MINISTRY OF JUSTICE

Discussion Paper
Re-evaluation of the Human Rights Protections in New Zealand

Ministry of Justice
Te Manatū Ture

FOREWORD

Human rights law must be effective, relevant, and comprehensive. It is fundamental to a free and democratic society. Human rights law expresses the values that New Zealanders believe to be fair and decent; and provides a catalyst for change where that is needed.

Our human rights legislation is now almost 30 years old. The manifestos of both the Labour Party and of the Alliance Party make clear our commitment to a review of that legislation and the structures, which implement it.

In April this year, the government commissioned an independent ministerial re-evaluation of human rights protections in New Zealand. This report was produced as an outcome of that re-evaluation. The report provides essential information on which future policy can be based, as well as clear recommendations. I am very grateful to members of the re-evaluation team — Peter Cooper, Paul Hunt, Janet McLean, and Bill Mansfield — for their hard work.

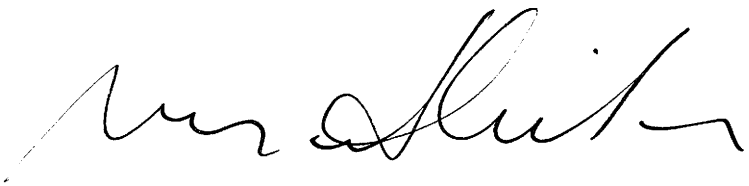
It is now time for members of the public, key stakeholders, and interest groups, to have their say. I invite comments therefore on this report – in particular its recommendations for the future – to provide the basis for further policy development and governmental decisions.

Submissions should be sent to:

Ministry of Justice
PO Box 180
WELLINGTON

Closing date for submissions is 20 December 2000.

Human rights affects all of us, and it is essential that everyone has the opportunity to get involved.



Hon Margaret Wilson
Associate Minister of Justice

RE-EVALUATION OF THE HUMAN RIGHTS PROTECTIONS IN NEW ZEALAND

REPORT

FOR THE

ASSOCIATE MINISTER OF JUSTICE AND ATTORNEY-GENERAL

HON. MARGARET WILSON

DISCLAIMER

The Ministerial Re-evaluation of Human Rights Protections in New Zealand was written by an independent evaluation team for the Minister of Justice. The views expressed in it are those of the independent evaluation team and do not necessarily represent the views of the Ministry of Justice or the Government.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY:

"The affirmation and implementation of human rights principles form the foundation of a just society. Such issues cannot be dismissed as of concern only to the international community, and as such, of academic interest only; they are vital to the peace and prosperity of every society."

Dame Silvia Cartwright

Background:

1. At the San Francisco conference that developed the United Nations Charter and ever since, New Zealand has played a leading role in the development of the international law of human rights that has established principles, standards and goals for the relationship between states and their citizens and amongst citizens themselves.

2. The significance of this branch of international law in underpinning the basic rules of a free and democratic society, and in charting a path for realisation of the potential of individuals and groups within society, is not widely recognised in New Zealand or, for that matter, in many other developed countries that have enjoyed a functioning democracy for many years.

3. New Zealand's law and institutions dealing with human rights have grown organically, largely in response to the adoption of the international standards we have helped to develop. This organic growth has had its advantages and disadvantages.

4. The understanding and effective protection of human rights at both the international and domestic levels is recognised to be a constantly evolving process. In New Zealand the political, economic, social and cultural factors relevant to the enjoyment of human rights have changed significantly in the quarter century or more since the establishment of our principal human rights bodies. To exemplify the consequences of this evolution, the term "race relations" now seems too narrow to reflect the issues (which include cultural rights, indigenous rights, economic and social disadvantage and the Treaty of Waitangi) that need to be addressed in the

context of human rights among the communities that make up society today. It is unsurprising therefore that there is strong support for the view that this is a timely point at which to take stock of our law and institutions relating to human rights.

The Law:

5. In considering how best to promote and protect human rights, the Terms of Reference query whether human rights law should enjoy primacy or otherwise over other legislation. New Zealand's human rights law is delivered through a number of Acts –particularly the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The relationship between these two major pieces of human rights law has not been well understood. This report seeks to clarify that legislation should be measured against a Bill of Rights Act standard, and recommends a process by which a citizen could mount a publicly funded challenge against discriminatory acts performed under statutory authority by way of complaint to the national human rights institution.

6. A thorough going revision of the Bill of Rights Act would inevitably raise constitutional issues of some magnitude touching on the respective roles of Parliament and the Judiciary. Those issues are linked to other constitutional issues, all of which can be properly considered only through an appropriate process at an appropriate time.

7. In the meantime it is suggested that some more limited changes should be made for the following purposes:

    i) To assist the principled examination of legislation (and policies or practices under legislation) to ensure that where it provides for differential treatment of individuals or groups, there is a sound social justification for such treatment consistent with the relevant international human rights standards.

    ii) To effect the institutional changes recommended in this report.

    iii) To give the national human rights institution the specific additional function of encouraging discussion, research and education on the relationship between the Treaty of Waitangi and the rights set out in

the international human rights instruments and domestic human rights laws.

iv) To encourage the principal human rights organisation in its educational and advisory work to promote and adopt a broad understanding of human rights including economic, social and cultural rights.

The present institutional situation:

8. The New Zealand institutions dealing with human rights issues have been set up at different points over a period of more than twenty years. There are significant differences amongst them in terms of role, structure and function. In the case of the longer established organisations (the Human Rights Commission and the Race Relations Office) the complaints function has tended to occupy much of their time and energy. Despite strenuous efforts to increase their educational and promotional work these older agencies are perceived as complaints driven.

9. The complaints load on the Human Rights Commission and the Race Relations Office has had the following consequences:

i) They have had difficulty in gaining public recognition of their role in promoting human rights in the broader sense as a foundation for social cohesion;

ii) Publicity surrounding particular cases that may have been unrepresentative of the casework undertaken has generated a public impression that they are involved in relatively less important human rights issues;

iii) The power to conduct inquiries into more systemic human rights issues has been under-utilised.

10. The fragmented nature of the institutions has led to some confusion amongst complainants as to where their complaint should be lodged. The same complaint may have aspects that require consideration by two or more of the agencies.

11. The small size of some of the agencies presents particular difficulties. They have limited capacity to cope with the normal ebb and flow of work pressures, let alone situations of urgency or crisis. They have the same accountability requirements as

larger organisations, and the same need for support and servicing, but limited ability to achieve efficiency gains in the area. They have to compete in the recruitment market with organisations that can offer staff more attractive conditions and prospects. More generally, they have difficulty in offering a career structure within the organisation and are often dependent on the commitment of staff to the nature of the work.

12. The structure of some of the organisations does not encourage, or even militates against, a proper understanding of the roles of governance and management. Lack of a separate governance regime means there is increased exposure to the risk of organisational failure.

13. In relation to some of the organisations, the existence of the enforcement side of the complaints function is seen as inhibiting the ability of the organisation to gain the confidence and trust needed for effective workplace or industry wide education work.

14. All organisations working in the field of human rights are from time to time likely to be unpopular with the government of the day and/or certain sections of the public. Small fragmented organisations can be particularly vulnerable to short to medium term adverse political sentiment.

Recommended Institutional Changes:

15. In many jurisdictions the national human rights institution is likely to have a number of related functions including, in particular, community education and individual complaints resolution. But the emphasis that is given to one or other of these two major functions can have a significant effect on the qualities required to lead the organisation, the way it is structured, the systems and processes it adopts for dealing with complaints and the priority, effort and resources it is able to apply to education work and other functions.

16. If the organisation is focussed on complaints resolution those leading the organisation will be seen as having principal responsibility for settling disputes and as exercising an important quasi-judicial function. They will need to be at least reasonably familiar with legal process and analysis. And the structure of the

organisation and its systems will need to be designed around the ability to analyse and process disputes in ways that assist determinations.

17. If on the other hand the principal focus of the organisation is on taking the lead within the community in promoting a society that respects the dignity, worth and human rights of all its members with all their differences then other leadership qualities, structures and systems are indicated. Those in the leadership role will need to be focussed on the strategic human rights issues of the day. They should have the personal qualities to initiate and lead constructive discussion within the community of the various dimensions of human rights issues, to promote general education and awareness of human rights and to encourage positive interaction between different individuals, groups, communities and cultures within society. Their involvement in individual complaints should be limited to those of strategic significance and the complaints resolution process should be structured and performed in ways that link to, and support, the organisation's educational role.

18. It is suggested that New Zealand's national human rights institution should be designed to enable it to focus appropriately on strategic community leadership and education work. This will require a new governance and organisational structure, new accountability arrangements and new processes. This community leadership role cannot be achieved effectively within existing organisational models that are, for the most part, small and fragmented and are structured around the need to make determinations on individual complaints.

19. The key feature of the proposed redesigned organisation would be a Governance Council of 7 or 9 members. The membership of the Council would be reflective of New Zealand society and of the various aspects of human rights and communities of interest in human rights that require particular attention. All members of the Council would be expected to bring a broad awareness of human rights to their work as well as an understanding of the importance, in the New Zealand context, of the Treaty of Waitangi. However, through their particular backgrounds, they should also ensure that the Council gives appropriate attention to each aspect of human rights. On another dimension, the Council will need amongst its members a diversity of skill sets including finance, legal, management, public relations and advocacy. The Council should establish the strategic directions of the organisation and collectively direct management through strategies, plans, policies and budget

bids. It would decide and, where appropriate, lead significant initiatives within the community to improve understanding of difference and respect for human rights. It would guide and monitor the work of the organisation and maintain high level contacts with all stakeholder interests including NGOs. In view of the range of activities needed in the short to medium term to achieve an effective community leadership role, and in particular the need to build relationships with all stakeholder groups, the Council should initially be led by a full time President.

20. The Council should be supported by a chief executive who should be accountable to the Council for the performance of the organisation across all its activities including the maintenance of sound working level relationships with stakeholder interests including NGOs. Included within the Chief Executive's accountabilities should be the establishment of high level capability within the organisation across all functional areas including the necessary knowledge and expertise in the various areas of human rights. The Chief Executive should also be accountable for ensuring that the Council is provided with the necessary trends analysis of complaints received and also with those strategically important individual cases on which the Council may wish to seek judicial determination.

21. The process of conciliation of complaints should be carried out within the organisation by experienced and capable staff backed by the necessary powers to bring the parties together and obtain documents. If the conciliation process is unsuccessful then, without further investigatory work and the present practice of forming provisional and final opinions, the matter should be referred directly to the Proceedings Commissioner for consideration as to whether proceedings should be initiated before the Complaints Review Tribunal.

22. The Proceedings Commissioner should not be a member of the Council nor be located within the organisation. Instead the position should stand-alone. Its principal function would be to ensure consistency of standards in the cases submitted to the Complaints Review Tribunal. An independent check on this function could be undertaken from time to time. A stand alone situation for the Proceedings Commissioner should reduce the following concerns expressed about the present situation:

i) that decisions about prosecution may be influenced by in house knowledge about the conciliation process; and

ii) that the in house prosecution function can inhibit external acceptance of the organisation's role in workplace education.

23. Although there is an argument for human rights cases to be given the greater weight of consideration at District Court level the relative speed, flexibility and informality of hearings in the Complaints Review Tribunal remain major advantages. Consideration should be given, however, to strengthening the Tribunal by warranting some District Court judges to sit on Tribunal cases.

24. The proposed redesigned national human rights institution should include the present Human Rights Commission and Race Relations Office. The role and functions of the Commissioner for Children, which are currently under review, would also seem to have some important linkages to the proposed organisation. If a decision is reached that the Commissioner for Children should be rights-based and/or should have a formal system for considering complaints in respect of children's rights similar to that available in respect of other human rights the case for including this small office would be very strong. In that event it would be necessary for the Council to include one or more members whom children's interest groups could identify as having the knowledge and concern to ensure an appropriate focus on children's interests. (This may or may not involve an increase in the total membership of the Council) If further work and consultation is thought to be necessary before a final decision is reached on this question the organisational design could be undertaken in a manner that would allow the Office to be included at a later date.

25. Different considerations apply in respect of the offices of the Health and Disability Commissioner and the Privacy Commissioner. In the longer term, and after the proposed national human rights institution has established itself and its public reputation, the obvious connections between the work of the Health and Disability Commissioner and other human rights work may well deserve further consideration. At the present time, however, the office is in the process of reorientation under a new Commissioner and is operating in an environment that has been experiencing major change over an extended period. With a staff of 45 it

has a critical mass and in the absence of pressing reasons for change should probably be allowed to settle down where it is.

26. The right to privacy is set out as a human right in the international human rights instruments but in practice the purpose of the work of the Privacy Commissioner does not currently connect closely with the other main agencies dealing with human rights. In fact, at present the purpose of the work would seem to bear a closer connection to the freedom of information work of the Ombudsman.

27. If the recommendation for a redesigned national human rights institution is accepted its implementation will need to be carefully phased. The necessary steps would include the identification of potential Council members, the detailed design of the organisation below the level of chief executive, the preparation and consideration by Parliament of the necessary legislative amendments, the formal appointment of the Council and chief executive once the legislation is passed and the conduct of a change management process. It is likely that some of these steps could be conducted in parallel provided that suitable interim arrangements can be designed into the transition phase. Work would continue to be carried out in the existing agencies until sufficiently robust new organisational arrangements are in place.

Early Consideration of Human Rights Issues and Obligations in Policy Making:

28. International human rights obligations are usually only factored into the government policy-making process at a relatively late stage with a consequent risk of disruption to that process. There are a number of practical steps that might be taken to encourage wider understanding amongst officials that early consideration of relevant international human rights norms will contribute to the development of sound policy proposals and a smooth policy making process.

A New Zealand National Plan of Action for the Promotion and Protection of Human Rights:

29. Consultations with stakeholders indicate there is reasonably widespread support for an appropriately prepared New Zealand National Plan of Action for human rights. The United Nations has recommended such plans of action and New Zealand has advocated for them in the Asia/Pacific region. The purpose of such plans is to identify measures that can help to develop and strengthen co-operation on human

rights at the national and local levels. It is generally recognised that, if proper consultations are undertaken and expectations are properly managed, the process by which such plans are developed can be a powerful device for enhancing respect for human rights across society.

30. To be successful a national plan of action must enjoy government support and involvement. There may be advantage, however, if it is driven by an agency that is not part of government. Consideration should be given to associating persons who might be considered for appointment to the Council of the proposed new national human rights institution with the preparation of the plan.

Funding:

31. The adequacy of the funding levels of the existing organisations was not part of the Terms of Reference of this re-evaluation; nor was the question of possible efficiency gains. It is noted that there have been strong calls for increases in the current levels of funding of these organisations. On the other hand, some interviewed stakeholders volunteered that they did not consider they were getting sufficient value from the current funding. Some staff also indicated that there were opportunities for significant improvements internally in the value to be obtained from the money currently expended.

