts to an authoritative interpretation of the UN Charter (itself a binding treaty) and that it reflects “general principles of law”, themselves a binding source of international law (Buergethal et al. 2002:39–43).

discrimination (C100 and C111) and child labour (C138 and C182). New Zealand has ratified six of the fundamental conventions – all excepting C87 (relating to freedom of association) and C138 (relating to the minimum age).

The Substantive Rights

The content of the domestic human rights instruments referred to above is relatively well known and is not detailed here. Nor do the constraints of this article allow us to set out or explore all the rights that are protected by the international treaty regime.⁵ Instead, we confine ourselves to three broad observations with respect to the scope of the treaty regime that we consider to be of particular significance for policymakers.

The first is to stress the overarching importance within the human rights treaty regime of the twin rights of equality and freedom from discrimination. Equality rights are prominently protected throughout the treaty regime. For example, under the second article to both the ICESCR and the ICCPR, states undertake to guarantee the rights enunciated in the respective treaties without distinction (or discrimination) of any kind as to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁶ Article 2 of the Children’s Convention is similarly worded. Article 26 of the ICCPR goes further and contains a general guarantee of equality before the law, equal protection of the law and freedom from discrimination. ILO Conventions 100 (on equal remuneration) and 111 (on discrimination in employment and occupation) have an overarching anti-discrimination focus, as do the Race Convention and the Women’s Convention.

The pervasiveness of the right to equality reflects a more general preoccupation in international human rights law with individuals and groups that are vulnerable, marginal, disadvantaged or socially excluded (OHCHR 2004a:17). Vulnerable groups that are singled out for special protection at different points within the express framework of international human rights treaties include women, rural women, children, ethnic and religious minorities, and refugees. Additionally, the UN human rights treaty bodies have drawn attention in their general comments to the plight of other vulnerable groups including disabled persons, the elderly, and indigenous peoples (see, for example, OHCHR 2004b:25–45, 93 and 215–216).

The second general observation relates to the distinction between ESC rights and CP rights. Broadly speaking, the former category aims to guarantee to the individual certain social or economic entitlements (such as the right to health, food or education),

5 The full paper commissioned by the Human Rights Commission (on which this article is based) does attempt a summary of the substantive content of relevant rights: Geiringer and Palmer (2003:14–18).

6 See also ICESCR Article 3 and ICCPR Article 3, relating to gender equality.

whereas the latter category consists of those rights that have traditionally been directed to protecting the individual against intrusion from the state (classic examples are the freedoms of expression, association, religion and assembly). This distinction, though commonly employed in the literature, is neither easily drawn nor useful for all purposes. If not deployed with care, it has the potential to conceal or downplay the interconnectedness of human rights and the ways in which they are mutually reinforcing. Thus, the Vienna Declaration and Programme of Action (1993) proclaims all human rights to be “indivisible, interdependent and interrelated”.

This discussion nevertheless employs the distinction between ESC and CP rights and develops a particular (although not exclusive) focus on the former category. This is for three reasons. First, while all human rights can impact on social policy, the preoccupations of ESC rights (health, welfare, education, employment, family life, culture) have particular resonance. Second, despite the rhetoric of “indivisibility”, the international bill of rights emphasises the distinction between these two categories and places markedly different obligations on member states with respect to the protection of each (compare ICESCR Article 2(1) and ICCPR Article 2(1)). This point is explored in more depth below. Third, the international framework for the protection of ESC rights is neither as well established nor as well understood as the framework for the protection of CP rights (Craven 1995:9–10, Chapman 1996:30). This article attempts to address that deficit.

Given the particular emphasis on ESC rights in the analysis that follows, it is important to emphasise two points at the outset. The first is that the distinction between the two categories is not clear-cut (see Gutto 1998:93–98, Scheinin 2001:32–42). For example, the Human Rights Committee (the United Nations treaty body responsible for monitoring the ICCPR) has interpreted a number of rights in the ICCPR to involve dimensions more naturally associated with ESC rights. It has said, for example, that the right to life protected by Article 6 of the ICCPR renders it “desirable” for states parties to take all possible measures to reduce infant mortality and to increase life expectancy (OHCHR 2004b:129). Similarly, in *Chaouilli v Québec (Attorney-General)* (2005) 130 CRR (2d) 99, a majority of the Supreme Court of Canada held that a prohibition on private health insurance violated the rights to life and personal inviolability protected by section 1 of the Quebec Charter of Human Rights and Freedoms. The United Kingdom Court of Appeal has likewise recognised the possibility that failure to provide adequate welfare support may, in extreme circumstances, amount to a breach of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (relating to inhuman treatment) or Article 8 (relating to family life) (*Anufrijeva v Southwark London Borough Council* [2004] QB 1124, paragraph 43).

The second point is that CP rights may in any event impact on social policy and in particular on the process by which social assistance is formulated and delivered. One category of CP rights that has particular resonance and importance for the process of social policy formation is rights concerning participation in the conduct of public affairs. Rights of participation are found in a number of forms in the international human rights treaties, including the ICCPR, the Race Convention, the Women's Convention and the Children's Convention. The significance of this emphasis on participation is explored further below, under the subheading "The Language of ICESCR's Article 2(1)".

The third general observation is that in order to ascertain the scope and implications of the obligations undertaken by New Zealand pursuant to binding international treaties, it is necessary to look beyond the instruments themselves to non-binding sources of elaboration and interpretation, such as the general comments and other documents produced by the UN human rights treaty bodies. This is particularly crucial in the case of ESC rights because, as mentioned above, the treaties lack detailed textual elaboration.

Nature of the Government's Substantive Obligations

Key to an appreciation of what a rights-based approach to social policy might entail is an understanding of what, precisely, it is that the New Zealand government has undertaken to do with respect to the protection of human rights.

