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Submission for the List of Issues Prior to Reporting (“LOIPR”)

to the

United Nations Committee on Economic, Social and Cultural Rights

JANUARY 2016

1 INTRODUCTION

- 1.1 This submission is on behalf of the Human Rights Foundation of Aotearoa New Zealand.
- 1.2 The Human Rights Foundation (HRF) is a non-governmental organisation, established in December 2001, to promote and defend human rights through research-based education and advocacy. We have made submissions on new laws with human rights implications and work to monitor compliance and implementation of New Zealand's international obligations in accordance with the requirements of the international conventions New Zealand has signed. We also have a focus on a human rights based approach to policy and legislative development.
- 1.3 We appreciate this valuable opportunity to present our views to the Committee.

2 EXPLANATORY NOTE

- 2.1 The HRF will make reference to the following documents: the Human Rights Foundation Parallel Report to the Committee in 2012, the HRF Submission to the Constitutional Review Panel in 2013 and the Concluding Observations for New Zealand from the Committee on Economic Social and Cultural Rights in 2012.
- 2.2 Our report will be less detailed than a parallel report and will concentrate on raising issues for the Committee's attention.
- 2.3 Due to time constraints, this report has not been able to address in detail all issues raised in our previous report of 2012 and in the Committee's Concluding Observations. As regards those which we have not been able to address in detail but which remain of concern, we will simply draw the Committee's attention to them. They will be addressed in detail in the HRF parallel report to the Committee in 2017.
- 2.4 This limitation applies particularly to the sections on Overseas development Assistance, Welfare Reform and the rights contained in the right to an adequate standard of living,

3 ARTICLE 2(1)

- 3.1 **ESC Rights are not incorporated into the domestic human rights legal framework: there is no constitutional or direct legislative protection for ESC rights.**
- 3.2 Despite recommendations from the Committee on Economic, Social and Cultural Rights (CESCR) and both 2009 and 2014 Universal Periodic Reviews (UPR), New Zealand has not yet formally incorporated economic, social and cultural (ESC) rights into the

domestic human rights framework.^{1 2} The Government has argued in these forums that individual statutes already protect such rights, as they do to some extent, though in piecemeal fashion. However, the advantages of incorporation of civil and political rights apply equally to ESC rights. Further, if these rights, as argued, are so well protected, there can surely be no objection to their being incorporated directly into the New Zealand human rights framework.

- 3.3 The lack of protection for many of these rights affects the members of those groups which are most vulnerable and marginalised – an even greater reason for their formal incorporation into legislation.
- 3.4 The HRF recommends the inclusion in the Bill of Rights of a range of ESC rights, including rights to work, social security, health, housing, water, food, education, environment and cultural life.

Justiciability of ESC rights

- 3.5 We note the desirability of making ESC rights justiciable as is recommended in the Committee's General Comment No. 9.
- 3.6 Although historically ESC rights have not been considered to be justiciable in the way civil and political rights have been, this perception has changed in many jurisdictions and the justiciability of aspects of many ESC rights is increasingly recognised, domestically, regionally and internationally.
- 3.7 Historically, the Courts in New Zealand have been reluctant to treat ESC rights as directly enforceable.³ This is partly due to the lack of direct incorporation into domestic law as noted in paragraph [3.2], and partly relies on the argument that the allocation of resources needed for ESC rights is of a political nature, and therefore a matter for Parliament rather than the judiciary.
- 3.8 However, we note a trend in the judicial system where judges are increasingly inclined to take note of the State's international obligations, including the ICESCR.⁴
- 3.9 We acknowledge that some ESC rights are protected by specific legislation,⁵ but consider direct incorporation to be also necessary.

¹ Committee on ECSCR, "Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant Concluding observations of the Committee on Economic, Social and Cultural Rights- New Zealand" dated 18 May 2012 on: <http://www.converge.org.nz/pma/E-C.12-NZL-CO-3.pdf>.

² See UN General Assembly "Report of the Working Group on the Universal Periodic Review-New Zealand", dated 4 June 2009 on: http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/NZ/A_HRC_12_8%20New%20Zealand_e.pdf.

³ *Lawson v Housing New Zealand* [1997] 2 NZLR 474.

⁴ *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

⁵ Employment Relations Act 2000, Human Rights Act 1993, NZBORA, Equal Pay Act 1972, Health and Safety in Employment Act 1992, Minimum Wage Act 1983, Education Act 1989. Also see Karen

Direct incorporation and recognition of ESC rights provides a clear human rights framework for interpretation and implementation of other statutes.