32. The purpose of the recommendations in this report is to achieve a more effective human rights environment for New Zealand; not to save money. Nonetheless it is considered that the implementation of these recommendations will in fact generate additional value from the current expenditure levels. It is not possible to be precise about the amount involved, but on the basis of comparable reorganisations elsewhere it could be of the order of $1 m. or more provided the changes are properly designed and implemented. A saving of this order would enable a useful amount of much needed additional community work to be undertaken. Given that for the 2000/2001 year approximately $6.3 m. has been appropriated for the Human Rights Commission and the Race Relations Office, it would also mean that an expenditure of up to $0.5 m. this year to implement the changes (it may be less than that) would have a pay back to the community of between two and six months.

33. It would be appropriate for the general level of funding for human rights work to be reconsidered following the completion of the proposed National Plan of Action.

Specific recommendations to implement the strategic directions outlined in the above summary can be found at pages 47, 83, 89, 102 and 111 of this report.

TERMS OF REFERENCE

1. On 3 May 2000 the Associate Minister of Justice, the Hon. Margaret Wilson, announced the Government's intention to establish a Ministerial re-evaluation of the Human Rights protections in New Zealand. This re-evaluation was to be conducted on the following terms:

TERMS OF REFERENCE
MINISTERIAL RE-EVALUATION OF HUMAN RIGHTS PROTECTIONS IN NEW ZEALAND

The Government is committed to creating and sustaining a world-leading human rights environment which enables people to reach their individual and collective potential regardless of their characteristics, and in which human rights considerations are at the heart of public and international policy development.

Accordingly, the Government has decided to conduct a Ministerial re-evaluation of the Human Rights Act 1993, the current system of independent human rights enforcement agencies and the mechanisms for ensuring that international human rights obligations are integrated into legislation and practice. New Zealand has had human rights legislation for almost 30 years and it is now an appropriate time for such a re-evaluation moving into the new millennium.

The re-evaluation, which will be in the form of a scoping exercise, should identify the most effective model of mainstreaming human rights considerations in New Zealand. The re-evaluation will identify from other jurisdictions current best practices in mainstreaming human rights that would be of benefit to New Zealand.

The tasks for the ministerial re-evaluation are:

1) To re-evaluate the nature and scope of the provisions of the Human Rights Act 1993, and if necessary, recommend amendments that would contribute to the further mainstreaming of human rights considerations in New Zealand.

2) To develop recommendations for the relationship of our domestic human rights laws to other legislation in a way that best promotes and protects the human rights of New Zealanders in accordance with international conventions. This should include consideration of the primacy or otherwise of human rights law to other legislation.

3) To re-evaluate the roles, interrelationships, operation and structures of the Human Rights Commission, Race Relations Conciliator, the Privacy Commissioner and Complaints Review Tribunal, and if necessary, recommend changes that would enhance the effective promotion and enforcement of New Zealand's domestic human rights laws. This should include the re-evaluation of options for the resolution of human rights complaints.

4) To re-evaluate the inter-relationships of the above agencies with the Commissioner for Children and Health & Disability Commissioner, given their respective statutory roles.

5) To re-evaluate the adequacy of current mechanisms, and if necessary, recommend changes that would ensure that international human rights obligations are taken into account in the development and implementation of government policy, practice and New Zealand legislation.

6) To consider whether New Zealand would benefit from a National Plan of Action for the Promotion and Protection of Human Rights as recommended by the United Nations World Conference on Human Rights, and if necessary, to recommend a process for the development of a New Zealand National Plan of Action.

2. By letter dated 10 May 2000, the Minister invited Peter Cooper, Paul Hunt, Janet McLean and Bill Mansfield to provide independent advice on the issues covered in the Terms of Reference. The list of individuals and organisations that were invited to participate in focused consultation meetings with the independent advisers is attached as Appendix I to this Report.

INTRODUCTION

3. Given the possible need for a legislative resolution to the primacy issues accompanying the expiry of section 151 of the Human Rights Act 1993 (HRA), the Minister requested that the independent advisers provide her with a scoping report by early August 2000. Accordingly, a focused consultation process was designed by the Ministry of Justice to provide an opportunity for the advisers to obtain the views of a cross-section of NGOs, parliamentarians, academics and government departments, as well as the Commissioners and staff of New Zealand's human rights organisations.

4. This focused consultation process was conducted over the months of June and July, and consisted of the following three phases:

- *Phase one: Understanding stakeholder views*

  Initial stakeholder interviews and consultation meetings were conducted from 6 – 16 June 2000. This was to provide a cross-section of stakeholders to express their views on the issues raised in the Terms of Reference.

- *Phase two: Stakeholder workshop*

  A two-day workshop was conducted on 1 – 2 July. This was to provide an opportunity for a selection of stakeholders to work together on identifying common ground that could be the basis for future directions.

- *Phase three: Stakeholder consultations*

  A second round of stakeholder interviews and consultation meetings were conducted from 3 – 14 July 2000. This was to discuss the independent advisers' initial thoughts and determine how best to meet the Terms of Reference.

5. It is a tribute to stakeholders' commitment to human rights issues in New Zealand that they were willing to participate in this intensive process with limited notice and time to prepare. The Commissioners and their staff gave generously of their time and resources to constructively participate in an open and frank discussion of

both successes and regrets in New Zealand's human rights environment. Given the amount of personal sacrifice and dedication that these individuals have given to the work of their specific organisations, their professionalism towards any criticism of the environment in which they operate is to be commended.

6. It should also be emphasised that this "scoping report" is intended to be the beginning of a longer policy process to be conducted by the Minister and her officials. Given the breadth of the Terms of Reference, the short time frame and the limited amount of consultation that could be conducted within the time available, the recommendations in this report should be used to formulate the principles for development of a better human rights environment. The details of the proposed organisational design and its implementation should be the subject of further work and discussion. This should include further consultation with Mäori representatives concerning the proposed legislative reference to the need for elucidation regarding the relationship of the Treaty of Waitangi with domestic and international human rights law.

PART ONE: THE DEVELOPMENT OF INTERNATIONAL AND DOMESTIC PROTECTIONS FOR HUMAN RIGHTS

"It is thanks to the Universal Declaration that human rights have established themselves everywhere as a legitimate political and moral concern, that the world community has pledged itself to promote and protect human rights, that the ordinary citizen has been given a vocabulary of complaint and inspiration, and that a corpus of enforceable human rights law is developing in different regions of the world through effective regional mechanisms"

Mary Robinson, United Nations
High Commissioner for Human Rights

The emergence of universal and indivisible human rights:

7. At the San Francisco conference that drafted the United Nations Charter (1945), and during the subsequent negotiations which led to the adoption of the Universal Declaration of Human Rights (1948), New Zealand played a leading role in the development of a new branch of international law. The international law of human rights establishes principles, standards and goals for the relationship between a state, individuals and communities. The significance of international human rights in underpinning the basic rules of a free and democratic society, and in charting a path for the realisation of the potential of individuals and groups within society, is not widely recognised in New Zealand - or, for that matter, in many other developed countries that have enjoyed a functioning democracy for many years.

8. All societies, religions and cultures have dwelt on the issue of what rights and responsibilities an individual has within his or her community, what he or she can do to others, and what power a government may legitimately exercise over individuals and groups. Adopted in the aftermath of the Second World War, the Universal Declaration of Human Rights marked the first occasion that a world organisation articulated and agreed a common set of rights - civil, political, economic, social and cultural - to which people everywhere are entitled. Its adoption was a landmark event signalling that human rights are a matter of

legitimate international concern and no longer under the exclusive jurisdiction of states.

9. As its title makes clear, the Declaration adopts a universalist approach to human rights. According to its Preamble, the Declaration constitutes "a common standard of achievement for all people and all nations" based on "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" as "the foundation of freedom, justice and peace in the world". That there is, in fact, widespread agreement across numerous societies and cultures about core human values, principles and rights is supported by the extent of ratification of key international human rights treaties which have been negotiated since the Declaration's adoption. Indeed, many societies have gone further and included these principles and rights in their national constitutional arrangements.

10. The rights contained in the Declaration were reaffirmed at the World Conference on Human Rights in Vienna (1993). New Zealand actively participated in this event which was the largest international gathering ever convened on the theme of human rights. The Vienna Declaration and Programme of Action, adopted by consensus among more than 170 states, confirmed that all human rights are "universal, indivisible and interdependent and interrelated", and noted that "while the significance of national and regional particularities must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms" (paragraph 5). More recently, the Declaration was repeatedly reaffirmed on the occasion of its fiftieth anniversary during 1998.

11. The Declaration regards all rights - civil, political, economic, social and cultural - as indivisible as well as universal, that is they are deemed to be of equal importance being interdependent and interrelated, and therefore requiring the same level of protection. Unfortunately, as Mary Robinson remarked when reflecting on the fiftieth anniversary of the Declaration, "we must be honest and recognise that there has been an imbalance in the promotion at the international level of economic, social and cultural rights and the right to development on the one hand, and of civil and political rights on the other." This imbalance is not only evident at the international level. At the regional and national levels, there

has also been greater recognition of civil and political rights in comparison to economic, social and cultural rights.

12. Today, there is an increasing recognition that this imbalance needs to be addressed, and there is also a growing acknowledgement of the relationship between governance, human development and human rights. Recently, in a publication called 'Development and Human Rights: The Role of the World Bank', the World Bank wrote: "The World Bank believes that creating the conditions for the attainment of human rights is a central and irreducible goal of development. By placing the dignity of every human being - especially the poorest - at the very foundation of its approach to development, the Bank helps people in every part of the world build lives of purpose and hope." While just a few weeks ago, the UN Development Programme (UNDP) published its annual Human Development Report which, this year, is devoted entirely to the relationship between human rights and human development. In his Foreword, Mark Malloch Brown, the head of UNDP, writes: "[A] broad vision of human rights must be entrenched to achieve sustainable human development. When adhered to in practice as well as principle, [human rights and sustainable human development] make up a self-reinforcing virtuous circle."

13. At a less general level, there is a significant and growing body of empirical evidence that reinforces the interrelationship between governance, development and rights. To cite one example from research undertaken by Amartya Sen, the 1998 Nobel Laureate in Economics: "It is not surprising that no famine has ever taken place in the history of the world in a functioning democracy - be it economically rich or relatively poor. Famines have tended to occur in colonial territories governed by rulers elsewhere (as in an Ireland administered by alienated English rulers), or in one-party states (as in Cambodia in the 1970s), or in military dictatorships (as in Ethiopia or Somalia). Authoritarian rulers, who are themselves rarely affected by famines, tend to lack the incentive to take timely preventive measures."[1]

14. In conclusion, as with other historic documents, our understanding of the Universal Declaration of Human Rights evolves with the passage of time. The

[1] Abridged from Sen's book *Development as Freedom* (Knopf 1999)

Declaration is animated by a sense of the dignity and well-being of all individuals and communities. Today, there is increasing recognition of the close relationship between governance, human development and human rights. Adherence to universal human rights standards is an important and necessary plank in achieving long-term, sustainable development.

The recognition of states' national human rights obligations:

15. One of the major accomplishments of the UN in the field of human rights has been the acceptance by states that national sovereignty in respect of the treatment of citizens is no longer unfettered: a state's treatment of individuals and groups within its jurisdiction has become the subject of legitimate enquiry and, in some cases, intervention by the international community.

16. The growing panoply of human rights treaties and monitoring mechanisms - together with the burgeoning of influential NGOs such as Amnesty International and Human Rights Watch, and the impact of the global information revolution - has raised the profile and awareness of international human rights issues and concerns, and led to more vigilant and searching scrutiny of human rights violations around the world. This has been termed the emerging 'globalisation of accountability'.

17. This international standards setting and monitoring regime has been and remains an evolutionary process that continues to develop. For example, since the creation of the Universal Declaration the UN has developed several specific treaties and monitoring treaty-bodies including:

- *The International Covenant on Civil and Political Rights (ICCPR)* - The Human Rights Committee
- *The International Covenant on Economic, Social and Cultural Rights (ICESCR)* - The Committee on Economic, Social and Cultural Rights
- *The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)* - The Committee on the Elimination of Racial Discrimination

- *The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* - The Committee on the Elimination of Discrimination Against Women
- *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* - The Committee Against Torture
- *The International Convention on the Rights of the Child (UNCROC)* - The Committee on the Rights of the Child

18. This globalisation of accountability has led to other developments, including the growth of national human rights institutions (NHRIs). The UN has actively encouraged and assisted states to establish NHRIs with the provision of technical assistance and the development of guidelines for their creation. Known as the Paris Principles, these guidelines affirm the need to invest independent NHRIs with a broad mandate, which should be set out clearly in a constitutional or legal text, to promote and protect human rights. The growing importance of NHRIs as mechanisms for the implementation of international and domestic human rights is reflected in this month's meeting in Rotorua of the Asia Pacific Forum of National Human Rights Institutions.

19. This Report adopts the conception of 'human rights' which is embodied in the Universal Declaration of Human Rights and subsequently elaborated in the six core international human rights treaties listed above. It is noted that the Treaty of Waitangi encompasses respect for cultural life, non-discrimination, equality and other fundamental principles, all of which resonate with international human rights law. Moreover, both international human rights law and the Treaty anticipate that a reasonable balance may be struck between the rights of individuals and groups. In this sense, therefore, the Treaty of Waitangi is a human rights instrument and it, too, has informed the understanding of human rights which underpins this Report.

The implementation of New Zealand's international obligations:

20. As already observed, New Zealand has played an active role in the development of international human rights standards. In addition to its common law inheritance of various human rights protections, New Zealand has demonstrated

its commitment to human rights by ratifying the six core international human rights treaties (see para 17 above), thereby voluntarily subjecting its legislation, policies and practices to international monitoring.

21. It should also be noted that another avenue of protection available to New Zealanders is the individual complaints mechanisms under: (i) the Optional Protocol to the ICCPR and (ii) Article 22 of the CAT. These international instruments enable individuals who claim to have had their rights under these treaties violated to submit communications to specific UN bodies for their consideration. New Zealand has not made a declaration under Article 14 of the CERD, to allow individual complaints to be taken to the Committee on the Elimination of Racial Discrimination. But the Government has recently announced that the necessary steps will be taken to enable New Zealand to become party to the recently concluded Optional Protocol to CEDAW. This will enable international consideration of individual complaints in respect of the rights contained in that convention.

22. New Zealand takes these obligations seriously. In general terms, New Zealand's approach is not to become a party to an international treaty unless domestic legislation and practice fully comply with all its provisions, or the treaty allows for specific exemptions; non-compliance would place us in breach of international law.

23. The long evolution of international human rights standards, combined with New Zealand's strong common law traditions, has led to the organic growth of specifically focused domestic human rights legislation and organisations. These measures were taken when it was decided that a specific issue needed to be addressed or specific protections codified. The range of domestic human rights legislation enacted, and organisations established, include:

- The Race Relations Act 1971;
- The Treaty of Waitangi Act 1975;
- The Human Rights Commission Act 1977;
- The Constitution Act 1986;
- The Abolition of the Death Penalty Act 1989;
- The Crimes of Torture Act 1989;

- The Children, Young Persons and their Families Act 1989;
- The New Zealand Bill of Rights Act 1990;
- The Human Rights Act 1993;
- The Privacy Act 1993;
- The Health and Disability Commissioner Act 1994;
- The Race Relations Conciliator's Office;
- The Human Rights Commission;
- The Commissioner for Children;
- The Privacy Commissioner;
- The Health and Disability Commissioner.