We identified above three domestic human rights statutes that are singled out in the rules governing Cabinet's decision-making processes: the Bill of Rights Act 1990, the Human Rights Act 1993 and the Privacy Act 1993. Although these statutes do impose substantive constraints on government action (they prohibit policies or actions inconsistent with the rights and freedoms contained in them), they do not, ultimately, impose substantive constraints on the policy process. That is because, in the final analysis, the New Zealand Parliament retains the ability to legislate in breach of domestic human rights statutes should it so wish.⁷ However, the necessity to enact legislation in order to override these protections, together with the mechanisms for consideration of human rights and related issues that have been built into Cabinet decision-making processes, create procedural constraints on policy making (see below, subsection "Executive Government"). The difficulties involved in legislating in an MMP environment act as a further *de facto* constraint.

As an unincorporated treaty, the Treaty of Waitangi has little direct legal effect in and of itself. However, it is given statutory effect in particular spheres of government policy through the inclusion of "Treaty clauses" in a number of specific statutes.

⁷ For consideration of the contrary view with respect to the Bill of Rights Act 1990 (i.e. that it does act as a substantive constraint on legislation), see Geiringer 2007.

As with the statutory instruments discussed above, it also acts as a procedural constraint on policy making through its invocation in the rules governing Cabinet decision-making processes.

Turning to New Zealand's international human rights treaty obligations as a matter of *domestic* law, in the absence of specific statutory reference there is similarly nothing to compel the New Zealand government to give effect to international law. It is a fundamental principle of *international* law, however, that the obligations contained in an international treaty bind the parties to the treaty, who are accordingly obliged to modify their domestic legal orders to give effect to them (see, for example, Vienna Convention on the Law of Treaties, Article 27). Failure to do so will render New Zealand in breach of its binding international obligations.

In ascertaining the nature of the state's obligations with respect to the advancement of particular rights, the starting point is the treaties themselves, each of which create slightly different obligations of protection. As a general rule, however, the state's obligations with respect to CP rights tend to be relatively straightforward. For example, the state's primary protective obligation under Article 2(1) of the ICCPR is to "respect" and "ensure" to individuals the rights contained in it. The obligation is an immediate one that comes into effect on entry into force of the treaty. It is sometimes elaborated as a three-pronged obligation to respect (refrain from interfering with), protect (from violation by third parties) and fulfil (take positive steps to realise) relevant rights (e.g. Hunt 1996:31, OHCHR 2004b:194).

That three-pronged obligation is also said to adhere to ESC rights (e.g. *Maastricht Guidelines* 1997: paragraph 6, Craven 1995:109–114). However, the precise nature of the state's obligation with respect to ESC rights is muddled by Article 2 of the ICESCR, which reads as follows:

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Two key features of Article 2(1) establish that the state's obligation of protection is something less than immediate and absolute. First, the language of Article 2(1) is

programmatic rather than immediate: states undertake to “take steps” towards the progressive realisation of the rights. Secondly, Article 2(1) expressly contemplates the possibility of resource limitations that might preclude full realisation of all the rights in all states.

These features reflect the fact that fulfilment of ESC rights can require the substantial outlay of resources. It can thus involve questions of resource capacity and can intrude into the democratic arena of economic and social policy choices. Because of this, Article 2(1) reserves for states a substantial discretion to determine how to go about realising ESC rights and makes the duty to fulfil them contingent on economic capacity (OHCHR 2004a:22). The UN treaty body charged with monitoring the ICESCR, the Committee on Economic, Social and Cultural Rights (the ICESCR Committee) has thus described Article 2(1) as “a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic ... rights” (OHCHR 2004b:17).

The contingent nature of the Article 2(1) obligation creates something of a conundrum. Given that Article 2(1) reposes such a large measure of discretion in states to decide how to meet their treaty obligations, has not the distinction between “rights” and “needs” collapsed? Is there any “bottom line” below which states are not entitled to drop? If so, how is it to be ascertained?

These questions, which are at the heart of ascertaining what a “rights-based” approach to social policy may require, are addressed below.

ESC RIGHTS: THE STATE’S PROTECTIVE OBLIGATIONS INTERROGATED

We seek here to identify more specifically the constraints on social policy in New Zealand that are imposed by ESC rights. We do this first by reference to the language of ICESCR’s Article 2(1); second by reference to its companion provision, Article 2(2); and finally by reference to the wider framework of international human rights law. In short, we conclude that notwithstanding the relative and contingent language in which Article 2(1) is cast, a set of substantive and procedural constraints on social policy do nevertheless emerge from the international human rights framework.

The Language of ICESCR’s Article 2(1)

If the language of ICESCR’s Article 2(1) is read with an eye to the outer constraints that the ICESCR imposes, the following points emerge.

- The obligation to “take steps” to realise the rights contained in the ICESCR “progressively” envisages a linear progression towards ever-increasing realisation

of rights. States must not tread water. Rather, they must take “deliberate, concrete and targeted” steps to continuously improve levels of enjoyment of ESC rights (OHCHR 2004b:15; see also *South Africa v Grootboom* 11 BCLR 1169 (2000) (*Grootboom*): paragraph 45). Further, although the obligation to realise the rights is progressive, the obligation to “take steps” is an immediate one (OHCHR 2004b:15, *Limburg Principles* 1986: paragraphs 16 and 21).