General Human Rights Issues which affect the protection of ESC rights

Weaknesses of the NZBORA

- 3.10 Currently the New Zealand Bill of Rights Act 1990 (NZBORA) can be over-ridden by any other statute.⁶ Parliament has at times exercised its “supremacy” to override the NZBORA, even where this is contrary to New Zealand’s international obligations. For example, the New Zealand Public Health and Disability Amendment Bill (No 2), which was passed under urgency thereby limiting debate, contained a clause preventing review of the subject matter of the law for incompatibility with the NZBORA by the Human Rights Review Tribunal or by the Courts.⁷ Similarly, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 enacted a blanket disenfranchisement of all prisoners, despite the Attorney General’s advice under section 7 that this was inconsistent with NZBORA.^{8,9}
- 3.11 The HRF reiterates its recommendations to the Constitutional Review Panel that the NZBORA be granted supreme status to override rights-infringing legislation, and that it be procedurally entrenched (requiring passage of any amendment by a 2/3 majority. Further we strongly suggest that mechanisms for monitoring compliance with the NZBORA be improved – for example by extending the section 7 review of Bills by the Attorney General to Supplementary Order Papers.
- 3.12 The National Report for the Universal Periodic Review for New Zealand in 2014 highlighted the lack of right to a remedy for human rights violations. “Individuals who consider that any of their rights under the NZBORA have been infringed can bring an action against the Government... a number of remedies are available, including the ability to award damages or compensation and to exclude evidence obtained in breach of a right guaranteed by the BORA”.¹⁰ At this very same time,

Meikle “Economic, Social and Cultural Rights: Protection in Aotearoa New Zealand – an Overview” in Margaret Bedggood and Kris Gledhill (eds.) *Law into Action* (Thomas Reuters, Wellington, 2011) 39 at 45.

⁶ Even though under section 6 of the NZBORA, other legislation is to be given a meaning consistent with the rights enshrined in the Act, section 4 allows an explicit over-riding by a contrary statute, regardless of any curtailment of fundamental rights.

⁷ The New Zealand Public Health and Disability Amendment Bill (No 2) 2013 (118-1).

⁸ Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

⁹ Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (J4, published by Order of the House of Representatives, 2010).

¹⁰ Human Rights Foundation of Aotearoa New Zealand (coordinated by) “*Joint Stakeholders Report for the Universal Periodic Review*” 18th session of the working group on the UPR, January/February 2014.

the Attorney General was arguing in the courts that this right to a remedy did not apply to breach of the NZBORA by the judiciary, a claim that was eventually upheld by the Supreme Court.¹¹

- 3.13 The HRF recommends that the NZBORA be amended to provide an explicit right to a remedy for breach of the NZBORA, including by the judiciary.

Ratification of other international human rights instruments

- 3.14 It is essential that New Zealand incorporate all rights enshrined in international human rights instruments to which New Zealand is a party into domestic law, as this will ensure these rights are enforceable in New Zealand courts.
- 3.15 New Zealand has not ratified the following International Conventions: the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (CRMWF), and the Convention against Enforced Disappearances (CED). Nor has the International Labour Organisation (ILO) Convention 87 (one of the 8 'fundamental' ILO conventions) been ratified – in fact, proposed amendments to labour legislation will further weaken the right to collective bargaining.
- 3.16 Additionally, New Zealand has not ratified the Optional Protocols to the Covenant on Economic, Social and Cultural Rights (OP-ICESCR), the Convention on the Rights of the Child (OP-CRC) or the Convention on the Rights of Persons with Disabilities (OP-CRPD).
- 3.17 The Government has still not indicated its intention to make the optional declaration in Article 14 (individual complaint procedure) of the International Convention on the Elimination of Racial Discrimination (ICERD), despite the recommendation to do so by the Committee on the Elimination of all Forms of Racial Discrimination (CERD) in August 2007 and in both UPR reviews in 2009 and 2014.

The Trans-Pacific Partnership Agreement (Also of relevance for articles 6, 7, 8 11, and 12)

- 3.18 The HRF has concerns over the effect on the protection of ESC rights in New Zealand of the Government's commitment to the Trans-Pacific Partnership Agreement (TPPA).
- 3.19 The effects of commitment to the TPPA, which is due to be signed by 12 countries on February 4th, 2016, has been a matter of concern to many groups in a number of countries, including in New Zealand. These groups include human rights groups, environmentalists, healthcare professionals and trade unions. One main concern is the

¹¹ *Attorney General v Chapman* [2011] NZSC 110.

possible loss of sovereignty, especially in connection with the Investor-State Dispute Settlement (ISDS) Process, where corporations can challenge domestic laws which can be argued to have a detrimental effect on the profits or activities of investing corporations. Such laws may well be designed to improve a human rights or environmental situation in that state. The TPPA processes are not at present set up to take human rights or environmental concerns into consideration.

- 3.20 Such rights include the rights to health, including access to essential medicines; to work and in the work place and rights to strike and to collective bargaining; the right to an adequate standard of living, including access to housing, food and water; rights to intellectual property, which may come into conflict with patenting rights; rights to a sustainable and healthy environment and to commitments to address climate change.
- 3.21 The rights of some vulnerable groups may be particularly at risk. These include those in poverty, especially children, and indigenous people.
- 3.22 There are also several procedural rights, sometimes called 'democracy rights', the rights to information, consultation and participation in policy and decision-making by those whose rights will be affected, which seem to be of no account, either in the ISDS proceedings or more broadly in the way the TPPA has been negotiated.
- 3.23 Note: the concerns detailed here are also relevant to the discussion of Articles 6, 7, 8, 11 and 12 below.