The enactment of these various laws and the growth of these separate organisations has allowed New Zealand to address specific domestic human rights issues such as discrimination, race relations and the rights of children. However, it has also led to a fragmentation of issues and the lack of a strategic approach in relation to community leadership and education across the entire range of New Zealand's international human rights obligations. These are among the central concerns of this report**.**

PART TWO: NEW ZEALAND'S HUMAN RIGHTS LAW

"There is no single model of democracy, or of human rights, or of cultural expression for all the world. But for all the world, there must be democracy, human rights and free cultural expression… The Universal Declaration of Human Rights, far from insisting on uniformity, is the basic condition for global diversity. That is its great power. That is its lasting value. The Universal Declaration of Human Rights enshrines and illuminates global pluralism and diversity. It is the standard for an emerging era in which communication and collaboration between States and peoples will determine their success and survival."

Kofi Annan, United Nations Secretary-General

24. The evolution of New Zealand's human rights legislation has occurred in a rather piecemeal fashion. If the opportunity existed for designing the domestic system of implementation anew, this report may have contained more thoroughgoing recommendations to clarify the law as it applies in the public and private spheres. We have not been asked to examine the large constitutional questions that such an exercise would confront, in this re-evaluation. However it is clear, even from this limited review, that the legislation as it has evolved carries certain public expectations which may have certain constitutional implications. It would be fair to say that there is more public ownership, certainly by NGOs, of the Human Rights Act than the Bill of Rights Act. Partly that is to do with nomenclature. What the United Kingdom calls its Human Rights Act is the New Zealand equivalent of the Bill of Rights Act. Our Human Rights Act, in large part, is really an anti-discrimination statute. Both of our Acts have jurisdiction over discrimination matters. The aim of this part of the Report is to try to restore some conceptual clarity about the respective roles of the Human Rights Act and Bill of Rights Act.

Primacy – the problem and how we got here:

25. The aim of the New Zealand Bill of Rights Act 1990, as with similar documents in the constitutions of other countries, is to regulate and limit the power of

government and public actors. In New Zealand, unlike many other countries, a decision was taken to preclude judicial review of legislation – meaning that it is not possible for a court to invalidate a law passed by parliament on the grounds that it is inconsistent with the Bill of Rights. But apart from that feature, the New Zealand Bill of Rights Act 1990 serves much the same role as equivalent documents elsewhere: it creates a set of rights for individuals which limit the power of executive government and public actors. One of the rights it confers, in s 19, is a right to be free from discrimination across the whole range of governmental activity. The Bill of Rights applies to the three branches of government – executive, legislative and judicial and also to bodies exercising a public function (s 3). This means that government and public actors have a corresponding duty not to discriminate. The Bill of Rights is written at a high level of abstraction. The meaning of the rights it affirms is to be discerned and applied by judges and others.

26. The Human Rights Act 1993 is different. It may be seen as the fulfilment of the government's obligations under the ICCPR, to protect its citizens from discrimination perpetrated by fellow citizens. The Act is written with the private sector principally in mind. It contains a detailed set of prohibitions all reflecting the general principle affirmed in s 19 of the Bill of Rights Act. It does not, in terms, prohibit "discrimination". Rather, in the areas to which it applies (goods and services, employment, accommodation, partnerships and so on) it prohibits treating people differently by reason of a prohibited ground of discrimination.

27. This distinction between the two Acts is important. Unlike a prohibition on "discrimination", which readily accommodates situations where different treatment is justified for good reason, a simple prohibition on treating people "differently" may have all kinds of unintended consequences. The Act recognises this by providing a series of exceptions designed to allow instances of "treating people differently" where it has been adjudged that it is right and proper to do so. Some of those exceptions aim to limit the *reach* of the prohibitions to the private sector based on a judgment that the activity is sufficiently private that government should not intrude to regulate such matters e.g. in matters of religious conscience, private clubs etc. Such exceptions, of course, will never apply to government itself.

28. The Human Rights Act also seeks to regulate the public sector when it is acting as an ordinary person. Indeed, some of the exceptions attempt to anticipate when government acting as employer should not be governed by the same rules as a private employer e.g. in relation to work involving national security, political parties, and armed conflict. The important point is that the Human Rights Act generally identifies which actions of government should be treated like those of ordinary individuals. It properly applies to government when government is acting as a private person, for example as an employer, or landlord, or as a supplier of goods and services that are analogous to those a private person might supply.

29. For present purposes, the most difficult sphere in which the Human Rights Act operates is "goods and services" (s 44). Unlike the rest of the Act, which is aimed at relatively narrow areas, "goods and services" could conceivably cover a great range of government activity. It is capable of an interpretation broad enough to include not only those government services that are analogous to those supplied by private persons (e.g. health care services), but also those services that only government *as government* can supply (e.g. policing and immigration control). The provision, enacted 23 years ago, has only recently become problematic as government has increasingly used private contractual forms for the delivery of public programmes and purposes. Citizens are now often referred to as "consumers" of government services and private institutions have sometimes had a role in delivering public programmes on behalf of government.

30. Once the breadth of the term *services* is appreciated, the lines between public and private as originally drawn in New Zealand anti-discrimination law tend to lose their coherence. The exceptions stated in the Act appear to be both over- and under-inclusive. For example, s 44 does not itself contain any "good reason" exception (in contrast to many of the other sections). The only specific exceptions relate to private clubs. Conversely, the wholesale exclusion of charitable benefits in s 150 may sometimes include a number of bodies exercising public functions that might otherwise be caught by s 44, and would certainly be caught by the New Zealand Bill of Rights Act 1990.

31. The position then, is that both the Bill of Rights Act and Human Rights Act apply to government. The former is specifically designed to do so; the latter is well-suited to do so when government acts in roles similar to those of private actors but less so when government acts *as government*.

32. This in turn has the result that the two statutes differ in terms of the standards and processes that potentially govern similar acts of government. Perceptions of the relationship between them have become blurred. For the purposes of clarity, the New Zealand Bill of Rights Act 1990 should be regarded as stating the general anti-discrimination principle to which government acting as government should adhere and against which all enactments ought to be judged. The Human Rights Act 1993 should be regarded as a detailed working out of the government's duty to protect its citizens from discrimination perpetrated by fellow citizens.

33. As a general principle, when the government is acting as an employer, landlord etc it ought to be subject to the same standards as a private person. When the government is acting as government, or anyone is acting pursuant to a statutory or public function, the appropriate standard is that set by the New Zealand Bill of Rights Act 1990. Any changes to anti-discrimination legislation should reflect these basic starting points. Thus different standards may operate in relation to government delivery of goods and services, depending, for example, on whether it is simply selling books in the ordinary market place or, say, issuing passports. There are a number of ways these principles could be reflected in the legislation, which are detailed in the recommendations below at page 47 of this report. There should also be a single entry point for complaints relating to goods and services, whichever standard is to apply (as detailed in recommendation (vii) on page 49).

34. It is appropriate for the private sector (and government acting as ordinary person) to be given specific guidance as to what is lawful when differentiating between people. The present prescriptive tenor of the Human Rights Act should remain, subject to more guidance as to the purposes for which the exceptions should operate, and to more extensive consultations with the private sector and unions than was possible within the short timeframe of this scoping exercise. The Employment Court's experience of the working of the employment provisions (at least under the old grounds) should also be taken into account. We make specific

recommendations about greater use of the guideline making power at paragraphs 87 and 92 below.

35. Any detailed set of rules may have unintended consequences or fail to anticipate genuine justifications. It would be helpful therefore, to include something like the s 97 general justification provision in Part II of the Act so that it may be considered as part of the conciliation process and not simply the adjudication process as at present. A purpose clause should be included in Part II so as to provide guidance on the scope of the general exception. Superannuation and insurance are discussed separately below at paragraph 88.

36. It is against this background that the questions of "primacy" should be considered. Section 151 (1) of the Human Rights Act states that the Act should not limit or affect the provisions of any other Act or regulation that is in force in New Zealand. Section 151(2) exempts government from the application of the new grounds of prohibited discrimination added in 1993. The provision is due to expire on 31 December 2001. The Terms of Reference require this report to advise about what should happen at that date.

37. The Human Rights Bill 1993 included a clause stating that it would not override existing Acts unless expressly stated. This became s 151(1). This provision had also been part of previous legislation. The Human Rights Commission in its submission to the Select Committee suggested that the clause was largely unnecessary and that it was likely that most legislation would have already been reviewed and brought into line. The Select Committee accepted that the clause should be removed, but out of caution provided that the provision should expire on 31 December 1999. It inserted provisions in s 5 to establish the Consistency 2000 project. This aspect of the Bill was not the subject of any widespread public comment or discussion.

38. The Consistency 2000 exercise, together with developments in the Canadian law, has raised expectations about what will happen upon the expiry of s 151. On one view, the Human Rights Act will simply no longer be subordinate legislation. It may sometimes, but not always, impliedly repeal legislation according to ordinary rules of statutory interpretation. Under that scenario, the New Zealand courts if

faced with a possible conflict between the Human Rights Act 1993 and an Act or regulation, would attempt as far as possible to give effect to both.

39. For example, if there were a conflict between the Human Rights Act and the Health and Safety in Employment Act, it is likely that the courts would seek to reconcile them when interpreting the scope of "reasonable accommodation". In the event of a more direct inconsistency, such as between the Human Rights Act and a statute containing a compulsory retirement age for people holding tenured office, the courts would be likely to give effect to the more specific statute rather than the Human Rights Act (in accordance with ordinary statutory interpretation principles, which prefer the specific provision to the more general one). That approach would not depend on when the age specific statute was passed. On the basis that repeal of s 151 merely removes the subordinate status of the Human Rights Act, the New Zealand Courts would be likely in the event of direct conflict to follow the Australian approach (illustrated, for example, by *Ware v Secretary, Commonwealth Department of Family and Community Services* 8 May 2000, Human Rights and Equal Opportunity Commission).

40. Though the issue was not raised at the time s 151 was enacted, there is now speculation that the expiry of s 151 will not only remove the subordinate status of s 151, but give it "primacy" over all other statutes. "Primacy" is a Canadian concept used to refer to clauses in statutes that purport to declare that the statute containing the clause is supreme over other statutes, future as well as past, unless the conflicting statute expressly says otherwise. Such clauses are intended to defeat the doctrine of implied repeal, under which a later statute would impliedly repeal an inconsistent earlier statute to the extent of the inconsistency. Such clauses contained, for example, in the Canadian Bill of Rights and Quebec Charter of Rights and Freedoms have been held to be effective. Indeed, the Supreme Court has gone so far as to hold that human rights legislation takes precedence over inconsistent later statutes even without such a primacy clause.

41. The authority for this last proposition is *Re Winnipeg School Division no 1 and Craton* (1985) 21 DLR (4^{th}) 1. The Manitoba Human Rights code which prohibited discrimination on the ground of age was found by the Supreme Court of Canada to prevail over the later Public Schools Act which allowed school boards of trustees to fix a compulsory retirement age for teachers. The provision

of the Public Schools Act was thereby rendered ineffective. The Court departed from what would be considered in New Zealand to be the usual rules of interpretation. It was influenced by the fact that the only reason the Public Schools Act was considered to be a later Act in time than the Human Rights Code was because the original provision in the 1970 Public Schools Act had been re-enacted in the 1980 Consolidation. The periodic technical act of consolidation was not considered sufficient evidence of Parliamentary intention to impliedly repeal the Human Rights Code.

42. The Court in *Winnipeg* said that, because "human rights legislation is of a special nature and declares public policy regarding matters of general concern", it may not be repealed or amended "save by clear legislative pronouncement". The case raises the possibility that in a contest between conflicting statutes, courts would have regard to what the Canadians refer to as the "quasi-constitutional character" of human rights statutes, and be persuaded to apply the Human Rights Act in preference to an apparently inconsistent enactment whatever its date and however specific. While there has been some limited acceptance of the quasi-constitutional character of human rights legislation in New Zealand, the more far-reaching aspects of the judgment would not necessarily apply and should be viewed as integrally connected with Canada's constitutional arrangements.

43. Unlike the New Zealand courts, the Supreme Court of Canada routinely exercises its powers under the Charter of Rights and Freedoms to strike down legislation that is inconsistent with its provisions – including s 15 which guarantees equality before the law. In the Manitoba case, the Human Rights Act was used as a short cut to a Charter result. (Although oddly enough, when the Supreme Court looked at the merits of compulsory retirement it came to a different decision in *Dickason v Governors of the University of Alberta* (1992) 95 DLR (4th) 439 SCC).

44. Under New Zealand's current constitutional arrangements it is far from inevitable that on the repeal of s 151, the Human Rights Act would be given such a reading. The orthodox view has been that the courts should not give effect to even an *express* provision requiring a statute to be given primacy (see *Vauxhall Estates v Liverpool Corporation* [1932] 1 KB 733). Such judicial reluctance has been founded on the basis that a provision of this kind binds future Parliaments to a particular manner and form by which legislation can be passed. To have effect,

conflicting legislation would have to contain a "notwithstanding" clause expressly overriding the primary statute. The courts may now be more willing to give effect to a primacy clause depending on its subject matter and the rigour of the process of enacting the primacy clause itself (whether, for example, a super-majority in Parliament agreed to it).

45. However, given that our principal rights protecting instrument, the New Zealand Bill of Rights Act 1990, currently cannot be read by the courts to prevail over inconsistent statutes, it would be incongruous if one of the rights protected in it were given status over all the others. It would be similarly incongruous for a constitution to give greater status to a Human Rights Act than a Bill of Rights Act. And it would be against the general tenor of the rest of this report to treat discrimination differently from the rest of the rights (such as the right to vote) protected in the ICCPR and incorporated in the New Zealand Bill of Rights Act. The status of the Human Rights Act is intimately linked to the status of the New Zealand Bill of Rights Act, and as a matter of principle it should be so. Moreover, for the reasons stated in paragraphs 25-33 above, the question of whether an enactment is good or bad law, judged against the anti-discrimination principle, is a matter properly to be decided under the standards set in the New Zealand Bill of Rights Act 1990. It is not a matter that can be resolved in a Human Rights Act conciliation process between an individual and government.

46. That said, it is recommended that s 151 of the Human Rights Act be repealed. The repeal of s 151 is unlikely by itself to give the Human Rights Act primacy over other statutes. It is not recommended that the Human Rights Act be amended to include a "primacy" clause, given the current status of the New Zealand Bill of Rights Act. The "primacy" debate, if there is to be one, should rightly focus on the status of and standards set by the New Zealand Bill of Rights Act. Any potentially discriminatory enactments, or actions pursuant to statutory authority or the prerogative, ought to be assessed against those standards.

