

MAKE RIGHTS REAL

IT IS TIME TO MAKE HUMAN RIGHTS IN
NEW ZEALAND REAL

**AMNESTY
INTERNATIONAL**



MAKE RIGHTS REAL!

New Zealand has a long and proud human rights record. We were the first country to grant universal suffrage. We ensured the United Nation's Charter included explicit reference to human rights, paving the way for the Universal Declaration of Human Rights. We continue to be a vocal advocate for a global moratorium on the use of the death penalty. In recent years however, New Zealand has begun to fall behind developments in other countries.¹ Many of our rights are not yet contained in domestic legislation and those that are, remain vulnerable to inconsistent legislation and lack adequate enforcement mechanisms. As we undertake a review of New Zealand's constitutional arrangements, it is time to restore New Zealand to the forefront of human right developments by carrying out the following recommendations - **it is time to make human rights real.**

New Zealand has long been a human rights leader. Lets keep it that way.

RECOMMENDATIONS

- Amend the New Zealand Bill of Rights Act 1990 (BORA) to:
 - Include economic, social, and cultural rights (ESC rights);
 - Require the Attorney-General to bring to the attention of the House of Representatives any provision in a bill that appears to be inconsistent with any of New Zealand's international human rights obligations;
 - Require the Attorney-General to table reports on the consistency of legislation with the BORA on a bill's third reading as well as its introduction;
 - Require the Attorney-General to give reasons for his opinion about whether a bill is inconsistent with the BORA; and
 - Require the Member of Parliament responsible for a bill to respond to reports from the Attorney-General that state that it is inconsistent with the BORA.²
- Establish a human rights select committee with the purpose of identifying and resolving inconsistencies between bills and New Zealand's human rights obligations.³
- Ensure adequate time for comprehensive public consultation at the select committee stage of the legislative process.
- Include a remedies section which explicitly provides the judiciary with the discretion to award remedies for breaches of the BORA.
- Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR).



Māori exercising their cultural rights at Waitangi. © Helen Robinson 2008.

TAKE ECONOMIC, SOCIAL AND CULTURAL RIGHTS SERIOUSLY

Including economic, social and cultural rights in the New Zealand Bill of Rights Act 1990 has not been seriously considered in over two decades.

The International Covenant on Economic, Social and Cultural Rights contains socio-economic human rights, including rights to education, adequate housing, water, sanitation, health care, and food. Having ratified this Covenant, New Zealand has committed to progressively realise these ESC rights by incorporating them into domestic legislation. New Zealand continually reports to United Nations bodies that we are compliant with our obligations under the ICESCR. As such, there can be no objection to formalising compliance by including ESC rights into the BORA. Yet, incorporation of ESC rights into the BORA has not been seriously considered since the Act was first introduced in 1990.⁴

Universal human rights have evolved as a cross-cultural response to worldwide abuses of power; Members of Parliament have a duty to ensure such abuses cannot occur in New Zealand. We have taken substantial steps to protect our civil and political rights, but these rights are meaningless unless we have access to adequate housing, education, health care, food, and water. New Zealand law does ensure access to basic levels of, for example, housing, health care and education. With ESC rights excluded from the BORA, New Zealand's flagship human rights legislation, however, these rights are not explicitly or comprehensively protected and in practice are unenforceable. Including ESC rights in the BORA will safeguard these rights. Inclusion will provide access to remedies and a benchmark against which to check during the policy and legislative development process. Inclusion will also help move our rights into one central document enabling people to easily find them. It is time for ESC rights to be incorporated into the BORA, making these rights accessible and enforceable, ensuring New Zealand's commitment to ESC rights is real.

ENSURE LEGISLATIVE PROCESSES PROTECT HUMAN RIGHTS

In New Zealand human rights, including fundamental civil and political rights, can currently be breached by Parliament without justification. Even the BORA itself can be repealed by a mere majority vote in Parliament. With a few changes to the way we enact legislation, human rights can be afforded the protection they deserve and require.

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THE BEGINNING STAGES

The Cabinet Manual requires cabinet papers to outline the human rights implications of their proposal, while the BORA, which incorporates the majority of civil and political rights in New Zealand, requires the Attorney-General to report to Parliament at a bills introduction any inconsistencies the bill has with the BORA.⁵ The Ministry of Justice also vets most bills for their consistency with the BORA and provides advice to the Attorney-General. However, currently, there are a number of limitations to these human rights safeguards. The Attorney-General and cabinet papers are only required to consider the implications for human rights contained in the BORA, overlooking many ESC rights New Zealand has committed to upholding through the ICESCR. Furthermore, the Attorney-General is not required to give full justification for his/her opinion about whether a bill is consistent with human rights contained within the BORA.⁶ Finally, the Attorney-General is only required to make a report at the introduction of a bill to the House of Representatives. Yet legislation can change greatly from the time it is introduced to the time it receives royal assent, especially through the select committee process and the introduction of supplementary order papers.

United Nations Headquarters. © Joao Araujo via flickr 2005.