A National Action Plan (NAP)

- 3.24 Responsibility for the development of a NAP currently rests with the Human Rights Commission (HRC), by a 2001 amendment to the Human Rights Act 1993. The HRC developed an earlier plan but this was not adopted by the Government. This meant that it had no budget attached to meet the cost of implementation, with the result that much of it was not implemented.
- 3.25 The HRC has now prepared an on-line resource, an interactive National Action Plan for Human Rights ("NPA").¹² However, while this may prove to be a useful tool for the Government's human rights transparency, it has neither a robust reporting system nor a budget, because the Commission is not the implementing body and has no budget for this purpose.
- 3.26 The development of the NPA by the Commission, while in accordance with the amendment to its mandate in 2001, has confused its role, which is to monitor the implementation of human rights, not to actually

¹² NZ Human Rights Commission "New Zealand Human Rights National Plan of Action 2015-2019" (30 June 2015) NZ Human Rights <<http://npa.hrc.co.nz/#/>>.

implement them. Any implementation plan should be the Government's. The Human Rights Act 1993 needs amending accordingly.

- 3.27 The result is that the Government has no plan to implement the Concluding Observations of Treaty Bodies, including those relevant to ICESCR.

Appointment of Human Rights Commissioners

- 3.28 Human Rights Commissioners are currently appointed by the Governor-General on the recommendation of the Minister of Justice. Recent appointments have been controversial, undermining both the ability of these Commissioners to fulfil their responsibilities and the credibility of the Commission itself. The appointment process for National Human Rights Institutions (NHRIs) like the Human Rights Commission should aim to appoint independent-minded Commissioners as the relevant international standards (the Paris Principles) makes clear. There are some commendable features of the current process, including wide notification of vacancies and interviews by a panel of senior public servants who make a recommendation to the Minister for appointment – although the practice of having a representative of civil society on the three-person panel should be reinstated.
- 3.29 Appointments to the majority of NHRIs around the world and in the Asia Pacific region in particular involve not just the Executive but also Parliament, via a range of mechanisms. In the Maldives, for example, a Parliamentary Committee scrutinises proposals by the President and recommends appointments. In India and Bangladesh, an Appointments' Committee includes the Speaker and the Opposition. Indonesian Commissioners are appointed by Parliament itself, with no involvement of the Executive. In Fiji, the President is required by law to consult with the Leader of the Opposition before making an appointment. All these processes contribute to more transparency and a broader scrutiny of the skills, qualifications and experience of the candidates. One option would be to involve a Parliamentary Human Rights Select Committee, as also recommended.
- 3.30 The HRF recommends the establishment of a Human Rights Commissioner appointment process that provides for the involvement of Parliament, possibly as one responsibility of a Parliamentary Select Committee on Human Rights
- 3.31 A similar recommendation was made to New Zealand's Universal Periodic Review in January 2014:

"Consider participation of the Parliament in a human rights commissioner's appointment process" (Ukraine) but the recommendation was not accepted by New Zealand. New

Zealand's response was" "45: The Human Rights Commission is an independent Crown entity. The Crown Entities Act 2004 specifies appointment by the Governor-General."

- 3.32 The response does not address the issue of independence of the appointment process, since the Governor General (New Zealand's Head of State) acts only on Cabinet directives - i.e. at the behest of the executive. The point of Ukraine's recommendation was to involve not just the executive, but also Parliament in the appointment process.

Level of Overseas Development Assistance

- 3.33 The HRF raised concerns in its 2012 report about Overseas Development Assistance and New Zealand's contribution. These concerns were echoed by the Committee in its Concluding Observations, paragraph [29]. While the HRF has not been able to research the current situation in detail (see paragraphs [2.3], [2.4] above) we consider that there is still cause for concern and that therefore this issue should remain on the list of issues for the Committee to raise with the Government of New Zealand.

4 ARTICLE 2(2)

Discrimination against particular groups

- 4.1 The Committee has previously raised the issue of discrimination against a number of disadvantaged groups, as regards a range of ESC rights (Concluding Observations paragraph [12]).
- 4.2 These groups include Maori and Pacific people, those with disabilities, children and those in poverty. We raise some particular concerns in the sections on articles 11 and 12 below, but are not in a position to provide more details at this time (see paragraphs [2.3], [2.4] above). But we consider these still to be issues of concern which should remain on the List of Issues for the Committee to raise with the Government.

Refugees & Asylum Seekers

Refugees

- 4.3 New Zealand continues to have a formal Refugee Quota Programme of 750 places in addition to the 300 places available annually under the Refugee Family Support Category.¹³ However, the refugee quota in New Zealand has not changed from 750 for 28 years. We currently rank 88th in the world for the number of refugees and asylum seekers we host.¹⁴ Calls to increase New Zealand's quota have come particularly in response to the refugee crisis following the war in

¹³ Auckland Regional Public Health Service "Refugees and Asylum Seekers in New Zealand" (2007) Refugee Health <www.refugeehealth.org.nz>

¹⁴ Tracey Barnett "About Wage Peace NZ" (2015) Wage Peace NZ <www.wagepeacenz.org>

Syria.¹⁵ In September 2015, the National Government undertook a further commitment to take 750 Syrian refugees over the next three years.¹⁶