What is the status of the New Zealand Bill of Rights Act 1990?

47. The Bill of Rights does not have the status of supreme law. A special majority in Parliament or referendum would be needed to give it such a status. A proposal explicitly to do so was rejected in 1988 and 1990 when the Bill was enacted by Parliament with a bare majority. While s 4 makes explicit that the Bill of Rights cannot impliedly repeal or render ineffective other statutes, in practice the New Zealand Bill of Rights Act has a significant effect on statutes and regulations, and even more so on government practices. Read together with s 6, s 4 of the Bill of Rights Act is not strictly the functional equivalent of s 151 of the Human Rights Act. The Bill of Rights can affect, limit, and sometimes augment statutes and regulations. If it is possible to read a statute consistently with the rights protected in the Bill of Rights, there is a legislative injunction to do so. However, if that is not possible because of direct conflict, the conflicting statute continues to have effect.

48. The New Zealand Bill of Rights Act is only a decade old and much of the early case law has involved the application of the criminal law. Remedies in that sphere have been developed to include exclusion of evidence and damages remedies for Bill of Rights breaches. Its potential to contribute to the civil law is still largely unrealised. The Court of Appeal has so far only considered a handful of civil law cases. However, there is a developing jurisprudence to the effect that broad powers in statutes will be read restrictively so as to give effect to the rights protected in the Bill of Rights Act. Such an argument would be available to challenge the exercise of a broadly worded power that discriminated on prohibited grounds. The New Zealand Bill of Rights Act would require the power to be interpreted restrictively so that its use would not unreasonably limit the right to be free from discrimination. The same reasoning could also be applied to provisions empowering the making of regulations - potentially effectively rendering regulations, or an interpretation of them, *ultra vires* or void.

49. The detailed proposals which follow provide a publicly funded avenue for such Bill of Rights challenges to be made in cases where the government has allegedly been discriminatory in its practices, and in the exercise of broad statutory powers. While the proposal ensures that the standard to be applied is the same across all the rights protected in the Bill of Rights Act, this does have the effect of elevating

anti-discrimination concerns over other protected rights to a limited extent. That is inevitable given the expectations surrounding the Human Rights Act and the Human Rights Commission's *Consistency 2000* audit project (discussed below).

50. Whatever the unexplored potential for Bill of Rights challenges, it is still the case that if a statute directly conflicts with the Bill of Rights in a way that cannot be justified, then the conflicting statute continues to have effect. There are very few cases genuinely in this category. Recently some members of the Court of Appeal have indicated that they may be willing to make declarations of inconsistency for such unjustified breaches (see, for example, *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, and *R v Poumako* (CA, 31 May 2000) in which one Justice made a declaration of inconsistency). Declarations, if used sparingly and not in relation to matters involving fine judgments, have the potential over time to acquire such moral force as to make it difficult for Parliament to ignore them. The practice of making judicial declarations of inconsistency under these conditions has the potential to enhance constitutional values and the level of trust between Parliament and the judiciary.

51. Although agreeing with this analysis, one member of the review team (Hunt) points out that, as it was recently put by Lord Cooke of Thorndon, the Bill of Rights Act "is regarded internationally as one of the weakest affirmations of human rights". One element of this weakness is s 4, whereby an ordinary statute may prevail over fundamental civil and political rights which are guaranteed under international law. The UN Human Rights Committee, which monitors New Zealand's implementation of ICCPR, has criticised New Zealand for this feature of its domestic legislation.

52. Accordingly, this member of the review takes the position that s 4 should be amended to create a procedure by which Courts may declare that a statute is incompatible with the Bill of Rights Act, while leaving Parliament to decide what, if any, action to take in respect of the statute concerned. Such declarations of incompatibility would maintain the legislative role of Parliament and the supervisory role of the Courts. They would be consistent with the scheme of the Bill of Rights Act which is designed to provide guiding lights to the executive and legislature. In the UK, the Human Rights Act (1998) has recently provided for declarations of incompatibility. In the opinion of one member of the review team,

the Court of Appeal's recent moves towards declarations of incompatibility should be reinforced by an appropriate amendment to s 4 of the Bill of Rights Act.

53. The others were of the view that, as the matter had not been properly canvassed with relevant interests during the re-evaluation process, it was not appropriate to offer a specific recommendation on the subject and that it would be best for the moment to leave the judicial practice to evolve. Lack of trust between Parliament, the electorate and the judiciary was one of the main reasons the original proposal to entrench the Bill of Rights was defeated. Careful judicial development of a declaration power, together with our other proposals, has the potential over time to help grow our constitution and to develop that trust – and it may be all that is necessary. As has recently been seen, constitutions are much more than words on paper and fundamentally depend on a shared sense of values. The Bill of Rights has up to now been seen rightly or wrongly as a "drunk-drivers' charter". For it to be valued, it needs first to appear to offer something to all New Zealanders.

54. Ultimately, it is the normative force of a finding of direct conflict with the Bill of Rights that is more important than mechanisms by which to enforce it. If declarations of inconsistency were commonplace or Parliament routinely ignored them, and included clauses such as "Notwithstanding the Bill of Rights Act", our shared sense of constitutional values would hardly be enhanced.

55. As a consequence of the recent judicial developments, thought should be given to amending Parliamentary standing orders to require that any judicial declarations of inconsistency be referred to a special Select Committee for consideration.

56. The focus of the recommendations in this report is on the changes needed, at this point of time, to encourage and assist principled examination of legislation to ensure that different treatment is based on sound social justification consistent with the relevant international human rights instruments.

Relationship between the Treaty of Waitangi and human rights law:

57. There is broad support for the view that the Treaty of Waitangi marked the beginning of constitutional government in New Zealand or is the country's founding constitutional document. The White Paper on the Bill of Rights for New Zealand (1985) advocated the incorporation of the Treaty into an enforceable bill of rights. At the time that proposal did not proceed. The possible incorporation of the Treaty into domestic New Zealand law remains a live constitutional issue but one that is outside the scope of this review.

58. Irrespective of that larger issue, there is a strong case for improving understanding of the linkages between the Treaty and human rights. Many of the fundamental principles and rights upon which New Zealand was founded, and which were encompassed by the Treaty, were subsequently developed and articulated in the Universal Declaration of Human Rights. But the human rights dimensions of the Treaty, and the relationship between them and the domestic and international law relating to human rights, has received relatively little attention. This is unfortunate.

59. For example, an understanding of Article 2 of the Treaty might be informed by section 20 (right to culture) of the New Zealand Bill of Rights Act, the international jurisprudence generated by article 27 (right to culture) of the International Covenant on Civil and Political Rights, and article 15 (right to cultural life) of the International Covenant on Economic, Social and Cultural Rights. The inter-relationship between the Treaty, section 73 (measures to ensure equality) of the Human Rights Act, and articles 2 (non-discrimination), 26 (equal treatment) and 27 (right to culture) of ICCPR, is another matter that could benefit from discussion. More generally, and partly because of the Treaty, New Zealand has rather more experience and understanding of the relationship between individual rights and collective rights than many other countries. Further discussion of the role of the Treaty in the human rights context may well enable constructive contributions to this subject at the international level.

60. The NHRI proposed in this report would be well placed to encourage discussion on the relationship between the Treaty and human rights, and the legislation should be amended to give it this specific function.

Affirmative Action:

61. There are different tests for affirmative action in the Human Rights Act and the New Zealand Bill of Rights Act. These tests should be aligned. In particular the affirmative action provision in the New Zealand Bill of Rights Act differs from that in the Human Rights Act in important ways and perpetuates the confusion between the two Acts which this report seeks to rectify.

62. Section 19(2) of the Bill of Rights Act allows:

> "Measures taken in good faith for the purpose of assisting or advancing persons or groups disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination."

Allowing affirmative action measures only when disadvantage has been caused by discrimination that is unlawful under the Human Rights Act, is potentially a much narrower test than that under the Human Rights Act. That Act merely requires a person to belong to a disadvantaged group which needs assistance to achieve an equal place with others. The reference in the Bill of Rights Act to the Human Rights Act is obscure. Part II of the Human Rights Act refers not to "discrimination" but rather defines certain acts as unlawful. And as this Report has emphasised, it only applies in certain limited areas.

63. In practice it is possible to read the Bill of Rights affirmative action provision to allow a broader range of measures than first appears – by giving substantive content to the concept of "discrimination" (as was suggested in the White Paper on the Bill of Rights). By suggesting in *Coburn v Human Rights Commission* [1994] 3 NZLR 323 that the purpose of s 73 was to encourage the rectification of past injustice, Thorp J has also helped to align the two tests.

64. A consequential amendment will be required to the Bill of Rights Act provision if a new Human Rights Act were to be enacted. That would be an opportunity to clarify the test to be used. Such an amendment should realign the tests – perhaps drawing on the language used in the Canadian Charter.

65. Under the 1977 Human Rights Commission Act, organisations could submit affirmative action schemes to the Human Rights Commission for advice and approval. That function should be restored to the new NHRI.

The Consistency 2000 Project:

66. Section 5 of the Human Rights Act 1993 required the HRC:

> "(i) To examine, before the 31st day of December 1998, the Acts and Regulations that are in force in New Zealand, and any policy or administrative practice of the government of New Zealand;
>
> (j) To determine, before the 31st day of December 1998, whether any of the Acts, regulations, policies, and practices examined under paragraph (i) of this subsection conflict with the provisions of Part II of this Act or infringe the spirit or intention of this Act."

67. The audit review carried out by the Human Rights Commission and Government departments was called "Consistency 2000", and involved an initial self-audit by each Government department followed by an examination and final determination by the Human Rights Commission. In 1997 the Government of the day decided to review the Consistency 2000 project in light of the significant resources committed to the project, and preliminary indications that many of the main areas of inconsistency were minor or repetitive in nature. The Government then decided not to continue with the review in its original form.

68. In 1998 the Government of the day introduced the Human Rights Amendment Bill (No.1). This Bill was designed to implement the Government's decisions and also contained exemptions for specific government activities. However, due to a lack of support in the House, this bill was not enacted. To meet its statutory obligation, the Human Rights Commission submitted a report on the determinations that it was able to make on audit material from six departments before 31 December 1998.

69. Opposition to the Bill led to further negotiations. These political discussions resulted in the preparation and passing of the Human Rights Amendment Act 1999. This Amendment Act essentially extended the expiry of section 151 for a further two years and created a new statutory reporting obligation on the Government. The obligation was broadly worded to require the Government to regularly report on progress made on "remedying significant inconsistencies" between existing legislation and the HRA. These reports must be tabled in the House of Representatives every 6 months and must include any written comments on the report that have been made by the Human Rights Commission. The first of these statutory reports was tabled in June this year.

70. The aim of the original Project, to identify those Acts, regulations, policies and practices which unjustifiably breach the right to be free from discrimination, is undoubtedly a laudable one. However, there have been a number of real difficulties with the project in practice. In hindsight it was overly ambitious. The audit reported large volumes of material without any systematic method of prioritising the pressing issues, and on matters in the abstract, which were only potentially discriminatory. It judged practices against a Human Rights Act standard when the Bill of Rights Act provided the appropriate standard. That was compounded by the fact that there is no case law on what distinctions may be justified by the general exception in the Human Rights Act. The Human Rights Commission has never had jurisdiction over or experience in defining the scope of the general justification and only one case has ever been decided on the point at the CRT.

71. As has already been identified, the Human Rights Act only covers a number of limited areas – rather than the whole of government activity. Those statutes that conflict with the core areas of the Act are actually rare. The audit however, took a very broad view of this (invoking the "spirit and intention" of the Act as required by s 5) and looked at the range of government activity. As this report has already emphasised, the proper standard by which to assess these broader forms of government activity is that set out in the New Zealand Bill of Rights Act 1990 and not the Human Rights Act. That is not to say that some of the information collected in the exercise is not valuable and that on occasion those standards will not overlap. Nevertheless a great deal of confusion has resulted. A clear signal to remedy that confusion must be given.

72. Take for example the compulsory retirement age of judges. Judges are not covered by the Human Rights Act because they – like others appointed under the prerogative - are not strictly "employed". However, the relevant provisions of the Judicature Act were reported as possibly inconsistent according to the spirit of the Human Rights Act. It must be relevant to that assessment that, being themselves a branch of government, Judges hold tenured office, and cannot be removed except in very narrow constitutionally defined circumstances. Such positions do not have any private sector analogue. Hence there is no specific exception in the Human Rights Act and there will never be any jurisprudence under s 97 – the present general exception – which could help. Such a provision would almost certainly meet a Bill of Rights Act justification test which requires the limit to be "demonstrably justified in a free and democratic society" – and yet fail a Human Rights Act one. There are many examples to similar effect.

73. An even more serious matter is that raised in relation to social assistance payments. As has been already noted, the Human Rights Commission took the view that s 44 could potentially cover such "goods and services". That view has never been judicially tested. Section 44 makes it unlawful for a person:

> "who supplies goods, facilities or services to the public or to any section of the public to treat any other person less favourably in connection with the provision of those goods, facilities, or services than would otherwise be the case by reason of any of the prohibited grounds of discrimination".

There is no relevant specific exception in this provision – again because it was not designed for the core public sector. There can be no argument that social assistance is not covered by the Bill of Rights Act. It clearly applies to all executive action. Such benefit legislation should be subjected to a Bill of Rights standard where the issue would be whether it constituted unlawful "discrimination" under s 19. It is most likely that the issue would be resolved by considering the definition of "discrimination" (as in Thomas J's judgment in the *Quilter* decision) and without necessary reference to the concept of reasonable limits in s 5 of the Bill of Rights Act. However, if recourse were had to s 5, then the substance of the inquiry would be much the same. In a matter concerning social security, the presence of statutory authority to give a ministerial direction

would be sufficient to fulfil the "prescribed by law standard" (it being a matter of substance rather than form, see for example *Slaight Communications v Davidson* (1989) 59 DLR (4th) 416 (SCC)). The policy would then be required to satisfy a reasonable limits test to assess:

(i) whether the importance and significance of the objective was enough to warrant the limitation of the protected right; and

(ii) whether the way in which the objective was sought to be achieved was rational and in reasonable proportion to the importance of the objective; and

(iii) whether there was as little interference as possible with the right or freedom affected.

74. Measured against such a standard, a wider range of factors can and should be taken into account than would be appropriate under a Human Rights test. For example, it may be relevant that a targeted benefit can be justified as an attempt to cushion a person temporarily after a drastic change of circumstances. A benefit might be justified because it applies to a particular age-defined cohort of, for example, married women who never held paid employment outside the home. It might be justified on the basis of its incentive effect. In the assessment of such legislation, other international commitments such as to the rights of the child, may also be relevant. On other occasions, distinctions may not be justified – for example, in situations which contemplate that only women could be in the position of primary care giver, or that assume a narrow conception of family arrangements, and ignore patterns of economic dependency.