OUR RIGHTS

Human rights in New Zealand are contained in various legal instruments, including:

INTERNATIONAL

Following the adoption of the Universal Declaration on Human Rights in 1948 New Zealand ratified:

- International Covenant on Civil and Political Rights and its Optional Protocol.
- International Covenant on Economic, Social and Cultural Rights.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol.
- Convention on the Rights of the Child;
- Convention on the Elimination of Discrimination Against Women.
- Convention on the Elimination of Racial Discrimination.
- Convention Relating to the Status of Refugees and its Protocol.

DOMESTIC

- New Zealand Bill of Rights Act 1990.
- Human Rights Act 1993.

SELECT COMMITTEES

The current speed at which legislation is being passed restricts people from exercising their right to take part in the governance of their country.

Select committees perform a crucial role in the legislative process, not least because they are able to closely examine the human rights implications of proposed legislation and because select committees allow citizens the opportunity to actively exercise their right to take part in the governance of their country. However, the pace at which legislation is currently being passed in New Zealand, especially in relation to law and order reforms, limits the ability of select committees to adequately consider such implications and restricts citizens' participation in the process. Furthermore, as an increasing number of bills are being passed under urgency, the select committee process is being bypassed entirely. Allowing greater time for comprehensive public consultation would give citizens the opportunity to fully exercise their political rights. It would also enable select committees to scrutinise legislation with the assistance of a wider variety of experts, including human rights organisations such as Amnesty International. This would improve the ability of select committees to identify when bills will breach human rights, ensure appropriate safeguards are put in place to protect these rights and ensure that human rights are only infringed to the extent necessary in order to achieve a significant and important objective, and then only in a manner that is rationally and proportionately connected to that objective.

Freedom of expression, Nelson Girls College. © Amnesty International Aotearoa New Zealand (AIANZ) 2008.





New Zealand's Parliamentary buildings. © AIANZ 2011.

CHANGES

It will sometimes be necessary for legislation to infringe people's human rights. For example, sometimes people's rights must be limited so as to protect the human rights of others. By making a few changes to the legislative process however, we can ensure that this country's legislation complies with New Zealand's commitment to uphold economic, social, cultural, civil and political rights and truly make rights real.

A few changes to the legislative process could see New Zealand's human rights commitments fully met.

New Zealand Coat of Arms and Government Building, Wellington. © Jonathan Ah Kit via flickr.



ENSURE NEW ZEALANDERS HAVE REMEDIES FOR BREACHES OF THEIR RIGHTS

BILL OF RIGHTS ACT 1990

The BORA confirms many civil and political rights. Yet it does not provide a mechanism to ensure remedies in the event that those rights are breached, as explicitly required by New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR).⁷ While the New Zealand judiciary has partially remedied this omission, they remain constrained by the legislation itself.⁸ Firstly, rights not included in the BORA, in particular ESC rights, are not directly enforceable and can only be used as an interpretative tool to clarify ambiguous legislation.⁹ This is despite arguments over whether breaches of ESC rights should be reviewable by courts having been long put to rest.¹⁰

Remedies for human rights breaches remain unclear and, in some cases, do not exist at all.

Even those rights that are included in the BORA are subject to significant limitations. Unlike many other countries, section 4 of the BORA means New Zealand courts cannot repeal or decline to apply legislative provisions which are inconsistent with the human rights recognised in the BORA¹¹ and section 5 prohibits this even when such inconsistencies are unreasonable.¹² The most New Zealand courts can do is attempt to interpret legislation so as to make it consistent with the rights contained in the BORA.¹³

The United Nations Human Rights Committee remains concerned at the lack of clarity over which human rights breaches are able to receive remedies. It is also of significant concern that there are some rights, especially ESC rights, which have no remedy at all.¹⁴ The inclusion of a remedies section in the BORA providing courts the explicit discretion to issue remedies for human rights violations would ensure New Zealand's international human rights obligations under the ICCPR and ICESCR are met.

Dunedin High Court.
© Chris Kerr 2009.





Citizens exercising their civil and political rights during an Amnesty International vigil in Auckland, September 2007. The vigil drew attention to those who cannot exercise their civil and political rights in Myanmar. © AIANZ 2007.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

New Zealand has shown its commitment to civil and political rights by signing the Optional Protocol to the ICCPR. The Optional Protocol enables victims of civil and political rights abuses to apply to the United Nations Human Rights Committee as a matter of last resort to recommend the New Zealand Government provide a remedy to victims. However, New Zealand has not shown a similar commitment to rights by signing the ICESCR Optional Protocol. Consequently, ESC rights in New Zealand are unenforceable domestically as they have not been consistently incorporated into the BORA or other domestic legislation. Furthermore, breaches cannot be appealed to the Committee on Economic, Social and Cultural Rights. It is time New Zealand fulfilled its commitment to the ICESCR and made ESC rights legally enforceable both domestically through the BORA and internationally by signing the ICESCR Optional Protocol.