- 4.4 The quota is set to come up for review this year, and there is considerable pressure from NGOs and civil society in support of increasing the quota to at least 1500. Both New Zealand's population and the number of refugees settled in New Zealand when considered in comparison with our comparative wealth (using GDP) would indicate that New Zealand should be playing a more significant role; the former indicates we could support up to approximately 1100 refugees and our current ranking using the latest figures is 115th of 200 countries.¹⁷

Refugees: Right to Housing

- 4.5 Assistance in finding housing is provided for quota refugees under the Refugee Resettlement Program via agencies such as New Zealand Red Cross.¹⁸ They continue to be supplied with Housing New Zealand homes because quota refugees are 'A' priority: they are at-risk households with a severe and persistent housing need that must be addressed immediately.¹⁹ As they are of permanent resident status, refugees are entitled to the ongoing support of Housing New Zealand.
- 4.6 Many refugees desire to settle in Auckland for reasons of employment and the presence of established refugee or ethnic communities.²⁰ However, house prices in Auckland are now the second highest relative to income in the developed world²¹ which means it is more or less impossible for refugees to ever own their own home.

Asylum Seekers

- 4.7 An asylum seeker is a person who fears returning to his or her home country and seeks refugee or "protected person" status. Asylum claims in New Zealand are decided according to the Immigration Act 2009 in accordance with the Convention Relating to the 1951 Status of Refugees, the International Convention on Civil and Political Rights (ICCPR), and the 1984 Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

¹⁵ Alan Gamlen "Why NZ should raise the refugee quota" (3 September 2015) New Zealand Herald <www.nzherald.co.nz>

¹⁶ Honorable Michael Woodhouse "New Zealand to take 750 more Syrian Refugees" (7 September 2015) National Party <<https://www.national.org.nz/news>>

¹⁷ Aimee Gulliver "Increase NZ's refugee quota, Government's support partners say" (2 September 2015) Stuff.co.nz <www.stuff.co.nz>

¹⁸ New Zealand Red Cross "Resettlement Programme" New Zealand Red Cross <www.redcross.org.nz>

¹⁹ Department of Labour "Settlement and Housing: Auckland Regional Resettlement Strategy" (2010) Immigration New Zealand <www.immigration.govt.nz>

²⁰ Ibid.

²¹ New Zealand Herald "London house prices have nothing on Auckland" (25 November 2015) New Zealand Herald <www.nzherald.co.nz>

Asylum seekers: Right to Education

- 4.8 According to Immigration New Zealand Operational Manual, children of asylum seekers have access to free primary and secondary school education upon being issued a student visa.²² This ensures compliance with the ICESCR. However, unlike quota refugees, asylum applicants who wish to undertake tertiary study must either have a student visa or their refugee status approved and a residence class visa.²³ Furthermore, financial assistance with tertiary education is only available from the date of approval of the residence class visa.²⁴

Asylum seekers: Right to Housing

- 4.9 Only residents of New Zealand have a right to be provided housing by Housing New Zealand. This means that despite having the right to remain in the country whilst the outcome of their application is decided, asylum seekers receive minimal accommodation assistance. As of June 2014, the New Zealand government cut all funding to the Asylum Seekers Support Trust (formerly the Auckland Refugee Council) who provided Auckland's only asylum seeker accommodation.²⁵ However, due to significant support, the hostel has been able to remain open, and from June 2014- June 2015 saw 44 people pass through.²⁶
- 4.10 It must be recognised firstly that this service is limited. Secondly, asylum seekers are often destitute and traumatized, having had to flee and leave family behind. It seems evident that there is a gap in support here because upon arrival, many are largely without assistance, unable to cover the market rent of a house.²⁷

Asylum seekers: Right to work

- 4.11 Asylum seekers are able to work as long as they have a valid work visa to remain in New Zealand. In order to be issued a work visa, asylum seekers must demonstrate a need to work to support themselves in New Zealand while their claims are ongoing. Immigration New Zealand recently updated its policy whereby it now issues work visas with a twelve-month validity to increase the incentive to employ asylum seekers, and improve job prospects.²⁸

Asylum seekers: Right to Physical and Mental Health

- 4.12 Both those individuals who have protection status and those who are in the process of having an application for refugee or protection status are

²² *Immigration New Zealand Operational Manual*, above n 16, at [U10.1.1].

²³ Department of Inland Revenue "Residency status or type- general definition" (1 December 2014) Studylink <www.studylink.govt.nz>

²⁴ *Ibid.*

²⁵ Tony Wall "Refugee support staff face redundancy" (8 June 2014) Stuff <www.stuff.co.nz>

²⁶ Marian Kleist "2015 Annual Report: Executive Officer" (10 October 2015) Auckland Refugee Council <www.aucklandrefugeecouncil.org>

²⁷ Andrea Vance "Asylum seekers denied basic services" (20 June 2014) Stuff <www.stuff.co.nz>

²⁸ Immigration New Zealand "Working Temporarily in New Zealand" Immigration New Zealand <www.immigration.govt.nz>

eligible for publically provided health services upon presentation of an approval letter or receipt of claim letter from the RSB.