75. It should be emphasised that compliance with the Bill of Rights Act anti-discrimination standard should have the effect of making social policy more robust and rational, and ensure that targeting is more strongly based on empirical evidence. Discrimination law should not be used as the justification for the adoption of individual entitlements to social assistance. It is also important to caution against Bill of Rights assessments being drawn too narrowly – focusing on a single area of social assistance and ignoring interconnected factors such as tax policy. Over the long term the Social Security Act will need to be revised. The principal Act relates to an idealised 1950s version of the family. That will be a large task.

76. It would be a mistake to think of Bill of Rights compliance as a merely technical exercise. Many complex and sometimes highly political issues are raised. If discrimination is found in the social security case (for example), compliance does not dictate that everyone should be raised to the highest level of benefit – some people may in fact be relatively worse off than previously. If a human rights audit were to report on discrepancies in the legislative recognition of the age of responsibility, that would hardly by itself compel Parliament to revisit the minimum drinking age laws so soon after so much heated public debate.

77. The proposals we make offer the following solutions to these problems. They will help to identify areas of real priority in three ways – through the ordinary complaints process; through the new National Human Rights Institution's strategic focus under Part I of the new Act; and through the proposed National Plan of Action. They enable the correct standard to be applied, and jurisprudence to develop.

78. The experience over Consistency 2000 demonstrates that an audit that is too difficult to operate ultimately results in a rush to obtain exemptions rather than to improve policies. Exemptions cannot be obtained from the Bill of Rights Act in that way. It applies to everything the government does. At the same time it offers a more nuanced standard against which to judge compliance – and against some decided cases.

79. The lack of jurisprudential guidance has proved particularly problematic in the Consistency 2000 process given the abstract nature of many of the issues raised. It may be, for example, that a statute itself is not inconsistent, but that it would be possible to interpret the statute in an inconsistent way. These instances were also reported. Under the proposals outlined in this report, it would be possible to make a publicly funded challenge to an unreasonable interpretation of such a provision (again measured under a Bill of Rights standard and clothed in a set of real facts).

What should happen in the mean time?

80. The original purpose of the Consistency 2000 audit, or database, was to identify possible areas for second phase consideration. Enough has now been done by way of identifying problematic areas. Even though it was not as thoroughgoing as originally conceived, a legislative audit is never likely to be an exhaustive or definitive way of identifying areas of inequality. Significantly, the most pressing issue of equality recognised by the present government was not signalled by the Consistency 2000 project at all. Undoubtedly the disparity in economic health and educational status between Mäori and the rest of the population is a major issue facing New Zealand today. Neither did the audit particularly raise as a concern the issue of indirect discrimination against women. A legislative project such as this is no substitute for empirical research, monitoring effects of legislative changes, and good policy analysis.

81. In terms of the narrower legislative focus, new problem areas can be identified via the Attorney General's monitoring of legislation for Bill of Rights compliance, and through the Human Rights Organisation complaints and other strategic mechanisms. The latest report from the Ministry of Justice dated June 2000 eliminates all but the most egregious problems. The programme should move to its second phase as originally contemplated.

82. The Consistency 2000 report identifies a number of themes that require further consideration through processes designed to deal with the particular concerns. They include: the position of same-sex couples and questions of family status; disability issues – including distinctions between different types of disability; and youth issues – especially relating to the age of responsibility.

83. Some of the substantive work has already been done - including the Law Commission work on same-sex relationships and the proposal to extend the Matrimonial Property Act to include de facto and same-sex relationships. The personal grievance provisions in the Employment Relations Bill have now been aligned. There are a number of other processes in train to deal with these matters in a systematic and ongoing way. The Disability Strategy Group, and the Ministry of Youth Affairs work on UNCROC, should drive further reform in those areas. It should be noted here that UNCROC may demand more

differentiation on the basis of age rather than less (for example it restricts involvement in armed combat to those 18 and over). While this re-evaluation was in its late stages, the Minister of Social Policy announced there would be a review of the benefit system – which will be an opportunity to address many of the more difficult remaining issues in the context of social assistance.

84. Much now depends on political will. Consultations revealed that particular Ministers, whose departments potentially confront quite complex issues, are committed to addressing human rights concerns. The focus now should be on ways in which actual conflicts can be rectified. Departments will need help in this exercise and possible solutions should be shared among departments facing similar problems. While the Ministry of Justice has produced useful guidelines for policy advisers, more specific help in solving problems still needs to be given. In practical terms, if the issues surrounding resources can be resolved, it would clearly be of considerable assistance if officers from the Bill of Rights monitoring team could be allocated to assist departments. Departments grappling with these issues may also be assisted by outside help.

Specific matters: Insurance and Superannuation

85. A number of stakeholders expressed the view that the scope of the exceptions in the Act should not be expanded. Given the restricted time frame of the re-evaluation exercise, we are not in the position to make detailed recommendations about the nature and extent of the exceptions. Those matters should be the subject of a separate more extensive consultation process. The more limited aim of this report is not to restrict or expand the exceptions but rather to encourage the development of jurisprudence, general principles, consistency and standard setting so that best practice in human rights will be better and more widely understood. Thought should also be given to including more legislative examples in the new Act, and general principles that indicate factors that would justify treating people differently (as in many of the Canadian statutes).

86. The Bill of Rights Act and Human Rights Act provide an exclusive list of prohibited grounds of discrimination. Some constitutional instruments such as the Canadian Charter of Rights and Freedoms, give the listed grounds of discrimination as examples and allow the possibility for new grounds to be judicially recognised. It may be desirable for the grounds in the Bill of Rights Act to be similarly indicative rather than exclusive. The Human Rights Act, being of a more prescriptive character, would have to be specifically amended in the event that a new ground was so recognised. Again, this may be a matter which should be pursued in a more thorough-going process of consultation.

87. Consultations with stakeholders and staff of the human rights organisations revealed that because the complaints process focused on individuals and the results of such processes were confidential, there was little chance to develop general standards. The HRC has periodically produced guidelines on, for example, insurance and pre-employment, and case notes, with individual identifiers removed. Increased effort in this area should be encouraged. Particular areas identified as needing attention are affirmative action, and the scope of the "reasonable accommodation" clause in relation to disability. Such guidelines (as now) would not be binding and could be challenged in the Tribunal.

88. Insurance and superannuation pose particularly technical issues. For example when determining the funding of superannuation schemes, actuaries routinely take account of age and gender related factors in respect of a number of contingencies such as probability of death, disablement, retirement, withdrawal, being married and level of expected salary growth. In terms of benefit levels, section 70 permits different superannuation benefits based on age and gender but only in relation to probabilities of death and disablement. This is a problem when calculating accrued benefits under defined benefit schemes due to members on the winding up of a scheme, on members becoming redundant, or as a basis of defining scheme surplus. In short, the funding of such schemes is based on a range of assumptions not available when distributing benefits. Under the New Zealand Act, members cannot be allocated their actuarial interest in the scheme according to the funding basis, as is the worldwide actuarial practice.

89. The health insurance industry used to allocate and fund risk by selecting its members. The Human Rights Act has restricted this practice by making it illegal

to refuse a person insurance. Another means of risk and funding allocation might be to charge higher premiums according to age bands, or on each progressive birthday as is the established actuarial practice. However, such an approach may be in violation of the prohibition on age discrimination in the Human Rights Act.

90. An obvious solution to the apparent age discrimination would be for everyone to be charged more. New York State adopted such a "community rating" system by which medical insurers were required to accept all applicants using flat premiums and no adjustments for age or sex. Pre-existing conditions were covered after a 12-month period. Subsequently enrolment dropped and the average age rose. Many companies were forced out of the market.

91. It is not suggested that such a result is imminent here (age, sex and disability can be taken into account under the present Act). But these are complex and potentially volatile areas. New Zealand is reliant on the offshore reinsurance market and overseas demographic tables. While New Zealand shares with other countries an ageing population, we are unique in that our young people presently leave in large numbers, and in that New Zealand expects a very rapid growth in the numbers of young Mäori and Pacific Islanders. Issues such as insurance have the potential to raise serious inter-generational equity matters that New Zealand may not wish to determine once and for all. This will become all the more contestable in an era of genetic testing.

92. Where the issues are particularly technical, such as in the insurance and superannuation sectors, the relevant sectors should be encouraged to submit their own best practice guidelines for endorsement by the Commission, perhaps with the assistance of the Government Actuary.

93. The demographic and inter-generational equity matters raised in relation to insurance have more widespread application. The notion of age discrimination raises distinct and often philosophical issues about the nature of equality, and whether it should be measured over a whole life. These issues have been the subject of heated scholarly debate. The recent Canadian Report on Human Rights also expressed concern about the effects of removing compulsory retirement, particularly in areas such as universities. It suggested that such effects should be

monitored. Similar monitoring should occur here, perhaps by the ministries of social policy and health.

The New Zealand Bill of Rights Act and the ICCPR obligations:

94. A recurrent theme throughout the Terms of Reference is the place of international human rights in New Zealand's domestic law and practice. As already discussed, New Zealand has ratified a number of key international human rights treaties. Article 31(1) of the Vienna Law of Treaties (1969) requires New Zealand to implement these treaties in good faith. It is not within the Terms of Reference to consider in any detail the effectiveness of the domestic implementation of specific treaties that New Zealand has ratified. This is an appropriate task for a National Plan of Action development process.

95. However, it should be noted that there are some inconsistencies between the relevant provisions of the New Zealand Bill of Rights Act (NZBORA) and the ICCPR. For example, the ICCPR has specific provisions relating to equality (articles 3 and 26), the right to privacy (article 17), non-discrimination on the grounds of language (article 2), and the right to an effective remedy (article 2(3)); there are no equivalent specific provisions in the NZBORA.

96. It is clear that the courts have done much to develop appropriate remedies – such as the prima facie exclusion rule and *Baigent* style compensation. Nevertheless, given that the ICCPR represents the most fundamental civil and political rights, it would be appropriate to re-examine the relevant New Zealand legislation to consider if it could more directly reflect the language of the Covenant.

Recommendations:

The 'Primacy' of New Zealand's human rights laws

(i) To make clear that what is presently Part II of the Human Rights Act is concerned with only one aspect of human rights, it should indicate by headings, that it contains the anti-discrimination provisions.

(ii) Unions and employers ought to be consulted as to their experience of the current employment provisions. Further consultation about the scope of the present exceptions should be undertaken.

(iii) The general justification provision in s 97 should be moved to what is currently Part II of the Act. It should no longer take the form of a dispensing power. It should be read against a purpose section in Part II of the Act which refers to the government's positive obligation to provide protection for citizens against discrimination by fellow citizens – and in particular:

> *To protect people from disadvantage caused by arbitrary distinctions based on prohibited grounds and other distinctions which result in systemic disadvantage; and*
>
> *To encourage measures to improve the condition of the vulnerable and disadvantaged.*

(iv) There should be a general audit of the specific exceptions contained in the Human Rights Act 1993 to ensure that they are not over or under-inclusive. The exceptions should be tested against the purpose clause, and the scheme of the Act, which focuses on the private sector and the government acting as ordinary person. The exception for charitable instruments should be made subject to whether the power exercised satisfies the "public function" test in s 3(b) of the Bill of Rights Act. If so, any potentially unlawful discrimination should be assessed against a Bill of Rights standard.

(v) Section 151 of the Human Rights Act should be repealed. The repeal of s 151 is unlikely by itself to give the Human Rights Act primacy over other statutes. It is not recommended that the Human Rights Act be amended to include a "primacy" clause, given the current status of the New Zealand Bill of Rights Act. The "primacy" debate, if there is to be one, should rightly focus on the status of and standards set by the New Zealand Bill of Rights Act. Any potentially discriminatory

enactments, or actions pursuant to statutory authority or the prerogative, ought to be assessed against those standards.

(vi) The question of whether an enactment discriminates is a matter properly to be decided under the New Zealand Bill of Rights Act 1990 which is designed for such a purpose. The question of whether a statute unreasonably limits the right to be free from discrimination is not a suitable matter to be resolved by a conciliation process between an individual and government. Matters involving the government acting pursuant to statute may be the subject of negotiation in limited cases (rather than conciliation). Ultimately the question will be one of law, which should be determined by adjudication.

(vii) While Acts and regulations should be held to a Bill of Rights standard, it will not usually be obvious to a complainant whether the government is acting under statutory authority. Consultations were unable to reveal how many complaints the HRC had received in which the government was acting under statute. It will always be difficult to identify such cases at first call. A number of NGOs expressed a view that as far as possible they desired a single point of entry for complaints. Accordingly it is recommended that all such claims could be taken initially to the proposed new NHRI, and be referred on to the Proceedings Commissioner in the usual way. At the Tribunal stage, once the issues have crystallised, cases should be sent to the High Court by way of case stated – to consider the consistency of an enactment against the Bill of Rights Act.

One way of doing this would be to provide that:

> *If the Tribunal is satisfied in proceedings before it that it must decide whether the Human Rights Act prevails against an inconsistent statute or regulation, it must state a case to the High Court.*

(viii) An amendment should also be made to the effect that on such references, the High Court must decide whether the Act or regulation is inconsistent with the New Zealand Bill of Rights Act.

(ix) Part II should make explicit that when a person is acting under statutory authority or the prerogative her actions should be assessed against the New Zealand Bill of Rights Act 1990. The Bill of Rights standard is flexible enough to allow different standards of conduct according to whether the government is acting as government or is in a similar position to that of a private person.

(x) In cases in which private sector respondents are relying on statutes to justify otherwise unlawful discrimination, the Attorney General should be given notice of the proceeding and may in appropriate cases choose to appear at the Tribunal.

(xi) In certain important cases, the new NHRI may elect not to refer a case to the Proceedings Commissioner but rather instruct its own counsel to take the matter directly to the Tribunal.

(xii) Section 153(3) (relating to immigration) should be repealed. These matters are already covered by the New Zealand Bill of Rights Act.

Encouraging discussion of the relationship between the Treaty of Waitangi and human rights law

(xiii) Section 5 of the Human Rights Act should be amended to give the new organisation this specific additional function. Technically, this function is already implicit in section 5. But it would seem appropriate to make it explicit. The function might be expressed to read as follows:

To promote, by research, education and discussion, a better understanding of the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international human rights law.

(xiv) In addition, and consistently with the recognition that the Treaty is a human rights document, it is suggested that the Treaty be added to the Long Title of the Act, which at present refers only to "United Nations Covenants or Conventions on Human Rights". Under this proposal the Long Title would read:

An Act ... to provide better protection of human rights in New Zealand and in general accordance with United Nations Covenants or Conventions on Human Rights and the Treaty of Waitangi.

Affirmative Action

(xv) The affirmative action tests in the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 should be aligned.

(xvi) The Human Rights Act should be amended to empower the NHRI to approve affirmative action schemes.

The Consistency 2000 project

(xvii) The Justice and Law Reform Committee should have a continuing role – and progress on specific themes should be reported to it on a periodic basis.

(xviii) Subject to resolution of the relevant resource issues, officers from the Ministry of Justice Bill of Rights monitoring team should be allocated to help departments find solutions. Outside help might also be sought.