- Article 2(1) states that the steps taken must be with a view to achieving “full realisation” of rights. The ICESCR Committee has suggested that Article 2(1) imposes an obligation to move as expeditiously and effectively as possible towards that goal of full realisation (OHCHR 2004b:17; see also *Limburg Principles* 1986: paragraph 21).
- States must take steps to the “maximum” of their available resources and by “all appropriate means”. This amounts to a direction to states to accord ESC rights high priority in the process of resource allocation. The ICESCR Committee has thus suggested that the flexibility inherent in Article 2(1) coexists with an obligation on each state to use “all the means at its disposal” to give effect to the protected rights (OHCHR 2004b:55). “Appropriate means” may include judicial remedies where appropriate, and will also include a range of legislative, administrative, financial, educational and social measures (OHCHR 2004b:15–16, *Limburg Principles* 1986: paragraph 17).
- Finally, the notion of “full realisation” clearly includes an obligation to take positive measures to ensure the enjoyment of the rights.

In light of this language, we suggest that a rights-based approach to social policy requires the incorporation of the seven elements discussed below.

1. An ongoing and reasonable engagement with the scope and effect of relevant rights

The Article 2(1) obligation to take steps towards the progressive realisation of ESC rights must, we suggest, require explicit recognition by policymakers of the international human rights normative framework, an ongoing engagement with the scope and effect of relevant rights, and the formulation of ongoing strategies and programmes for the promotion of such rights (see OHCHR 2004b:18). This would seem to require policymakers to remain actively engaged with at least four questions:

1. What is the scope of the protected rights?
2. To what extent have they been realised?
3. What is the extent of the state’s current capacity to realise the rights?
4. How might they be more fully realised within current resource constraints?

As to the first question, we have identified above a degree of imprecision in the language in which many ESC rights are cast (Chapman 1996:30). This does not mean that they can be ignored. Rather, if ESC rights are to be given the priority that Article 2(1) demands, it is incumbent on relevant officials to keep abreast of the evolving international consensus as to what is required to realise particular rights (see OHCHR 2004a: 14–15). This will necessarily be an ongoing and dynamic process, requiring policymakers to constantly update their understanding of the content of international law (always bearing in mind the interconnectedness and interdependence of relevant rights) and to incorporate any fresh insights into their framework for policy development. In doing so, they will need to engage with the non-binding sources of elaboration and interpretation adverted to under the subheading “The Substantive Rights” above and listed more fully in Geiringer and Palmer (2003, paragraph 48).

As to the second question, the ICESCR Committee has said that diagnosis and knowledge of the existing situation is the essential first step towards promoting the realisation of ESC rights (OHCHR 2004b:10–11, 18, 28). Effective, regular, transparent and accessible monitoring of ESC rights is an essential feature of a human rights approach (Alston 1990:379). Further, if the progressive realisation of rights is to be effectively monitored, the government must have in place mechanisms to measure the extent of its progress. This can be done through the combined application of human rights “indicators” (measures of the extent of realisation) and “benchmarks” (targets) (e.g. OHCHR 2004b:101). In the light of the State’s obligations to promote equality and to offer particular protection to vulnerable groups, statistical data must also be appropriately disaggregated. A rigorous human rights approach to policy making demands an analysis of the distributional impact of reforms on the wellbeing of different groups in society, especially the poor and vulnerable (see, for example, OHCHR 2004b:10, Hunt 2006, Chapman 1996, Human Rights Commission 2005: paragraph 7.6).

As to the third question, Article 2(1) would seem to require that any shortfall in the state’s realisation of ESC rights be positively justifiable on grounds of insufficient resources. It is, therefore, incumbent on policymakers to keep under constant review the explanations for any such shortfall (see *Grootboom*: paragraph 45).

As to the fourth question, it almost goes without saying that the obligation to “take steps” and use “all appropriate means” requires constant re-evaluation of existing strategies for meeting the treaty obligations (see, for example, OHCHR 2004b:10, 17–18 and 28).

Finally under this head, we suggest that international law requires that the strategies employed in New Zealand to realise protected rights must be “reasonable” in the sense employed by the Constitutional Court of South Africa in *Grootboom* and in *President of*

the Republic of South Africa v Modderklip Boerdery (Pty) (2005) 8 BCLR 786 (Modderklip). In *Grootboom* (paragraphs 28 and 38–44, followed subsequently in *Minister of Health v Treatment Action Campaign (2002) 10 BCLR 1033*, especially paragraphs 68 and 100 (TAC)), the Constitutional Court held that progressive realisation of rights requires the government to devise comprehensive and coordinated policies and programmes and to sensibly prioritise resources to address the situation of those most in need. In *Modderklip* (paragraph 49), the Constitutional Court added that progressive realisation requires careful planning and fair procedures that have been made known in advance to those most affected. Although flexibility is important, orderly and predictable processes are also vital.

It should be noted that the wording of the constitutional obligation at issue in *Grootboom* and *Modderklip* differs slightly from Article 2(1) of the ICESCR. Whereas Article 2(1) requires states to take “all appropriate means” to progressively realise rights, the provision at issue in *Grootboom* and *Modderklip* requires the state to take “reasonable ... measures”. In our view this linguistic difference is, however, of little practical significance.

2. *No retrogressive measures*

The Article 2(1) requirement to take steps towards the progressive implementation of ESC rights would seem to preclude states from introducing deliberately *retrogressive* measures, at least in the absence of truly exceptional circumstances. The ICESCR Committee has said that retrogressive measures are prohibited in the absence of clear justification and a background of severe resource constraint (OHCHR 2004b:17, 94 and 111; see also Craven 1995:131–132).

3. *An obligation to “respect” the rights*

A related point is that an immediate prohibition on state *interferences* with protected rights would seem to be implicit in Article 2(1). The leeway that is inherent in the notion of “progressive implementation” relates, rather, to the positive measures that are required of states in order to “protect” or “fulfil” rights, it being these positive measures that have resource implications for the state concerned. That was the view taken by the Constitutional Court of South Africa in *Grootboom* (paragraph 34) and TAC (paragraph 46) (see also Kotrane 2003: paragraph 19, Sachs 2000:1389–1390).