- 4.13 However, in reality, accessing the care is difficult. It appears agencies working with asylum seekers, such as Refugees and Survivors New Zealand, lack the funding and support to help asylum seekers understand, access and use the health services they are entitled to. In addition, any benefits that could be gained by this care appear to be almost entirely negated by the conditions in which many asylum seekers find themselves upon arrival: already distressed, many are homeless or living in vulnerable situations with minimal financial means.
- 4.14 Furthermore, asylum seekers must still register with local general practices and pay practice fees as any other residents would. This proves a barrier to accessing healthcare in addition to the language and cultural barriers refugees face.

5 ARTICLE 3

Equal pay, pay equity (also relevant to Article 7)

- 5.1 Despite key legislative measures preventing employment and pay discrimination, for example the Equal Pay Act 1972 and the Human Rights Act 1993, and policies promoting Equal Employment Opportunities and addressing gender discrimination, New Zealand women still face substantial gender inequities in employment and pay. In brief this is shown in women's lower participation rates in the labour force compared with men, women's higher rates of part-time, temporary and casual work than men, such work being more insecure and lower paid. In addition, gender horizontal and industrial segregation remain at high levels. For example, around half of both women and men work in occupations where at least 70% of workers are of their gender. Low-paid work in caring, cleaning and clerical roles continues to be predominantly female, with Maori and Pacific women concentrated in low-paid occupations. Finally, women continue to be underrepresented in higher-level and management positions.
- 5.2 As a result, women earn considerably less than men. Measuring the gender pay gap is not straightforward, due to different measures used and different sources of data. These technical issues are outside the scope of this report and will, in any event, be well known to members of the Committee.
- 5.3 Using the measure of the median hourly earnings of women and men in full and part time work from the 2015 New Zealand Income Survey, the gender pay gap for New Zealand women is 11.8%. Of concern to the HRF is that this gap has increased from 2009 when it was recorded at 11.5%. In 2014, it was measured at 9.9%. New Zealand can take little comfort from this increase. Even worse, Maori and Pacific women

face pay gaps of over double this when compared with Pakeha men. Using median hourly earnings for only part-time workers produces an even larger gender gap for women of around 28%.

- 5.4 The HRF notes that the Court of Appeal's 2014 judgment, lodged on behalf of low paid caregivers in the aged care sector, upheld the Employment Court's finding that the Equal Pay Act 1972 is not limited to providing equal pay to women and men doing the same work. The Court held that it is entitled, in assessing equal pay claims, to have regard to what is paid to other males in other sectors (meaning dissimilar sectors) if enquiries within the same sector would not produce an ideal comparator group. The main reason why intra-sector enquiries might not yield an appropriate comparator group is likely to be because of sex-based undervaluation of the work.
- 5.5 Having made its findings the Court of Appeal then directed the case back to the Employment Court to state principles under section 9 of the Act "to be observed for the implementation of equal pay..."
- 5.6 While a landmark decision, in extending the ambit of the Equal Pay Act to encompass the principle of pay equity (equal pay for work of equal value), the case highlighted considerable difficulties in interpreting and applying the wording of the Equal Pay Act. The Government has since announced a working group to develop a set of principles under the Equal Pay Act. The Government has also signalled it may amend the Equal Pay Act. What this will mean in future for low paid women workers is yet to be determined.
- 5.7 Despite this promising development, the HRF submits that urgent decisive government and legislative intervention, for example reinstatement of the Employment Equity Act (repealed by the incoming government in 1990) and measures to increase collective bargaining for low-paid workers, are required to address structural discrimination in the labour market including pay equity.

6 ARTICLE 8

Reservation re ILO Convention 87

- 6.1 As noted above, New Zealand still has not ratified ILO Convention 87, as recommended by the Committee in its Concluding Observations, paragraph [30].

7 ARTICLE 9

Welfare reform

- 7.1 Concern over the Government's welfare reforms was expressed by the HRF in its 2012 report to the Committee and in the Committee's Concluding Observations in 2012 (paragraph [17]). Due to time

constraints, this report has not been able to address in detail current developments in the Government's welfare reform programme. But we consider that there are ongoing concerns and that this issue should remain on the Committee's list. It will be addressed in the HRF's Parallel Report in 2017.

8 ARTICLE 10

Family violence

- 8.1 The government and public agencies have implemented a range of measures and steps to address New Zealand's ongoing high rates of violence against women and children. For example, in September 2015, the Ministry of Justice called for submissions reviewing New Zealand's domestic violence laws, Dr Kim McGregor, an expert on sexual and family violence has been appointed Chief Victim Advisor, the Law Commission is reviewing defences for victims of family violence who kill and Family Court judges have had training in family violence.
- 8.2 Despite these laudable measures, the Government is yet to commit to and implement a fully-funded and comprehensive Action Plan and strategy to end violence against women and children. Such a Plan and strategy should be developed in collaboration with domestic violence and sexual violence providers and users, it must recognise the gendered nature of domestic and sexual violence, its disproportionate impact on Maori, people with disabilities and migrant women and the need for all who work in this area to complete a certified national training programme and maintain accredited standards. Family violence experts have proposed that such a strategy could be implemented as a pilot programme in a smaller region such as Wairarapa and then, in graduated steps, be extended nationally.
- 8.3 In the absence of such an Action Plan and integrated Strategy, there is a real danger that ongoing policies to prevent violence against women and children will be ineffectual and counter-productive. Just two examples: the Government's review of family violence laws has specifically excluded the legal aid scheme. Yet the income limits for legal aid are extremely low and exclude many women who seek to obtain protection orders. Government changes to the Family Courts and the Care of Children Act 2004 have led to serious delays in progressing family court matters, to the detriment of women and children.
- 8.4 Finally the HRF records that New Zealand is yet to formally recognize violence against women as a gross breach of children's and women's rights and that women and children have a right to be free from gender-based violence, coercive control and exposure to domestic and sexual violence.