(xix) A pool of information should be made available to departments struggling with similar problems – which includes worked examples showing how the statutes could be made compliant.

(xx) Processes should be created by which committed lead agencies can mentor other agencies not yet up to speed.

(xxi) Attorney General's opinions on Bill of Rights compliance should be made available to departments, and publicly, in order to build a jurisprudence and rights culture.

(xxii) Chief Executives should be required to include in the department's annual report, progress on human rights and Bill of Rights compliance.

Specific matters

(xxiii) The Human Rights Act should be amended to include legislative examples and general principles that indicate the factors that would justify treating people differently (as in many of the Canadian statutes).

(xxiv) The new NHRI should produce non-binding guidelines particularly in the areas of affirmative action; and the scope of the "reasonable accommodation" clause in relation to disability.

(xxv) Where the issues are particularly technical, such as in the insurance and superannuation sectors, the relevant sectors should be encouraged to submit their own best practice guidelines for endorsement by the Commission, with the assistance of the Government Actuary.

(xxvi) The inter-generational and other effects of removing the compulsory retirement age should be monitored, perhaps by the ministries of social policy and health.

(xxvii) Given that the ICCPR represents the most fundamental civil and political rights, it would be appropriate to re-examine the relevant New Zealand legislation to consider if it could more directly reflect the language of the Covenant.

(xxviii) Section 5 of the Human Rights Act should be amended to better encourage the NHRI, in its educational and advisory work, to promote and adopt a broad understanding of human rights including economic, social and cultural rights.

PART THREE: THE NEED TO REASSESS OUR IMPLEMENTATION AND PROTECTION OF HUMAN RIGHTS IN NEW ZEALAND

"National human rights institutions are by their very nature well placed to transform the rhetoric of international instruments into practical reality at the local level. Because they are national – they can accommodate the challenges posed by local conditions and cultures, respecting ethnic, cultural, religious and linguistic diversity in implementing internationally agreed human rights principles. And a national institution can provide constructive, well informed criticism from within – a source of advice and warning which is often more easily accepted than criticism from outside sources."

Mary Robinson, United Nations
High Commissioner for Human Rights

97. Given the evolutionary history of the international human rights standards, it is important to constantly review the need for new standards as new issues arise and to regularly assess the effectiveness of the procedures established under the various human rights instruments for monitoring compliance with those standards. Thus, New Zealand has been active in the United Nations on issues related to reform of the human rights treaty bodies. Equally, we should not assume that the way we have given effect to the international standards in our domestic law and through our domestic institutions will be satisfactory for all time. The understanding and effective protection of human rights at both the international and domestic levels is a constantly evolving process.

Time for reassessment?

98. The Minister's Terms of Reference for this exercise states that "New Zealand has had human rights legislation for almost 30 years and it is now an appropriate time for such a re-evaluation moving into the new millennium". This idea was fully supported by stakeholders during the consultation process. Consultations have revealed that the present situation does not meet the expectations of a wide range of stakeholders. Many believe it is time for a major change in direction. They also identified that clear leadership would be required to effect improvement.

99. Of particular concern to many stakeholders was the fact that although many individuals have worked hard, the public reputation of some of the agencies is relatively poor. The consequence of this situation is that those agencies that believe they are performing well do not want to associate themselves with other agencies that are perceived to be performing below expectations.

100. As a consequence of fragmented growth, each agency is focussed on its own principal areas of activity, and particularly the complaints arising in those areas. Consequently, they have limited time and capacity for attention to the broader aspects of human rights or the overall levels of understanding and acceptance of human rights principles in the community. There is also a natural tendency for each agency to develop its own constituency, in part as a means of ensuring support when its work creates some tension with the government or sections of the community. Accordingly, in circumstances where the direction of each agency rests in large part with the relevant commissioners, and there is no overarching governance regime, there is little pressure or drive for strategic co-ordination and co-operation amongst the agencies.

101. Of a lesser order of significance, the inefficiencies and loss of effectiveness caused by fragmentation was commented on by many. A range of stakeholders mentioned duplication such as separate PABX systems, receptionists, annual reports, websites, newsletters and payroll systems. Staff expressed frustration at the inefficiencies caused by having separate education functions and consequent sensitivities about which human rights issues could properly be discussed by which organisations in workplace presentations and discussions. For example, Human Rights Commission staff felt that because of inter office sensitivities they could not discuss race issues when they arose in the course of their education activities but had, instead, to refer them to the Race Relations Office.

Some features of the present institutional arrangements:

102. The five agencies mentioned in the terms of reference display different institutional arrangements. The Human Rights Commission covers a wide range of different rights protections within one Act and one organisation. Governance

has been attempted with a mix of full-time, half-time and part-time commissioners.

103. In the case of Race Relations, the Conciliator sits on the Human Rights Commission, shares the same Act but has a separate organisation that has significant differences in the way it operates from the Human Rights Commission.

104. The Privacy Commissioner is a member of the Human Rights Commission but operates under a separate Act and the office is self-governing. Benefits have been derived from the Privacy Commissioner's membership of the Human Rights Commission, inter alia in terms of cross-fertilisation of ideas. But in general there appears to be little connection between the purpose of the work of the Privacy Commission and the other human rights agencies.

105. The Offices of the Commissioner for Children and the Health and Disability Commissioner stand alone. Although there are differences in role and function, and both agencies claim their own differentiation, it is hard to escape the view that they are fundamentally concerned with issues of human rights. At present their contact with the other human rights related agencies is limited.

106. It would be unwise to link the effectiveness or otherwise of each institution to the different institutional arrangements alone. Each has different funding and size pressures, different natural constituencies, different political appeal and different leadership style. What is common is a natural desire on the part of each agency to protect and enhance its own "brand".

Confusion of management and governance:

107. Current arrangements provide for commissioners to have both a governing role and an active role in doing the work of the agencies. Under these circumstances, commissioners (who in part, were appointed for their expertise in a specific area of human rights) must be capable of doing everything from developing long term strategy to day to day operations. There are no systemic means to provide quality assurance on the work of commissioners.

108. Staff in the current agencies described the consequences of this situation in a range of ways. For example, staff value strategic plans as the means to guide their work but subsequent changes in direction or direct interference by commissioners create confusion and resentment.

> "Decisions were made around the Commissioners table and then individual commissioners would lobby managers to make sure their jobs were done."
>
> Staff member

109. In the Human Rights Commission, this situation has been temporarily resolved by the linking of specific Commissioners to specific managers. Any work requests of the manager must be channelled through the relevant commissioner. The General Manager at the Human Rights Commission initiated this and many other changes in managerial systems but these changes can not achieve their potential under the current structural arrangements because of the perceived requirement for Commissioners to intervene to meet their statutory obligations. In any new organisation, it will be crucial to separate governance from managerial accountability.

Some consequences for overall effectiveness:

110. The diversity of arrangements has meant that some interest groups are seen to have had more success in having their concerns addressed than others. There is limited ability in the present arrangements to achieve a principled resolution of the various demands on the time and resources of the agencies. Independence of "brand" is achieved at a price.

111. Limits to co-operation have created some rather curious situations. For instance, in Wellington there are 3 offices of different commissions on one floor, each with its own infrastructure. In Auckland, "brand" separation of the RRO and the Human Rights Commission in particular has meant that the offices are located apart when the linkages in the nature of the work would suggest an effective sharing of resources

112. As a number of stakeholder groups pointed out, users also pay the price of no single point of entry. Multi-facetted complaints must be handled either by

multiple complaints to different agencies or sequential processing as each agency determines the extent of its jurisdiction. This can increase queue lengths and in some cases cause long delays.

113. Underlying assumptions that derive from a complaints focus need to be re-evaluated if a more effective approach is to be taken into the future. A common assumption that derives from the "quasi-judicial" work of these organisations in respect of complaints is to vest much of the decision making in Commissioners. This is understandable at an individual rights level but is a barrier to effective organisational design. Duplication of the work of senior managers and Commissioners is costly, consuming resources that could be used to deliver better value to the community if a different approach were taken.

Complaints focus:

114. Consultations revealed that in spite of strenuous efforts in some cases to reduce this problem, the urgent and compelling demands of incoming complaints and other day to day operations consumes resources. This tends to severely limit capability to operate more strategically.

115. Stakeholder groups believe that the public's perception of human rights organisations is that they simply deal with individual cases. Although the Human Rights Commission and Race Relations Office, for example, have recognised this and sought to allocate more funds to education, the overwhelming theme in comments from stakeholders is that the focus of these organisations remains on the resolution of individual complaints at the expense of a focus on building respect for human rights.

> "They are breach orientated instead of applying the values and principles of Human Rights"
>
> Member of Parliament

> "HRC's future challenge is to become relevant to New Zealanders every day"
>
> Staff member

> "They focus on discrimination not the broader human rights environment"
>
> Departmental Official.

116. Because the complaints process is the public face of the organisations, their reputations depend, in significant part, on the perceived quality of this service. Large backlogs have adversely affected the public's confidence in these organisations. In a recent survey of people involved in the HRC complaints process, 72% indicated that the complaints handling process took too long.

> "Timeliness is a problem. HDC, Children's Commissioner, and HRC take too long. The issue then can not be addressed. There will be no resolution – the complainant's rights have been trampled on again."
>
> NGO Representative

> "As the backlogs get bigger, further inequity and injustice occur. The longer it takes the more entrenched the parties become and the more difficult it becomes to conciliate"
>
> Staff member

117. Given the relative lack of publicity about broader human rights issues, the results of recent publicised cases tend to provide the enduring image of the organisations. Cases referred to by a number of stakeholders include a married persons golf tournament and the price of women's haircuts.

> "They are not tackling the big, important issues. They focus on trivia (same sex bowling matches)".
>
> NGO Representative

> "Many people think HR is silly. They [small business] can't advertise for a sharemilking couple. They [human rights organisations] need to pool resources and tackle the big issues and do educative work and publicise it."
>
> Media representative

118. For many stakeholders, the focus on such issues is seen as trivial and devalues the public perception of human rights. Stakeholders see the need for systematic analysis of human rights issues and larger scale resolution of such issues.

> "The complaints process can only look at a small number of complaints. Inquiries can bring major challenges to peoples thinking about HR. They are great value for money because they can change public opinion".
>
> NGO representative

Dependence on Commissioners as leaders:

119. The current generic model of organisation across the human rights sector utilises figurehead Commissioners as leaders, governors and operators in specific areas of human rights. This approach may have utility in creating a focal point for the community. However, such a strong investment in a few individuals carries an obvious downside. What is achieved is heavily dependent on the effectiveness of the particular individuals concerned. Where it works it is seen to be a success, where it does not the individual is blamed. In the latter case, there is no means, other than threats to the survival of the office, to provide the checks and balances that provide assurance that the Commissioner is leading in a direction that will deliver long-term improvement in human rights performance. A more consistent and secure approach for the future would be to place greater emphasis on the building of strong, broad based governance and organisational capability.

120. Stakeholder interviews revealed the vulnerability of the existing organisations to the quality of the individuals that lead them. For example, the success of the Privacy Commission over the last ten years has been in no small measure due to the drive and personal competence of the Commissioner. He has personally built an institution from scratch including writing the legislation and providing leadership over a long period of time. He attracts high quality staff who want the opportunity to learn from him. The risk lies in succession – it will be a hard act to follow.

121. The fragility of the current structural arrangements becomes apparent when there is a change of Commissioner. Consultations revealed that regardless of institution, severe changes in direction are experienced when Commissioners change. The result is disruptive restructuring, changes in function and changes in process. The ability to evolve in an orderly fashion over time is compromised. For example, previous education strategies in the Human Rights Commission concentrated on building networks of people in communities who could distribute

information and act as a focal point for human rights issues. This strategy was changed to one of 'train the trainers' when a new set of Commissioners was appointed. The local networks were disbanded. Work is now under way to rebuild them.

122. A fragmented approach to organisation that relies on the performance of a single person for its effectiveness does not provide the conditions for sustainable long-term performance. Furthermore, in a rapidly changing world, diversity of culture is important to ensure healthy internal debate about alternative approaches to complex problems. Narrowly based strong cultures can find it difficult to adapt and the risk of extinction increases.

Impact on staff:

123. Whilst some staff turnover in an organisation is important (new ideas are injected and established practices challenged by new staff members) the difficulty in attracting and retaining high quality staff has been identified as an issue for some of the organisations.

> "The fragmentation of the organisations means we can't buy the best people"
>
> Staff member

> "We have none {training and development opportunities}. Morale is low. I spend 30% of my time keeping morale up – this could be used more productively"
>
> Staff member

124. The Human Rights Commission, for example, has identified 'the need to attract and retain its valued staff as a key organisational competency which is critical to its future success' (Workplace Partnership Project, April 2000). But its ability to do so is hampered by its relatively small size and consequently limited capacity to offer development opportunities. High calibre specialist staff in such key areas as public relations and human resources are also often beyond the reach of very small organisations.

International reassessments of National Human Rights Institutions:

125. As mentioned previously, national human rights institutions are a relatively recent development among mechanisms for the protection and promotion of human rights. They represent a recognised means whereby states can more effectively work to guarantee human rights within their own jurisdiction. As an independent organisation established by law to protect and promote human rights within the country, an effective NHRI can play a fundamental leadership role in the creation and maintenance of a domestic human rights environment. It is important that New Zealand, which has a reputation for leadership in human rights matters, makes every effort to ensure it has a strong and effective NHRI.

126. Useful guidance can be obtained from the International Council on Human Rights' recent report: *Performance & legitimacy: national human rights institutions* (2000, International Council on Human Rights Policy, Versoix, Switzerland). This report demonstrates that social legitimacy through effective performance is a crucial factor in the success of an NHRI. The report's recommendations include:

- NHRIs should move from a complaints-led to a programme-led approach;
- NHRIs should encourage consultation and participation in their operations;
- NHRIs should ensure that senior executives and staff are qualified, committed, representative and independent;
- NHRIs should have adequate financing arrangements as well as transparent reporting procedures;
- NHRIs should be more accessible;
- NHRIs should annually declare their priorities and identify vulnerable groups who will have first call on their services;
- NHRIs should address economic, social and cultural rights.

127. Another useful resource is the recently completed *Canadian Human Rights Act Review*. Although the Canadian review was much more detailed and specific than this scoping exercise, the final recommendations of the Canadian Review Panel reveal some important strategic directions, including:

- Amendments to allow the Canadian Human Rights Commission to move away from being complaints driven and to focus more on education;

- Amendments to address the conflict between advocacy and investigation/decision making functions;
- Amendments to avoid lengthy complaints processes and backlogs;
- Amendments to allow the Commission to strategically focus its resources on the most serious/systemic human rights issues;
- Amendments to facilitate more open and transparent appointment processes for the Commission and Tribunal.

PART FOUR: THE NATIONAL HUMAN RIGHTS INSTITUTION

"The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information and education in human rights ... The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the 'Principles relating to the status of national institutions' and recognising that it is the right of each State to choose the framework which is best suited to its particular needs at the national level."