The obligation to “respect” rights is, however, not unmediated. It must be applied in light of Article 4 of the ICESCR, which provides that states may subject the covenant rights “only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.

4. *An obligation to provide minimum levels of realisation?*

The ICESCR Committee has suggested (and some commentators agree) that the leeway given to states under Article 2(1) needs to be read subject to a minimum core obligation to ensure satisfaction of “minimum essential levels” of each right (OHCHR 2004b:17, *Maastricht Guidelines* 1997:18, Kotrane 2003:11, OHCHR 2004a:26–27, Hunt 1996:18). The Committee posits, for example, that a state in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing or of basic education is *prima facie* failing to discharge its obligation under the ICESCR. In order to absolve itself, the state would need to demonstrate that every effort has been made to use all the resources that are at its disposal as a matter of priority (OHCHR 2004b:17).

The notion of minimum core obligations was rejected by the Constitutional Court of South Africa in *Grootboom* (paragraph 33) and TAC (paragraphs 35–38) as unworkable. However, that conclusion was to some extent context-dependent (see *Grootboom*: paragraph 32) and reflected a particular concern about the *justiciability* of minimum core obligations (as opposed to their utility in establishing the content of ESC rights for policy purposes) (see TAC: paragraphs 37–38).

We reach no conclusion here as to the relevance of the concept of minimum core obligations to New Zealand’s international human rights commitments, but simply note that it is a matter that needs to be discussed by those involved in the policy-making process.

5. *Participation of rights-holders in policy development*

The language of Article 2(1), read against the background notion of rights-bearers as autonomous and empowered individuals, also speaks to the *process* of policy formation. It requires active engagement on the part of policymakers with civil society and, in particular, with affected groups.

As suggested above, rights bearing on the ability to participate in the conduct of public affairs are found in a number of forms in the international bill of rights and the other human rights treaties (see, for example, Universal Declaration, Article 21; ICESCR, Articles 1 and 13(1); ICCPR, Articles 1 and 25; Race Convention, Article 5(c); Women’s Convention, Articles 7, 8 and 14(2)(a) and (f); and Children’s Convention, Articles 9(2), 12 and 17). Such express rights of participation are additionally bolstered by the freedoms of association, assembly and expression (e.g. ICCPR, Articles 19, 21 and 22).

Drawing in part on these rights, the ICESCR Committee and the Office of the High Commissioner for Human Rights (among others) have stipulated the need for consultation with affected persons and groups in the process of formulating relevant policies (e.g. OHCHR 2004b:18–20 and 23; see, also, *Limburg Principles* 1986: paragraphs 10–11, Craven 1995:120–122). Encouragement of such consultation is, the ICESCR Committee suggests, one of the principal objectives of the state reporting procedures contained in the ICESCR (OHCHR 2004b:11). More generally, though, the Office of the High Commissioner for Human Rights has suggested that a rights-based approach requires engagement with affected groups at *all* stages of policy development, from initial conception through to implementation, monitoring and assessment (OHCHR 2002:16–17).

6. *Forms of enhanced accountability*

Some degree of governmental accountability for its performance with respect to fulfilment of human rights is also essential to a rights-based approach. That is inherent in the very nature of a human “right” as a demand or entitlement owed to the rights-holder as a matter of obligation.

The obligation on New Zealand to report periodically to the United Nations human rights treaty bodies charged with monitoring the six human rights treaties to which New Zealand is a party provides a valuable form of international accountability. However, domestic accountability mechanisms are also important.

New Zealand’s system of democratic elections provides a base level of domestic accountability. The literature, however, discloses a growing consensus that a human rights approach requires something more specifically targeted to the protection of relevant rights (see, for example, ICESCR Committee 2001: paragraph 14, OHCHR 2004a:15–16, Hunt 2003:9–10).

There is a range of potential mechanisms available for enhancing domestic accountability for breaches of ESC rights, ranging from full judicial accountability (justiciability of all ESC rights) to forms of political accountability (e.g. enhancing the attention given to ESC rights in the parliamentary process). In between these two extremes sit, for example:

- justiciability of some but not all ESC rights
- use of administrative complaints mechanisms
- utilisation of other (non-complaint-driven) forms of administrative scrutiny of government action
- establishment of capacity, either within government or within a separate administrative agency, for the preparation of impact assessments (i.e. assessments of the potential impact of proposed laws or policies on human rights).

The ICESCR does not require states to utilise any particular mechanism or mechanisms for enhancing governmental accountability. However, the Article 2(1) stipulation that “all appropriate means” are to be used to move towards full realisation of the rights calls for the deployment of *some form* of enhanced accountability. We suggest that the obligation under Article 2(1) is to *consider* all available options and to institute the particular mix of accountability mechanisms that is judged to be both “appropriate” (using the language of Article 2(1)) and consonant with available resources. At a minimum, however, such accountability mechanisms must be effective, transparent and accessible.

One aspect of the wider question of accountability that requires separate consideration is the provision of effective remedies. The ICESCR should be read, in this respect, in the light of Article 8 of the Universal Declaration (which sets out the right to an effective remedy by competent national tribunals for acts in violation of fundamental rights) and of the legal maxim that where there is a right, there is a remedy (see, for example, *Simpson v Attorney-General [Baigent’s Case]* [1994] 3 NZLR 667 at p.717 McKay J; see also OHCHR 2004b:55). Against that background, Article 2(1) would seem to require states to “take steps” to their “maximum available resources” and to the extent “appropriate” to make provision for effective remedies to individuals for breach of their ESC rights. The ICESCR Committee has suggested in this respect that administrative remedies may in many cases be adequate, as long as they are accessible, affordable, timely and effective, but has called for special consideration to be given to the adoption of judicial remedies to reinforce or complement administrative ones (OHCHR 2004b:57).