9 ARTICLE 11

The Right to an Adequate Standard of Living

- 9.1 The right to an adequate standard of living comprises rights to food, clothing, water and housing. As discussed above (paragraph [3.1]), none of these rights are protected by constitutional or direct legislative incorporation in New Zealand law.
- 9.2 An issue of major concern is the increased and increasing level of inequality in New Zealand, stemming from the market-oriented, employment and benefit reforms of the 1980s and early 1990s. This inequality gap has a major effect on the enjoyment of the component rights of an adequate standard of living, particularly for those on low wages or on benefits.
- 9.3 Successive governments have made some attempt at alleviation of hardship for lower income families, notably through the introduction in 2007 of a family assistance policy, “Working For Families”. However, this programme assists only those families in work, not those on a benefit. The Child Poverty Action Group (CPAG) has challenged this aspect in the courts as discriminatory on the ground of employment status, which is prohibited under the Human Rights Act 1993.

The Right to Food

- 9.4 As with other ESC rights, there is no constitutional or legislative protection of the right to food in New Zealand. Nor are there any statutory or judicial or quasi-judicial structures such as protect aspects of the rights to work and housing.
- 9.5 New Zealand does not have the levels of absolute poverty or food deprivation which are experienced elsewhere. Nevertheless, there is general agreement on the existence here of relative poverty, which can lead to difficulty in accessing adequate food. The lack of access to adequate, sufficient, appropriate, food is particularly acute for certain disadvantaged groups, including the poor and Maori and Pacific people. For all of these the underlying issue is poverty and children are particularly affected. The issue of “the working poor” remains an issue for New Zealand, as it does for most other OECD countries.²⁹ The New Zealand Living Standards 2008 study showed that the following groups are disproportionately affected by poverty:

²⁹ “Key findings”, <http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/monitoring/household-incomes/index.html>

- 9.5.1 *Beneficiaries with children:* well over half (57%) of all households with children which received a benefit experience hardship.
 - 9.5.2 *Children are at special risk of poverty:* dependent children under 18 years are the age group with the highest rate of hardship with almost a quarter experiencing some hardship.
 - 9.5.3 *Cultural impact:* Pacific people are most notably affected with nearly 40% living in significant or severe hardship, compared to nearly a third of Māori (32%) or less than a sixth of Asian or Pakeha ethnicity.
- 9.6 Concern about the level of child poverty in New Zealand was raised by the HRF in its 2012 report and in the Committee's 2012 Concluding Observations. It remains a matter of concern to a wide range of NGOs and others in New Zealand, including the Children's Commissioner and the Child Poverty Action Group (CPAG). Child poverty was at 15% in 1984; for 2015 it was 29%.³⁰ The fact that many schools, often with the assistance of local companies and the Government itself, have to provide breakfast and/or lunch for a significant number of children, provides a telling example, as does the increasing call on foodbanks, as outlined in a series of policy reports by the Salvation Army.

The Right to Housing

- 9.7 The right to housing, that is to housing which is secure, affordable, habitable, accessible and culturally appropriate is not specifically provided for in any New Zealand legislation. However, a range of central government policies, laws and regulations provide certain rights and protections related to housing.
- 9.8 These include:
- 9.8.1 Building Act 2004 (which repealed the Building Act 1991)
 - 9.8.2 Building Amendment Act 2009
 - 9.8.3 Housing Improvements Regulations 1947 (under the Health Act 1956)
 - 9.8.4 Housing Restructuring and Tenancy Matters Act 1992
 - 9.8.5 Residential Tenancies Act 1986 • Residential Tenancies Amendment Act 2010
 - 9.8.6 Local Government Act 1974 (where still in force) • Local Government Act 2002
 - 9.8.7 Resource Management Act 1991 (covers the zoning of residential areas and also the environmental impact of housing)
 - 9.8.8 Resource Management (Simplifying and Streamlining) Amendment Act 2009
 - 9.8.9 Fire Service Act 1975