Vienna Declaration and Programme of Action 1993

Human Rights in a Changing Society:

128. Effective human rights institutions and a progressive human rights environment are at the heart of a nation's ability to maintain a peaceful and stable society that respects the dignity and worth of all its individuals and groups, with all their differences. Stakeholders generally agreed that New Zealand enjoyed a "placid" social order in contrast to the recent turmoil in some countries in Asia, Africa and the Balkans. The existing institutional arrangements have contributed to this relative stability in the human rights environment of New Zealand.

129. Nonetheless stakeholders also shared a concern that there is potential for future disruption to this internationally recognised state of stability if the human rights environment does not evolve to respond to the changing political, economic, social and cultural factors relevant to the enjoyment of human rights in New Zealand. There have been major changes in all these factors in the twenty-five years or more since the principal human rights bodies were established in New Zealand. To take one example of the significance of these changes, the term "race relations" now seems too narrow to reflect the issues (which include cultural rights, indigenous rights, economic and social disadvantage and the Treaty of Waitangi) that need to be addressed in the context of human rights amongst the communities that make up New Zealand society today.

130. The following were some of the key points made by many stakeholders in this context:

(i) The institutions need to be seen to be taking a lead in promoting constructive discussion of the major human rights issues of the day.

(ii) Their work must be seen to be relevant to these major issues or their value in a changing society will be diminished.

(iii) They must be able to obtain general respect for their work from individuals and minority groups but also from the New Zealand community at large. In that regard they must be effective in improving public understanding of the fact that protecting the human rights of individuals and minorities is central to the health of society.

(iv) If they are doing their job they will be unpopular with the government and/or some sections of the community from time to time but provided they have well argued and well presented reasons for their actions they should be able to maintain general public support.

(v) They should have a strongly interactive relationship with the NGO community although the expectations of particular NGOs will not always be met.

Comparative Organisational Models:

131. New Zealand is not alone in re-evaluating its NHRIs at this point in time. Although it was not possible to fully investigate a full range of overseas models in the short time available for this scoping exercise, opportunities to visit HREOC (Australia) and hear the personal experiences of individuals involved in its evolution were taken. Literature covering the Canadian review completed in June this year, the study of NHRIs published earlier this year by the International Council on Human Rights and the specific arrangements for some other NHRIs were also canvassed.

132. It is clear there is no single model for successful NHRIs and, as the International Council on Human Rights points out, much depends on the different socio-political circumstances under which the particular national institutions have emerged. Nonetheless it is equally clear there are some common and related

issues that are being faced in many jurisdictions and that are regarded as important by those with an overview of the international scene.

133. One of the most pressing issues for those jurisdictions that have an individual complaints system, is the extent to which that system tends to become the focus of the institution and to tie-up resources to the detriment of the broader responsibilities of the institution in the field of human rights education and attention to systemic issues. The Canadian review panel, for example, says it was clear from the submissions they received that human rights education and promotion were understood by community groups, labour organisations, employers and government agencies to be essential in addressing human rights issues in Canada. They make a strong case for a major shift in the orientation of their national institution towards this area of work.

134. Closely linked to the education work that can be easily crowded out by the pressure of processing individual complaints is the conduct of inquiries into systemic issues and more generally the provision of community leadership across the whole field of civil, political, economic, social and cultural rights. The fundamental importance of community education across the range of human rights, attention to broader systemic human rights issues and the development of relationships with government bodies and civil society/NGO groups is also stressed in the recommendations of the International Council on Human Rights.

135. There is no simple answer to this issue and it is obvious that each jurisdiction must work out its own solution in accordance with its own social and political circumstances and resources. It is of interest however, that the problem identified by New Zealand stakeholders and by some of the agencies themselves is being faced by other comparable jurisdictions.

Organisational Design - Choices of Approach:

136. It is widely accepted that NHRIs should have a broad mandate and a range of functions. The functions should generally, although not invariably, include both promoting respect for human rights in the community and dealing with individual complaints. What seems to have been less widely recognised is that the emphasis

placed on one or other of these two major functions is likely to have quite a profound effect on the nature of the institution and the way it operates. It will influence the qualities seen as necessary to lead it, the way it is structured, the systems and processes it adopts for dealing with complaints and the priority, effort and resources it is able to apply to education work and other functions.

137. If the organisation is focussed on complaints resolution those leading the organisation will be seen as having principal responsibility for settling disputes and as exercising an important quasi-judicial function. They will need to be well versed in legal analysis and process, or at least reasonably familiar with it, and preferably will have expertise or experience in at least some of the relevant areas of substantive law.

138. The structure of the organisation and its systems will need to be designed around the ability to analyse and process disputes in ways that assist determinations, if necessary, at a high level within the organisation. As the goal is a 'just' decision in respect of each individual complaint, those responsible for the decisions will want to ensure that all significant work passes through them or through a unit that controls the quality of decision making. Timeliness will tend to be subsumed to the higher goal of justice. Ultimately, as in any judicial or quasi-judicial system, good decisions will be promoted by the existence of a means for correcting poor decisions retrospectively through appeal processes.

139. If on the other hand the principal focus of the organisation is on taking the lead within the community in promoting a society that respects the dignity, worth and human rights of all its members, with all their differences then other leadership qualities, structures and systems are indicated. Those in the leadership role will need to be focussed on the strategic human rights issues of the day. They will need to have the personal qualities to initiate and lead constructive discussion within the community of the various dimensions of human rights issues, to promote general education and awareness of the broad range of human rights and to encourage positive interaction between different individuals, groups, communities and cultures within society.

140. The involvement of the leadership in individual complaints will be limited to:

i) those where their personal involvement may assist in the resolution of a dispute or difficulty that has developed wider community implications; or

ii) those of strategic significance for the organisation.

The complaints resolution process will be structured and performed in ways that link to, and support, the organisation's educational role. For example, the organisation's role in complaints might be focussed on conciliation/mediation, with determinations on the merits being made outside the organisation. Under this approach the organisation can be seen as a system that produces a service which can be judged against criteria of quality and timeliness. Control will be exercised proactively by creating governance and management arrangements that encourage individuals to exercise appropriate discretion in a timely way. The result will be that work is done at the lowest competent level in the organisation.

141. In practice most jurisdictions that allow the NHRI to receive and consider individual complaints have placed an emphasis on the complaints process and structured the institution around a quasi-judicial approach. Attempts to moderate this approach in recognition of the growing importance of education and promotion work across the full range of rights appear to have met with very limited success. In Australia, for example, there have been four reorganisations of HREOC in seven years in an attempt to find the optimal arrangements. But the experience there, and also in New Zealand, is that while the quasi-judicial approach or model is in operation Commissioners will continue to "dip down" into the organisation, bypassing the chief executive and undermining accountability, where they see it as necessary in terms of their own responsibilities.

142. It is unsurprising that the effort to place greater emphasis on community leadership and education work within the present institutions has not met expectations. The present focus on complaints is inextricably built into the structures. Change will occur only as a result of a fundamental redesign of the structure, accountability arrangements, systems and processes to support the broader role of the institution as described above. A redesign of this nature is recommended and the key features are described below.

A New Organisation: Key Features:

Role and Focus

143. The principal role and focus of the organisation should be as described in paragraphs 139 and 140 above. It should initiate and lead constructive discussion within the community of the full range of human rights issues. It should promote general education and awareness of civil, political, economic, social and cultural rights, including the interrelationship of those rights and the Treaty of Waitangi. It should encourage respect for difference and positive interactions between different individuals, groups, communities and cultures within society. It should be, and be publicly seen to be, working strategically and tackling constructively the most pressing and difficult human rights issues of the day while continuing to conciliate individual cases.

144. In this strategic role it should make cost effective use of its powers (previously under utilised) to commission research and undertake general inquiries for the purpose of identifying all emerging issues across the range of human rights, and developing proactive responses to them. It should brief counsel to take test cases, or to seek intervenor status in an extant case, where there is a need to settle important questions of law. And it should make full use of non-binding guidelines or policy statements to help clarify what is needed to comply with the law and generally to educate the community about human rights issues and their solutions.

145. This role and focus for the organisation will properly locate it where NHRIs should be located (i.e. between, on the one hand, the activism of NGOs in respect of particular aspects of human rights and, on the other, the majoritarian outcomes that tend to be delivered by democratic government). By developing community understanding of the importance of human rights in underpinning the opportunities for individuals and groups to realise their potential the organisation will be seen to add value to society and thereby earn its place and secure its ongoing independence.

146. The way in which the complaints function can be carried out effectively, while supporting rather than dominating the broader role and focus of the organisation is described in *Part Five: The Dispute Resolution Model*.

Structure: General considerations

147. The structure of the organisation must ensure that the functions of governance and management are separated so that accountabilities are clear. Governance of the new organisation will be effective if it is seen as oversight, not control and is focussed on performance, not mechanical compliance. This latter point is important because, in the end, performance is the key to maintaining the necessary level of independence from government and the funding to support the role.

148. Good governance only requires review meetings at intervals of one month or longer. It is therefore inherently part time. In fact, those exercising the governance role should not, in general, be full time or they risk interfering with the day to day operations. Good governors should be capable of assessing and adding value to the strategic direction of the organisation. They should also be able to provide public leadership on human rights issues.

149. Establishing a successful regime of governance will be essential for the effective functioning of the new organisation. The key element in this regime will be a Governance Council that will be required to ensure that the role and strategic purpose of the new organisation is achieved, that it is properly connected with the community and that its performance is kept in public view. This task cannot be accomplished if those who govern the organisation also work in it. The clear separation of governance from management will be critical.

150. To be effective the Governance Council must be collectively (not individually) accountable for the work of the organisation across all aspects of human rights. Individual accountability for particular areas or individual representation of special interests on the Governance Council would be destructive. At the same time the composition of the Council must be such that those with interests in particular aspects of human rights can be confident that those interests will receive proper attention. The collective responsibility of the Council for ensuring the organisation pays due attention to all aspects of human rights should be recorded in the statute.

151. The Council will establish the strategic directions of the organisation and will collectively monitor and direct management through strategies, plans, policies and budget bids. It should be noted in this regard that the development of the organisation's first strategic plan will be greatly assisted and informed by the proposed National Plan of Action recommended in Part Seven of this report. The process involved in the development of a National Plan of Action will also provide a means through which the organisation will be able to achieve an early engagement with its full range of stakeholders including national and local government, business, Mäori, Pacific Island and other ethnic communities, women's groups, disabilities groups, children's interest groups and other human rights NGOs. The need to update the strategic plan annually and rewrite it every three to five years will help the Council to keep the organisation connected to its environment and able to evolve as international and domestic expectations and issues in relation to human rights continue to change and develop.

Composition of the Governance Council

152. First and most importantly, the Governance Council should be reflective of New Zealand society and of the various aspects of human rights and communities of interest in human rights that require particular attention. All members of the Council would be expected to bring a broad awareness of human rights and their importance to their work as well as an understanding of the importance, in the New Zealand context, of the Treaty of Waitangi. However, through their particular backgrounds, they should also be able to contribute to the task of ensuring that the organisation gives appropriate attention to all aspects of human rights. More generally they need to have the capability to undertake an effective community leadership role and to maintain high level contacts with all stakeholder interests and NGOs.

153. Secondly, the Governance Council must have the capability to govern. The full mix of skills for competent oversight must be present including expertise in human rights, public leadership, finances, human resources, legal, public relations, strategic thinking and practical oversight of operations. The consequences of shortfalls in skills have recently been evident in crown entities in the area of financial governance. As funding will always be an issue for the

organisation it will be important that there is good governance capacity in the area of financial resources as well as in the other areas.

154. Thirdly, the Governance Council must be capable of balancing needs. This is not achieved in the current system and will not be easy because of the strong cases that will be made on behalf of particular human rights interest groups. It has been suggested that inclusion of some agencies in the new NHRI should be resisted because of the fear of subsuming special interests. This is not a solution. It simply avoids the issue or transfers it elsewhere. It also precludes the opportunities for developing programmes that are effective across more than one aspect of human rights. To achieve unity in the human rights arena, however, the Council will certainly need to collectively ensure that all special interests are heard and given appropriate balance. To that end it will be desirable for each major interest group to be able to identify at least one (and preferably two or more) individuals on the Council who will be able to reflect their interests both in governance and, as appropriate, publicly.

155. The Governance Council will need to consider the allocation of resources in the annual budget. The alternative (as is currently the case) is to simply ignore the need for a conscious strategic decision as to how best to pursue human rights in aggregate and leave it to natural evolution. The current lack of a unified system is nowhere more evident than in the individual agency pleadings for funding allocations. The natural result, proven historically, is allocations that rarely change over time except where major catastrophes force a funding review. The risk is steady erosion of resources and ultimately organisational failure.

156. Council members might be assigned specific oversight tasks across the range of issues to ensure that decisions of educational strategy and funding are balanced according to the need for a cohesive society that respects difference.

157. One test of overall Council performance will be the public acceptability of its strategic funding decisions. Another will be its ability to convince government of adequate funding levels based on the demonstrated performance of the organisation in improving the human rights environment. In this regard independent surveys should be established to measure the value the community

sees in the performance of the organisation. The results of properly conducted surveys would be useful in assessing the effectiveness of its overall strategy.

Appointment of the Governance Council

158. The Governance Council should be of manageable size and constituted to encourage consensus with voting as a last resort. It should therefore consist of either 7 or 9 people with a President as chairperson having a casting vote. In view of the range of activities needed in the short to medium term to achieve an effective community leadership role for the organisation and in particular the need to build relationships with all stakeholder groups the President should initially be engaged on a full time basis.

159. The President and Council members should be appointed for fixed terms of a minimum of 3 to a maximum of 5 years with provision for reappointment for a maximum of a further 3 years.

160. Because of the need to finely balance the collective capability of the Governance Council, the selection process should be very carefully conducted. Consideration should be given to discussing possible nominees for Council with the President to ensure that a well functioning team is established in accordance with the criteria outlined above. Appointments should be made by the Governor General in Council.

Organisational Capability:

161. The Council should be supported by a chief executive who would be accountable to the Council for the performance of the organisation across all its activities including the maintenance of sound working level relationships with all stakeholder interests including NGOs. The roles of President and Chief Executive must be kept clearly separate. A competent Chief Executive will be able to provide full service to the board, meeting accountabilities for strategy formulation, policy development and financial control.

162. The selection of a highly capable Chief Executive will be a key to the success of the organisation. The appointee must be selected using modern competency

based processes that critically evaluate past behaviour as a guide to possible future performance. To be successful, this process must be conducted by competent recruitment professionals.