We do not seek here to resolve the vexed question of the extent to which judicial or quasi-judicial remedies for violation of ESC rights in New Zealand are either “appropriate” or economically viable (nor the related question of whether there should be an international complaints mechanism).⁸ In our view, however, a rights-based approach to social policy requires these questions to be confronted and addressed in a principled manner.

7. Special protection for the disadvantaged

The ICESCR Committee has suggested on a number of occasions that where resource constraints restrict a state’s ability to provide for full realisation of ESC rights, special attention or priority must be given to the most vulnerable or disadvantaged (see, for example, OHCHR 2004b:18 and 21–23; see also OHCHR 2004a:17). In other words,

8 There is an extensive international literature on the justiciability of ESC rights (e.g. Sachs 2000, Dennis and Stewart 2004). The possibility of a draft optional protocol to the ICESCR, which would allow individuals to complain of breach of their rights under the Covenant, has been under discussion within the United Nations for some 15 years. It is currently being considered by an open-ended working group appointed by the Commission on Human Rights.

responses to social and economic need must be from the bottom up. The obligation in relation to vulnerable or disadvantaged groups is, the Committee has suggested, to take positive action to reduce structural disadvantages and to give appropriate preferential treatment in order to achieve the objectives of full participation and equality (OHCHR 2004b:27).

A failure to provide relief for the most needy formed the nub of a finding of violation of ESC rights by the Constitutional Court of South Africa in *Grootboom* (paragraphs 36, 44, 63–69; see also *TAC*: paragraph 68). The Court held that the obligation of progressive realisation required sensible priority-setting with particular attention to the plight of the most disadvantaged.

ICESCR's Article 2(2): Non-Discrimination and Equality

The call to attend to the predicament of the most disadvantaged and vulnerable naturally directs attention to Article 2(2) of the ICESCR, which has been set out above. Under it, states guarantee that the rights enunciated in the ICESCR will be exercised without discrimination of any kind.

The significant point with respect to the Article 2(2) obligation is that it is additional to (rather than subject to) Article 2(1). Accordingly, the obligation to provide for the non-discriminatory exercise of the rights contained in the ICESCR is neither progressive nor subject to resource constraints. It is immediate and absolute (see, for example, *Limburg Principles*: paragraphs 22 and 35, Craven 1995:181).

If there were any doubt about this, it is reinforced by Article 26 of the ICCPR, which provides an absolute guarantee of equality before the law, equal protection of the law and freedom from discrimination. The Human Rights Committee confirmed in *Broeks v The Netherlands* (1987) Communication No 172/1984, A/42/40 that Article 26 is broad enough to guarantee freedom from discrimination in the provision of social and economic entitlements. The Race Convention and the Women's Convention further cement the obligation to provide social and economic entitlements without discrimination.

Significantly, it is generally recognised that the concept of equality found in these international instruments is one of substantive (*de facto*) rather than formal (*de jure*) equality. What this means is that the state is not only obliged to ensure that formal rights and entitlements are extended without discrimination but must also act to eliminate structural inequalities and actual social and economic disparities. This may well require affirmative action designed to ensure the positive enjoyment of rights by historically disadvantaged groups (see, for example, OHCHR 2004b:146–148, ICESCR Committee 2005, Chapman 1996:43–44, Geiringer 2006:185). There is,

however, some recognition in the literature that unlike *de jure* equality, *de facto* equality may need to be “progressively” realised (e.g. Kotrane 2003:10, Craven 1995:181–182).

The State’s Obligations Under the Other Treaties

Finally, it should be borne in mind that the leeway given to states under Article 2(1) of the ICESCR to realise rights progressively and within available resources does not apply to obligations undertaken under other international treaties. For example, under the Children’s Convention, states’ parties guarantee numerous ESC rights to children without reference to the language of progressive realisation. ESC rights also receive protection in various forms in other group-specific treaties (such as the Refugee Convention), in the ILO Conventions (with respect, in particular, to labour rights), and even in the ICCPR (see under the subheading “The Substantive Rights” above). To repeat: resort must be had to the precise terms of each of these instruments in order to ascertain the nature of the state’s protective obligations under them.

IMPLICATIONS FOR SOCIAL POLICY MAKING

When considering the implications of the above analysis for the New Zealand policy environment, it is important to begin by restating the degree of recognition that is accorded within the international human rights framework to the entitlement of democratically elected governments to pursue the progressive realisation of ESC rights in their own way and choosing their own policy frameworks. The ICESCR is, as the ICESCR Committee has stressed, “neutral” as to political and economic systems (OHCHR 2004b:16–17, Craven 1995:123–124).

That said, we have identified above a set of parameters or boundaries derived from the international human rights framework, related particularly to ESC rights as outlined above, that act as substantive and procedural constraints on social policy making. We consider that explicit, systematic attention to these constitutes the essence of a rights-based approach.

It is not that a rights-based approach to social policy making must be deployed to the exclusion of other approaches. The utilisation of other approaches – whether needs-based, population-based or evidence-based – can only enhance the richness of analysis that will result in good social policy. The point is that along with these other approaches, the New Zealand government also needs to incorporate rights-based analysis into policy development. Doing so can only serve to bring additional clarity to strategic social policy development and detailed goal setting. As the Office of the High Commissioner of Human Rights has suggested, the “value added” by a human rights approach is, in part, the way it reinforces and legitimises existing strategies (OHCHR 2002:4).