³⁰ <http://www.occ.org.nz/our-work/child-poverty-monitor/child-poverty-monitor/>

9.8.10 Watertight Homes Resolution Services Act 2006.³¹

- 9.9 None of these statutes, however, afford protection or remedy in the case of a number of serious housing issues:
- 9.10 **Affordability:** The cost of housing in many parts of New Zealand, particularly in Auckland, has made the buying or, increasingly, the renting of a home unaffordable for a great many people. Auckland is now 4th on the list of the world's 'unaffordable' cities, ahead of London or New York.
- 9.11 **Lack of social housing:** There is a severe shortage of social and emergency housing in many areas of New Zealand, again especially in Auckland. Recent media reports describe people, including children, who are waiting for social housing allocation, reduced to living and sleeping in cars.
- 9.12 **Tenancy:** Despite the existence of tenancy protection legislation and tenancy tribunals, the lack of affordable housing and the scarcity and increasing cost of rentals can provide opportunities for exploitation and lead to housing which is not fit for purpose.
- 9.13 **Homelessness:** Homelessness, in its various forms, affects a significant number of New Zealanders and is reported, by for example the Auckland City Mission and the Salvation Army, to be increasing.
- 9.14 All of these issues are exacerbated by the Government's failure to devise a national action plan which might address what is regarded by many as a housing crisis in a systematic and considered manner.
- 9.15 A lack of access to secure, affordable, accessible, culturally suitable housing affects a number of disadvantaged groups in particular: the poor, those with disabilities, Maori and Pacific people.
- 9.16 The HRF would like to commend the Government on the implementation of *He Whare Āhuru He Oranga Tāngata (He Whare Āhuru)*, the Māori Housing Strategy which sets out six directions to improve Māori housing over the period of 2014 to 2025. This is a much larger commitment than has been seen in the past and we hope it will have continual positive effects.
- 9.17 However, the same cannot be said of the Government's strategy for Pacific people's housing. The HRF suggests a similar approach be adopted for the Government's Pacific Economic Strategy.
- 9.18 Again children can be particularly affected. About 16% of children live in a crowded house (defined as households requiring one or more additional bedrooms). Māori, Pacific and Asian children are significantly

³¹ https://www.hrc.co.nz/files/9214/2388/0508/HRNZ_10_right_to_housing.pdf

more likely than European children to live in a crowded house. Almost half of the children belonging to Pacific ethnic groups live in crowded households.³² A recent coroner's report on the death of a child considered that her ill health and death was in some part attributable to the inadequate housing conditions in which she was living.

The Right to Water

- 9.19 As with the other ESC rights, the rights to water and sanitation are not directly protected by legislation in New Zealand. The crucial issues in relation to water rights in New Zealand parallel those emerging in case-law and policy decision-making in other parts of the world: namely the privatisation of water supply and sanitation facilities, with the consequent expanding involvement and influence of non-state actors (NSAs) and the introduction of user-pays systems.
- 9.20 In 2012, the New Zealand Human Rights Commission released a report entitled *Human Rights and Water*. The report stated that rights to water were becoming an increasing concern both internationally and nationally, and identified the main issues in the New Zealand context as being the availability, accessibility, affordability, quality and safety of water; water services being socially and culturally acceptable; the accountability of the main actors, and the sustainable management of water resources.³³
- 9.21 The stated position of the Government is that nobody owns water in New Zealand, rather that the Crown holds water in trust for the public. Water must be contained or captured in order to become property in law. At common law, water in its natural state is not capable of private ownership. Section 354(1) of the Water and Soil Conservation Act [1967] preserves the vesting of water in the Crown. Due to that ownership, control is delegated to local councils and authorities.
- 9.22 **Affordability** of water is clearly a human rights issue, in New Zealand as elsewhere, and is linked with the increasing privatization of the water supply and sanitation facilities, with the consequent expanding involvement and influence of NSAs and the introduction of user-pays systems. The Resource Management Act 1991 (RMA) does not require public resources taken for private use to be paid for, but water suppliers, including councils managing a reticulated supply, can charge consumers for water supply and wastewater services. Provisions in the Local Government Act 2002 prevent the wholesale privatisation of council water-services, the rationale being that water services must remain the responsibility of democratically elected local bodies, answerable to their constituents. While councils may contract out aspects of water services, they will continue to be legally responsible for the provision of water services, the pricing of those services, and

³² http://www.nzchildren.co.nz/#toc_1 under Housing

³³ Human Rights Commission *Human Rights and Water* (Human Rights Commission, Auckland, 2012) at 6.

the development of water provision-policies regardless.³⁴ Nevertheless, there is increasing criticism of the level of charging for water in parts of New Zealand and resistance to the introduction of user-pays systems and to the installation of water metering.

- 9.23 The **quality and safety** of water: in 2009-10 the Ministry of Health found that 6 per cent of New Zealanders were drinking water that was unsafe.³⁵ While pollution is a relative term, the Human Rights Commission notes that there is an increasing consensus about the poor quality of New Zealand's water bodies in general³⁶ and the onus for resolving these problems falls primarily upon local authorities.
- 9.24 There are various legal regimes in place as regards certain aspects of water rights, such as water management and the right to access water for domestic or agricultural use. The main actors in relation to water management are local government. The regulatory regimes governing the quantity allocated and quality of water are contained in the RMA, the Local Government Act 2002 and the Health Act 1956.
- 9.25 The statutory provision that most closely resembles a 'right to take water' is found in the RMA: section s14(3) provides that individuals' may take freshwater for their reasonable domestic needs (and the reasonable drinking-water needs of their animals),³⁷ Māori may use geothermal resources for the communal benefit of the tangata whenua, and in accordance with tikanga Māori,³⁸ and all persons may take the water, heat or energy from the general coastal water for their reasonable domestic or recreational needs.³⁹
- 9.26 All of these takes and uses are permitted on the proviso that they do not create 'an adverse effect on the environment'.⁴⁰

³⁴ LGA, s 136(2); see also Local Government (Auckland Council) Act 2009 pt 5 (additional provisions in relation to Auckland council controlled water organization).