Economic, social and cultural rights in New Zealand are unenforceable domestically as they have not been consistently incorporated into the BORA or other domestic legislation.

The Reality

It's a really hard nights sleep. It's normal. It's better than listening to my parents fighting and drinking all the time...I'm hungry, I'm cold and I don't want to go home. No use going home to no food in the cupboards. I'm alright here!! [Wrapped in a mat sleeping under a bridge].

Mere, Paeroa.¹⁵

Vulnerable children like Mere will continue to be unprotected unless New Zealand makes economic, social and cultural rights legally enforceable through the New Zealand BORA and by signing the ICESCR Optional Protocol.

NOW IS THE TIME

With the current constitutional review underway, now is the time for New Zealand to live up to its historic reputation as a global human rights leader. The New Zealand Bill of Rights Act 1990 was a great starting point for making rights real in New Zealand. Now, over two decades later, it is time to build on that platform by ensuring the inclusion of those ESC rights not yet recognised and by providing greater protection for the BORA against inconsistent legislation. It is time we made human rights real.

With the constitutional review underway, now is the time to make human rights real in New Zealand.



New Zealand Law Reports, University of Auckland, Davis Law Library. © Rachel Kendall 2011.

New Zealanders should be proud that as a nation we have championed many of the world's notable human rights achievements.

We must now extend this legacy by providing greater domestic legal protection for the human rights we already recognise internationally.

Patrick Holmes, Chief Executive Officer of Amnesty International Aotearoa New Zealand.

END NOTES

Front image: The Beehive, Wellington. © AIANZ 2011.

Back image: A women signing a petition. © Amnesty International 2008.

1. Diana Pickard, *New Zealand Left Behind on the Constitutional 'Rights' Road*, 2011.
2. The United Kingdom currently employs this safeguard.
3. Both the United Kingdom and Australia have human rights select committee models. The United Kingdom's Joint Committee on Human Rights has the authority to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases) and proposals for remedial orders in certain circumstances.
4. New Zealand is required, under Article 2(1) of the Convention, to bring these rights into domestic law "by all appropriate means." United Nations, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 9*. ESC rights were last considered in the white paper which proceeded the New Zealand Bill of Rights.
5. Section 7 New Zealand Bill of Rights Act 1990.
6. Explanatory note, New Zealand Bill of Rights Amendment Bill, Members Bill from http://www.greens.org.nz/sites/default/files/Keith_Lockes_NZ_Bill_of_Rights_Amendment_Bill_2010.pdf.
7. Article 2 (3) ICCPR.
8. Philip Joseph, *Constitutional & Administrative Law in New Zealand*, 3rd ed, Brookers, 2007, p 1179.
9. Courts have recently been using treaties, especially the ICCPR, to help interpret legislation. See Ibid, p 1178.
10. International Commission of Jurists, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability', *Human Rights and Rule of Law Series No. 2*, International Commission of Jurists, 2007, chapter 7.
11. Section 4 BORA.
12. Section 5 BORA.
13. Section 6 BORA.
14. See comment from Zonke Zanele Majodina, *Human Rights Committee Concludes Consideration Of New Zealand's Fifth Report; Questions Posed On Treatment Of Māori, Asylum Seekers, Human Trafficking*, United Nations Human Rights Committee, 2010, accessed from <http://www.un.org/News/Press/docs/2010/hrct721.doc.htm>.
15. Michelle Egan-Bitran, *This is how I see it: Children, young people and young adults views and experiences of poverty*, New Zealand Office of the Children's Commissioner, January 2010, p 19.

MAKE RIGHTS REAL IN NEW ZEALAND

As a candidate in New Zealand's 2011 General Election, I support Amnesty International's *Make Rights Real* Campaign and commit to:

- Amend the New Zealand Bill of Rights Act 1990 (BORA) to:
 - Include economic, social, and cultural rights (ESC rights);
 - Require the Attorney-General to bring to the attention of the House of Representatives any provision in a bill that appears to be inconsistent with any of New Zealand's international human rights obligations;
 - Require the Attorney-General to table reports on the consistency of legislation with the BORA on a bill's third reading as well as its introduction;
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 - Require the Member of Parliament responsible for a bill to respond to reports from the Attorney-General that state that it is inconsistent with the BORA.
- Establish a human rights select committee with the purpose of identifying and resolving inconsistencies between bills and New Zealand's human rights obligations.
- Ensure adequate time for comprehensive public consultation at the select committee stage of the legislative process.
- Include a remedies section which explicitly provides the judiciary with the discretion to award remedies for breaches of the BORA.
- Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR).

If there is a particular recommendation that you do not wish to support, please indicate accordingly by crossing it out.

**TO RETURN THIS FORM AND FOR FURTHER INFORMATION
OR QUESTIONS PLEASE CONTACT:**

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Amnesty International is a global movement of more than 3 million people in more than 150 countries and territories who campaign to end grave abuses of human rights.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion—funded by our membership and public donations.

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