Standing back from the minutiae, it is quite possible that the *substantive results* of a large portion of current New Zealand social policy analysis would live happily within the parameters set by a rights-based approach. For example, the Ministry of Social Development's *Social Development Approach* (2001) separately identifies human rights as a distinct "desirable social outcome". In addition, the discussion in that document of reducing social exclusion (in the Overview) and the discussion of increasing the overall level and distribution of wellbeing (in the Strategy section) are consistent with a rights-based understanding of these notions, although neither are explicitly cast in rights-based language.

Inevitably, however, a rights-based analysis will sometimes require a departure from existing strategies and a reordering of social policy priorities. We have not undertaken the detailed analysis of current New Zealand social policy approaches to particular issues that would be necessary in order to evaluate the extent to which such a reordering might need to occur. We do consider that such analysis needs to be undertaken in order for New Zealand to better align its social policy with its international obligations. Building on observations to this effect in the issues paper on which this article is based (Geiringer and Palmer 2003), the Human Rights Commission in its National Plan of Action (2005: paragraph 7.4) recommended as a priority for action the conduct of practical case studies with central and local government applying a human rights approach to new and existing policies and legislation. In the absence of a formal government response to the Plan of Action, however, no such case studies have been undertaken.

What is clear is that the obligatory nature of human rights compliance means that on those, hopefully rare, occasions where a rights-based approach comes into conflict with other approaches, any requirements generated by the rights-based approach must be complied with. To do otherwise is to risk putting New Zealand in breach of its binding international obligations.

Finally, if a rights-based approach to social policy making is to be taken, there must be adequate procedural and structural mechanisms in place to support it. We turn now to consider the range of institutions and processes of New Zealand government.

THE STRUCTURE AND PROCESSES OF GOVERNMENT

Cabinet decision-making processes, the legislative process, independent scrutiny, and the judicial process all have the potential to impact on the substantive dimensions of social policy making. We consider these in turn. In each case, we make some suggestions for how it might be possible to enhance the government's capacity to bring a rights-based approach to bear on social policy making.

Executive Government

The Cabinet decision-making process is the key way in which social policy is formulated within the New Zealand government. The principal procedural mechanisms by which the consideration of human rights and related issues is built into it are as follows.

- Since May 2003, all policy proposals submitted to Cabinet committees must include comment on their consistency with the Bill of Rights Act 1990 and the Human Rights Act 1993. Formulation of this advice is the responsibility of the relevant officials, who may consult with the Ministry of Justice and/or Crown Law Office (Cabinet Office 2001b: paragraphs 3.53–3.57).
- All Cabinet papers submitted to the Cabinet Social Development Committee are required to include a gender implications statement as to whether a gender analysis of the policy proposal has been undertaken (Cabinet Office 2001a: paragraphs 3.61–3.62, Cabinet Office 2002) and “where appropriate” a disability perspective (Cabinet Office 2001b: paragraphs 3.63).
- The Cabinet Manual (Cabinet Office 2001a: paragraphs 5.35–5.36) requires legislative proposals submitted to Cabinet Legislation Committee to confirm compliance with the principles of the Treaty of Waitangi, the rights and freedoms contained in the Bill of Rights Acts 1990 and the Human Rights Act 1993, the principles in the Privacy Act 1993 and “international obligations”.
- Section 7 of the Bill of Rights Act 1990 requires the Attorney-General to draw to the attention of the House of Representatives any inconsistencies between proposed legislation and the Bill of Rights Act 1990, and, accordingly, government officials (from the Ministry of Justice or the Crown Law Office) must advise the Attorney-General on the consistency of all proposed legislation (see Cabinet Office 2001a: paragraph 5.39).

The first of these mechanisms has the advantage that it seeks to bring human rights considerations to bear early in the policy-making process. If a rights-based approach is to be taken, clearly it must be integrated into the process at an early stage. The mechanism is, however, defective in that it demands an exclusive focus on the Bill of Rights Act 1990 and Human Rights Act 1993. Accordingly, it does not facilitate consideration of the full range of human rights including, for the most part, ESC rights.⁹ The same criticism can be made of the last of the mechanisms set out above.

⁹ The major exception to this general proposition is that both the Bill of Rights Act 1990 and the Human Rights Act 1993 invite consideration of discrimination which, as discussed above, may include discrimination in the provision of social or economic entitlements.

The second of the above mechanisms does not directly call for “human rights” analysis, although in practice any analysis of gender and disability implications is likely to include consideration of human rights issues. Whether this mechanism is being routinely utilised to analyse policy proposals for ESC rights is, however, a matter that would require further study. We suspect that it is not.

By requiring legislative proposals to confirm compliance with “international obligations”, the third of the above mechanisms does have the potential to facilitate consideration of ESC rights. Again, although further study is required, we suspect that this mechanism is not routinely utilised to analyse the implications of legislative proposals for ESC rights. However, this mechanism is in any event defective because it applies at a late and limited stage of policy development – once legislation is proposed and thus only in relation to policy initiatives that ultimately require legislative imprimatur.

In order to overcome current systemic biases in these processes towards CP rights (whether explicit or subconscious), an express requirement that officials address the ESC rights implications of policy proposals would probably be required. The most straightforward way to achieve this would be to add to the first of the mechanisms set out above an express stipulation that all policy proposals comment on consistency with New Zealand’s international obligations regarding human rights, including ESC rights.