³⁵ *Annual Review of Drinking-Water Quality in New Zealand 2009-2010* (Ministry of Health, Wellington, 2011) reported in *Human Rights and Water* (Human Rights Commission, Auckland, 2012) at 15.

³⁶ *Human Rights and Water*, above n 49, at p 10; *Managing freshwater quality: Challenges for regional councils*, (Office of the Auditor-General, Wellington, September 2011); The New Zealand Institute, *NZahead* (New Zealand Institute, Wellington, 2011) at 84-85; and reports by the Parliamentary Commissioner for the Environment: *Water Quality in New Zealand: Land use and nutrient pollution* (November 2013); *PCE Freshwater reforms submission* (April, 2013); *Water Quality in New Zealand: Understanding the science* (March, 2012). The greatest polluter of waterways is the dairy industry. The industry has agreed to a voluntary code of conduct - *Sustainable Dairying: Water Accord* (July 2013) <<http://www.dairynz.co.nz/publications/dairy-industry/sustainable-dairying-water-accord/>> - although this code has been criticized for ineffectiveness by environmental NGOs (for example see: Forest and Bird, "New dairy farmers' accord misses key lessons" (20 February 2013) <<http://www.forestandbird.org.nz/what-we-do/publications/media-release/new-dairy-farmers%E2%80%99-accord-misses-key-lesson>>).

³⁷ RMA, s 14(3)(b).

³⁸ RMA, s 14(3)(c)

³⁹ RMA, s 14(3)(d).

⁴⁰ RMA, s 14(3)(b) –(d)

- 9.27 In practice, there are many demands on available water resources and the Human Rights Commission has warned that the over-allocation of water is becoming a serious problem in parts of New Zealand.⁴¹ At present, legislative processes manage water-allocation poorly – both between competing *uses* of water and in relation to competing *users* – a point highlighted in numerous cases.⁴²
- 9.28 Increasing pressure on water resources – particularly in a climate-changed world⁴³ – makes the issue of water availability increasingly pressing and the Government has made dealing with over-allocation a national objective. The National Policy Statement for Freshwater 2011 (as amended in 2014), promulgated by central Government, requires local councils to identify over-allocated water resources and resolve the problem.
- 9.29 The tension is particularly acute when it is necessary to balance the interests of domestic consumers, environmental protection and industrial use.
- 9.30 In New Zealand also, due to our history, there is another factor of growing importance: the making of customary claims by Maori which can then affect many aspects of water control, allocation and use. This is particularly the case as access to water becomes an issue of environmental and climate change concern and of potential profit.
- 9.31 For additional background to these issues see the HRF's 2012 Report to the Committee.

10 ARTICLE 12

The Right to Health

- 10.1 The Government has itself recognised that in New Zealand, Māori, Pacific peoples and socio-economically disadvantaged groups generally experience worse health outcomes than other New Zealanders. The causes of these differential outcomes are complex,

⁴¹ Human Rights Commission *Human Rights and Water* (Human Rights Commission, Auckland, 2012) at p 10.

⁴² See, in particular, comments by the Court of Appeal in *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZRMA 200; *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609; [2010] 2 NZLR 363. See also Land and Water Forum Reports recommending alternate strategies for managing water: *Report of the Land and Water Forum: A Fresh Start for Freshwater* (2010); *Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity Freshwater Policy and Plan Making through Collaboration* (April 2012); *Third Report of the Land and Water Forum* (November 2012). Further, see Ministry for the Environment, *Freshwater reform 2013 and beyond* (Ministry for the Environment, Wellington, 2013).

⁴³ Mandate of the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, “*Climate Change and the Human Rights to Water and Sanitation*” United Nations Position Paper (2010), related to access to safe drinking water and sanitation.

but include differences in access, use and experience of health services, as well as differences in exposure to risk factors.

- 10.2 These health issues are often linked to the problems of inadequate housing and are another factor stemming from and associated with poverty. Again children can be particularly affected. For example, the current levels of rheumatic fever in New Zealand are considered to be generally unacceptable in an affluent developed nation.
- 10.3 Since 2000 there has been little change in the rate of death for children aged 0–14 years as a result of assault, abuse or neglect, and a small but significant fall in the hospitalisation rate for such injuries. The highest rates of assault, neglect or maltreatment are seen in the first year of life.

11 Article 12

A Right to a sustainable healthy environment

11.1 One recognised social determinant of the right to health is a sustainable healthy environment. New Zealand's constitutional framework makes no reference to environmental issues. The RMA, however, has environmental protection as one of its aims. The HRF is concerned that proposed amendments to the RMA may lower the standards necessary to maintain or achieve a healthy environment.