There is, however, one other significant limitation of the existing mechanisms: they focus on what the relevant policy or legislation *does*, not what the policy or legislation *fails* to do. In other words, these mechanisms focus primarily on *preventing* state interferences with protected rights rather than on promoting positive state action to ensure greater realisation of rights. As such, they do not create incentives for policymakers to address the state’s positive obligations to “fulfil” rights during the policy-making process, but rather tend to encourage a “checklist” approach to human rights protection. This deficiency cannot be remedied by simply adding ESC rights to the current requirements. Rather, it requires that rights-based analysis be brought to bear at the very conceptual beginnings of the policy-making process.

This raises a more general question as to whether adequate capacity exists within government to support a rights-based approach. A necessary prerequisite for rights-based analysis is that there be, within all social policy agencies, analytical capacity to understand, monitor and apply a rights-based approach. In light of the importance of participation to a rights-based approach, that capacity should include capacity to engage with civil society in the process of policy formation.

It is not clear to us that such capacity currently exists. Clearly, some capacity has developed as a consequence of participation by policymakers in the preparation of New Zealand's periodic reports, as required under the United Nations human rights treaties. Nevertheless, while it is perhaps dangerous to speculate, we suspect that in practice there are varying degrees of expertise in relevant social policy agencies as to the international law framework of human rights in general and ESC rights in particular. We doubt that existing policies are uniformly and routinely analysed by officials in human rights terms in the sense developed in this article.

The economic implications of capacity building require further examination. To reiterate, Article 2(1) of the ICESCR leaves substantial discretion to government to weigh competing resource claims as long as, in the overall picture, realisation of ESC rights is being advanced. The mainstreaming of a rights-based approach to social policy may need to be "progressively realised". A transitional approach to developing mainstreamed capacity might involve the establishment of a centralised capacity for the application of rights-based analysis in one key department. Alternatively, capacity could initially be reposed in a virtual team along the lines of the interdepartmental group led by the Ministry of Justice to promote and support the mainstreaming of human rights considerations in policy development across government.

The key requirements for establishing the capacity for rights-based analysis of social policy, whether centralised or decentralised, are:

- a willingness at senior levels in one or more departments to adopt a rights-based approach to social policy issues (along with other approaches)
- understanding of social policy and ability to engage in social science analysis
- a critical mass of individuals to sustain an ongoing capacity
- high-quality legal skills and experience in applying legal analysis to policy issues characterised by fluid and flexible parameters
- sufficient allocation of funding to ensure that the capacity is of sufficient quality to be credible and sustainable.

The Legislative Process

The primary means by which rights-based approaches to policy are taken into account in the legislative process is through the requirement by section 7 of the Bill of Rights Act 1990 for the Attorney-General to draw the attention of the House of Representatives to provisions in Bills that appear to be inconsistent with the Bill of Rights Act 1990. Advice given to the Attorney-General by the Ministry of Justice and Crown Law Office that supports his or her fulfilment of this function is now published on the Ministry of Justice's website.

In addition, the House of Representatives agreed to a recommendation of the Standing Orders Committee in its 2003 review of Standing Orders that “human rights” be explicitly specified in the stated subject area of the Justice and Electoral Committee. In its report (Standing Orders Committee 2003:29) the Committee suggested that “a wide interpretation [of ‘human rights’] be made, so that it covers the fundamental rights and freedoms protected by the New Zealand Bill of Rights Act 1990 and rights set out in the International Covenant on Civil and Political Rights, as well as anti-discrimination matters. We intend that the term be interpreted to include privacy matters.” There is no reason why the logic of the Committee’s approach could not also extend to inclusion of ESC rights, but the danger is that the lack of explicit reference to them in the Committee’s report might lead to their neglect.

Although this development may provide an important vehicle for raising legislators’ awareness of human rights issues, it will not ensure consistent attention to the human rights implications of all legislation that is brought before the House. One means of achieving this broader aim would be to replicate the section 7 legislative mechanism with respect to ESC rights. However, given the undeveloped nature of ESC rights jurisprudence, both in New Zealand and internationally, this would probably not be desirable at this stage. It would be possible to bring these issues to legislators’ attention by some other means. For example, the explanatory notes to government bills that are introduced to the House could include a statement about the implications of the bill for ESC rights in much the same way as explanatory notes currently include a regulatory impact statement. We note, though, that mechanisms of this kind would, again, primarily focus on the negative rather than the positive obligations of the state.

The Wider State Sector

According to its long title, the Human Rights Act 1993 is intended in part “to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights”. The Act establishes the Human Rights Commission, an independent Crown entity that has, as one of its two primary statutory functions, “to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society”.

The Commission has already made a contribution to the development of a rights-based approach to social policy within the New Zealand government through its commissioning of the paper on which this article is based, through its promotion of and participation in a dialogue among relevant officials over what a rights-based approach might entail, and through its preparation and release of a National Plan of Action (Human Rights Commission 2005). There are a number of others ways in which

the Commission, pursuant to its statutory functions and in conjunction with relevant government departments, is able to contribute to the development of a rights-based approach. These include:

- the promotion of further and ongoing discussions within relevant departments over what a rights-based approach entails, the extent to which such an approach is currently being taken and the capacity implications of its adoption
- the development and maintenance of a publicly available resource designed to clarify the nature and scope of particular rights as they impact on social policy
- the development of human rights indicators designed to measure levels of attainment of human rights, and of processes for monitoring progress in achieving such attainment
- the conduct of education and information programmes, whether aimed at the public, at government officials or at parliamentarians
- the making of submissions to select committees.

The Commission already engages in some of these activities on an *ad hoc* basis. Needless to say, there would be resource implications for the Commission in extending its involvement further. It would also be possible to extend the Commission's statutory functions. For example, the South African Human Rights Commission has been given express monitoring, reporting, advocacy and dispute resolution roles with respect to ESC rights (section 184 South African Constitution, see Liebenberg 2001:82–83).

Finally, it is noted that there are other administrative “watchdogs” within the wider state sector that already play a similar information and education role to the Human Rights Commission, most particularly in relation to ESC rights: the Health and Disabilities Commissioner and the Commissioner for Children. Other complaints agencies, such as the Ombudsmen and the Privacy Commissioner, may also be relevant.

The Courts and Other Adjudicative Bodies

The New Zealand statute books contain countless examples of the courts and/or quasi-judicial bodies being expressly empowered to protect and enforce specific aspects of ESC rights. By way of example only, the Education Act 1989 contains numerous detailed and enforceable rights that contribute to the state's fulfilment of the international right to education (on this, see the Court of Appeal in *Attorney-General v Daniels* [2003] 2 NZLR 742; Geiringer 2006:179–180); and the Health and Disability Commissioner Act 1994 sets out a range of enforceable patients' rights.

What the New Zealand courts lack is the ability to test state and/or private action against broad ESC rights protections. This is, first, because international treaties cannot be directly enforced through the domestic courts, and second because Parliament has

not itself generally enacted such broad protections. Thus, the Residential Tenancies Act 1986 might create certain specific justiciable rights for tenants but does not create a general “right to housing”.

On the rare occasions where broad ESC rights language has been enacted, a further hurdle is the tendency of the New Zealand courts to treat such language as non-justiciable (see *Daniels*, above). Indeed, New Zealand courts have expressed a general reluctance to bring their judicial review powers to bear in the area of socioeconomic entitlement because of the “political” nature of social policy questions (see *Lawson v Housing New Zealand* (1996) 3 HRNZ 285).

The position differs in this respect from that pertaining to CP rights. Of course, no court in New Zealand has the power to strike down legislation for failure to comply with human rights standards of any kind. In the absence of a clearly contrary statutory enactment, however, the broad language of the Bill of Rights Act 1990 is directly enforceable against the state through the courts and, where freedom from discrimination is concerned, through the Human Rights Review Tribunal. The Tribunal’s express powers now include the power to declare that legislation is inconsistent with section 19 of the Bill of Rights Act 1990, the right to freedom from discrimination (see Human Rights Act 1993, sections 92J). Under the Optional Protocol to the ICCPR, individuals are additionally entitled to complain to the UN Human Rights Committee of breaches of that treaty, although the Committee’s resulting recommendations are not binding.

To repeat, CP rights and ESC rights are not watertight categories. Notably, the right to freedom from discrimination contemplates equal access to economic and social, as well as civil and political, entitlements. In the light of the judicial reluctance to enforce ESC rights identified above, however, it cannot necessarily be assumed that the Human Rights Review Tribunal or the courts will embrace attempts to litigate economic and social entitlements through the lens of section 19 of the Bill of Rights Act 1990 (see Geiringer 2006). The case of *Child Poverty Action Group v Attorney-General*, which is currently before the Human Rights Review Tribunal, can be seen as something of a test case in this regard.

In sum, it is clear that as a general proposition, ESC rights currently receive substantially less judicial protection in New Zealand than do CP rights. We referred above to the underlying principle that effective remedies need to be provided to enforce rights. In terms of Article 2(1) of the ICESCR, such remedies must be progressively realised but can be limited to what is “appropriate” and what is affordable. We have suggested that the obligation under Article 2(1) is for states to investigate mechanisms for state accountability, including mechanisms for the provision of effective remedies, and to institute them to the fullest extent appropriate (and subject to resource constraints).

The question of the “appropriateness” of particular remedies clearly puts the issue of justiciability of ESC rights centre stage. There are a number of difficulties and certainly much controversy about the justiciability of ESC rights, and this is not the appropriate place to resolve that controversy. What we do suggest is that the time for a broad-based review of the possibilities for greater administrative and/or judicial enforcement of ESC rights has arrived. This suggestion is consistent with the call from the ICESCR Committee (2003: paragraph 21) in its concluding comments on New Zealand’s most recent periodic report that New Zealand reconsider its position on justiciability.

Judicial enforcement is not the be-all and end-all of human rights protection. Indeed, integration of a rights-based approach into the toolkit of policy advisers and policymakers may well be a higher priority. First, judicial challenges are best suited to examining what the Crown *is doing* (as opposed to what the Crown *should be doing*), and, accordingly, they tend to skew the focus towards the Crown’s negative obligation *not to interfere* with rights. Secondly, the first necessary condition for engagement with human rights is education and information, rather than the erection of punitive legal instruments. While the justiciability question is an important one, it should not be allowed to dominate discussions of the substantive and procedural consequences of taking a rights-based approach.

CONCLUSION

As noted at the beginning, this article aims to facilitate debate about the implications for New Zealand social policy making of taking a rights-based approach. It does so by exploring the sources and scope of New Zealand’s international human rights obligations, particularly but not exclusively in relation to ESC rights, and by identifying a range of constraints on social policy making that derive from New Zealand’s international human rights commitments. We suggest that explicit and systematic attention to these constraints or parameters constitutes the essence of a rights-based approach to social policy making.

The focus in this article has necessarily been on the work of government officials and on inter-governmental interactions over human rights. It is appropriate to end by emphasising that the long-term effectiveness of New Zealand’s engagement with human rights, and of a rights-based approach to social policy more generally, depends on dialogue with and within the wider community. In a democracy, government needs to be responsive to public opinion. Public opinion that neither understands nor values these rights will ultimately lead a government to adopt the same view, to the detriment of both the public interest and good government. Just as importantly, as demonstrated in the body of the article, participation and community engagement are an inherent feature of engagement with rights. We believe that engagement with the values underlying human rights, within government and within the wider community of New Zealand, will help make for better social policy.

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