163. The size of the new organisation will be important to establish adequate capability. Adequate size will enable different levels of capability to be established from strategic to operational. It will also enable people to see a career path enabling the organisation to attract high capability individuals in specialist roles such as media and legal. Size also provides increased capability to handle varying workload demands and an integrated range of functions

164. Although the organisation must take a global view of human rights, there will be a need to maintain the clear identity of the various aspects of human rights (e.g. disability, women etc) within the work of the organisation. The Chief Executive must be accountable to ensure that adequate capability and accountability for specific aspects exists in the organisation. This is best done by ensuring that for each aspect, there is an individual who is accountable for organisational capability in that area. This does not mean that the individual does the work themselves; it does mean that, under the guidance of the Chief Executive and in consultation with appropriate Council members, they develop a plan that will deliver a professional service in that area. By providing such a service, the Council will be able to publicly demonstrate how the organisation is effectively improving human rights standards in the broad community.

165. As this re-evaluation was primarily a scoping exercise it was not envisaged that it would include a full organisational design, nor was there sufficient time to undertake such an exercise. That is a task for a later stage. What can be said is that a properly designed organisation, with well designed processes within it, would offer substantially improved effectiveness and efficiency across the range of human rights activities encompassed by it.

166. An obvious candidate is the “front end” conciliation part of the complaints function which should be designed and operated using sound process management principles. Even though each existing agency has adopted its own “best practice” approach there would seem to be plenty of room to improve further by learning from others. Good process design starts with an understanding of what value the

organisation is offering to its users. Delivery of value does not necessarily equate to delivery of wants. Good complaints process for the new organisation may not equate to good social work nor to traditional legal investigatory paradigms. These questions need to be addressed if staff are to be assisted to achieve optimum performance.

167. Other areas where the new organisation should be able to achieve higher performance due to improved size include the conduct of formal inquiries and education, research, advocacy, policy development and legal work. Stronger functional groupings in these areas would be able to use the diversity of human rights issues to build broader and more strategic expertise.

168. A further consequential benefit of increased size and sound organisational and process design is that efficiencies gained in functional areas can be applied to enhanced capability in different streams of human rights work. It could be envisaged, for example, that enhanced specialist capability could progressively be built over time in racial harmony, women's advocacy, disability, possibly children, and so on depending on which of the current rights institutions are integrated into the new organisation and when they are integrated. These specialist areas would work with the stronger functional areas as appropriate.

169. The benefits of this approach are obvious if one considers how the education function might run a series of different programmes through a year. For example, the full weight of educational resources could be made available for a few months to target indications of racial discrimination in a particular industry. This could be followed over the next few months by a programme on gender issues in some other industry. There would also be the possibility of making different programmes mutually reinforcing. This situation would be far superior to the current situation where in small offices such as the Race Relations Office small size has meant few resources to produce publications let alone conduct targeted education. It may be that with improving professional standards, employers may pay for effective workplace education creating improved conditions for mainstreaming human rights in the community.

170. Once strong institutional capability is achieved, the fragility of reliance on a few individuals is removed. Senior officers in specialist areas will come to be

increasingly valued in the community as serious and professional contributors to human rights, enabling competent work to be done at lower levels in the organisation. Performance of the whole organisation then rises and the attractiveness of jobs in the institution increases – a virtuous cycle is established.

171. Provided that a well-constituted Governance Council is achieved, human resources policy approved by the Council will ensure appropriate selection of staff. It is crucial that staff be recruited using competency based assessments and a rigorous selection process. Furthermore, an improved balance of demographic representation throughout the organisation and mutual support of diversity needs to be achieved.

172. As a matter of principle, work should be done at the lowest competent level in the organisation. This must then be controlled by well-designed internal control systems that drive the desired behaviours of individuals in their roles.

173. More generally the human resources policy approved by the Council and implemented under their oversight should ensure that the organisation demonstrates leadership in the community by living the principles of human rights internally. The staff of the organisation should to be able to declare that it demonstrates respect for human rights in everything it does.

Independence:

174. The "Principles Relating to the Status of National Institutions" (the Paris Principles) were adopted by the UN Commission on Human Rights in 1992. They outline minimum standards of status, functions and methods of operation for NHRIs. A well-designed larger NHRI will be better able to meet these principles than the fragmented current organisations.

175. The principles recognise that for a NHRI to be effective, it must have adequate resources to fulfil its mandate. Its access to those resources needs to be sufficiently secure that its ability to perform its functions, including where necessary public criticism of governmental action and the provision of advice that is contrary to government policy, is not threatened by the withdrawal of funds for

political reasons. At the same time, it is essential that a NHRI, like any publicly funded body, should not only have to account for its expenditure of the public funds allocated to it, but should also have a defined process by which its performance can be evaluated.

176. In a democratic society, the key to independence is performance. An institution that is well managed and governed will have the support of the broad community and will consequently be able to attract a level of funding that the community considers appropriate through the democratic process. In the new organisation, annual budget funding should be provided in response to well argued cases in the strategic plan that can be supported by the Secretary of Justice, as Chief Executive of the responsible government department, on the basis of confidence in past performance. Funding should not be provided in response to complaints queues or other operational pressures because it is the responsibility of the organisation to manage its processes and prioritise its resources within the vote provided by government. Performance must be assessed in accordance with sound accountability arrangements.

Accountability arrangements:

177. Well constructed accountability arrangements are crucial because they ultimately drive the long term capability of the organisation. To achieve high performance, the accountability arrangements must be specifically designed to require the organisation to be responsible for its own success. Specifically, there should not be any specification of outputs by central government because these remove the accountability to think strategically from the organisation. If outputs are specified, the accountability for planning them shifts to the agency specifying the outputs. This reduces independence.

178. The crown entities reforms currently under consideration require output agreements to be prepared. This should not be adopted for this organisation. For any organisation that is expected to be adaptable and responsive, output agreements work against effectiveness and reduce efficiency. The new human rights organisation should be expected to build capability to deliver against

evolving community needs and expectations – a much more sophisticated task than delivering against specified outputs.

179. Accountability arrangements and relationships for the new organisation should be based on two principles:

(i) The best accountability relationships are based on *judgement* about potential future benefit for society of the organisation taking into account its past performance and future plans. In the current Public Service accountability system, assessment of performance is not based on high level judgements about the value an organisation contributes, but rather ex ante specification of what should occur and ex post measurement of what did occur. Accountability relationships based on specification and measurement have proven to be counter-productive at a high level because they do not recognise or plan for the degree of uncertainty that organisations face.

(ii) The best judgements are made using *face-to-face discussions*. At present, the Public Service accountability system relies on documents to transfer information. Face-to-face discussions enable the necessary information to be passed directly to the person who needs it to make the judgement. They enable that person to probe for further information in real time so that a depth of understanding and rapport can be established between the individuals. They also enable decisions to be made about whether further information is required from other sources. In the end, face-to-face discussions also enable a climate of trust to be established. The best quality judgements are made this way and enable the most productive accountability relationships to result.

A strategically focussed Accountability Process:

180. The accountability cycle should begin with the Minister of Justice seeking funding for the human rights organisation from parliament as part of Vote: Justice. The Minister of Justice is accountable to Parliament for the funds allocated to the human rights organisation. The Minister should seek advice from the Secretary of Justice on the value of alternative strategic programme choices at different levels of expenditure. This information should be used by the Minister,

and Ministers collectively, to decide where the Government should best place public funds.

181. To provide advice to the Minister, the Secretary will need to satisfy him/herself about the value of alternative strategic options by personally discussing them with the President and senior management. One proven method of doing this is for the senior managers to present their strategy to the Secretary in the presence of the President. Part of the strategy presentation should cover past lessons from previous implementations of the strategy. The Secretary would be expected to test their analysis and rationale behind the strategy. This would be the face-to-face opportunity for the Secretary to form personal judgements about the proposed strategy that can then underpin the advice given to the Minister on appropriate levels of funding.

182. Accountability for performance is the key compliance task. A three to five year strategy 'operationalised' each year in a memorandum of understanding (MOU) would specify the capability to be provided using these funds, not the outputs. The MOU should outline what parts/stages of the long-term strategy the organisation will work on that year. The quality of the strategy should be underwritten through public discussion with interested stakeholder groups including the Minister. Approval of funding and the MOU by the Minister should be based upon advice from the Secretary of Justice. Evaluation (including Select Committee examination of the annual report) should be based on the success of the strategy in dealing with evolving human rights issues. It should be noted that the Minister has a public ownership responsibility to decide on the level of capability that should be publicly funded (including adequate financial reserves).

183. Once the annual allocation is voted, the Secretary for Justice would be accountable for ensuring the organisation delivers value for the resources the Minister has invested in it. This is best done through regular personal contact with the organisation, not written reports. Value is ultimately a question of community perception and the organisation should be able to demonstrate how value is being assessed to the Secretary of Justice. The Secretary may be advised by a policy analyst in this regard but remains personally accountable for the relationship with the entity. This is not a task that can be adequately conducted by Ministry planning staff.

184. The Council of the new organisation should be accountable to the community for the quality of the organisation's strategy and its implementation. This is different from the "value for money" accountability of the Council for the use of public funds. The Secretary of Justice should require the Council to demonstrate how accountability to the community has been achieved; for example through consultations on strategies and plans. (It should be noted that this would be in line with the International Council on Human Rights' strong recommendation that NHRIs should develop methods for evaluating their performance, particularly in relation to vulnerable groups.) The Council should require the senior managers in the entity to be able to discuss the rationale for strategic choices and show how the proposed strategy will produce the best possible results.

185. The personal judgement of the Secretary of Justice must integrate past performance, quality of thinking and proposed future strategy. The Secretary has an accountability to add value to the quality of the strategy by providing a view about the organisation's long term capability (an ownership perspective). Once the Secretary is satisfied with the justifiability of the strategy and accompanying funding levels, the Secretary is then accountable to represent the best interests of the entity in budget round discussions.

186. The Chief Executive of the organisation should be accountable for conducting a rigorous process that formulates strategy taking into account the value expectations of all relevant stakeholder groups. To be effective, this process needs to be at a much higher level of sophistication than in the past. The Chief Executive must enable the Council to test the quality of the strategy through careful probing. Once the Council is satisfied and approves the strategy, the Chief Executive is responsible for ensuring the organisation implements it. The Chief Executive should use traditional tools such as performance management systems and operational plans to transfer the strategy into work programmes and achievements. These should be internal accountability mechanisms and must not be assessed by the Ministry through any ex-ante/ex-post technical analysis. Apart from removing accountability, these kinds of assessments destroy capability because they remove the requirement for the organisation to develop strategic capability.

187. Throughout the year, the Secretary should meet with the President or Council from time to time to learn how the strategy is working. This will enable him/her to obtain a personal feel and to provide feedback to the Minister about any significant political risks. The Council will need to meet regularly to assess the effectiveness of the strategy and to consider changes in light of new information or circumstances. A specific role they have is ensuring audit recommendations are being actioned.

188. Towards the end of the financial year, the cycle begins again with the organisation presenting the Secretary with its proposed strategy for the upcoming year so that decisions can be fed into the next year's budget process. It may have been modified in line with shifts in the environment. The Secretary would make a judgement (based on discussions with the Council and stakeholders and observations over the past year of the performance of the organisation) about how well the Council and organisation have performed. The Secretary would also analyse, based on discussions with the Council, the strategy proposed for the next year. The Secretary would make a judgement based on past performance and the future strategy about funding levels for the next year. This judgement would be relayed to the Minister who, in turn, would apply for funding for the organisation.

Composition of the New Organisation:

189. Organisational design is complex because of the need to establish systems and structures that operate in subtle but integrated ways to drive the productive behaviours described above. Poor design usually emerges when simplistic assumptions create superficial constructs that do not recognise the inherent complexity of interpersonal relationships. If the recommendations of this report are accepted, it will be necessary that careful consideration is given to detailed organisational design and the sequencing of implementation.

190. For the reasons already identified it is essential that the new NHRI has the size necessary to operate effectively, to handle varying workload demands, to properly integrate a range of functions, and to attract and retain high capability staff including specialist staff. In terms of commonality of purpose and functions it is clear that it should include from the outset the present Human Rights Commission

and Race Relations Office. Other questions may be considered to arise in respect of the Commissioner for Children, the Health and Disability Commissioner and the Privacy Commissioner. In the case of the Commissioner for Children and the Privacy Commissioner, the small size of their Offices must raise questions about their sustainability as effective organisations in the longer term.

191. The role of the Commissioner for Children is currently under review. Clearly there are important linkages between the work of that Office and the work of the proposed new organisation. If as a result of the review process a decision is reached that the organisation should be rights-based and/or there should be a system for considering complaints in respect of children's rights similar to that available in respect of other human rights, the case for including the Office would be very strong. In that event it would be necessary for the Council to include one or more members whom children's interest groups could identify as having the knowledge and concern to ensure an appropriate focus on children's interests. (The organisation would also need the necessary specialised staff.) If further work and consultation is thought necessary before any final decision is reached on this question the organisational design work could be undertaken in a manner that would allow the Office to be included at a later date.

192. The right to privacy is recognised as an important international human right. In practice, however, the purpose of the work of the Privacy Commissioner does not connect closely with the work of the other main agencies dealing with human rights. In fact the purpose of the Privacy Commissioner's work would seem to bear a closer connection to the freedom of information work of the Ombudsman's Office.

193. Different considerations again apply in respect of the Office of the Health and Disability Commissioner. In the longer term, and after the proposed new organisation has established itself and its public reputation, the obvious connections between the work of the Health and Disability Commissioner and other human rights work may well deserve further consideration. The result would be a very strong and comprehensive NHRI with many advantages in terms of effectiveness and efficiency. At the present time, however, the office is in the process of reorientation under a new Commissioner and is operating in an environment that has been experiencing major change over an extended period.

With a staff of 45 it has a critical mass and in the absence of pressing reasons for change should probably be allowed to settle down where it is.

International Considerations:

194. Properly designed and implemented, the new institutional arrangements recommended in this re-evaluation will be more than capable of meeting evolving international performance expectations.

195. It is not surprising that New Zealand should find itself in a position where it is considering arrangements that may differ in important respects from those currently in operation in other countries. New Zealand has always taken something of a lead in the field of human rights and many other countries have adopted models based on the New Zealand experience. At the same time we have always adhered to the view (which continues to be supported by the relevant international organisations with standing in human rights) that to be effective a NHRI must fit the socio-political circumstances in which it is to operate and must evolve as those circumstances evolve. In view of the fact that a number of other countries are grappling with similar problems that have arisen under the older models it may be that the adoption of the recommendations of this report will in time continue New Zealand's contribution to leadership in human rights.

196. It may be that some will ask whether issues of racial discrimination and the development of race relations generally will be able to be dealt with effectively in the absence of a separate stand-alone office. For the reasons already outlined, it is suggested that in fact those issues will be able to be handled more strategically and effectively in the proposed new organisation. There will be collective responsibility in the Council for ensuring that those issues are addressed and the composition of the Council will be such that they will be given appropriate attention externally and also internally in respect of strategy, plans, policies and budget. The much larger functional resources of the organisation will be able to be applied to the issues in conjunction with the relevant staff with specialist expertise in the substantive area. The issues will be able to be addressed in an appropriately strategic way taking full account of related economic, social,

cultural, indigenous and Treaty rights matters. And the organisation will have a much wider range of networks that can be utilised in support of its work.

Recommendations:

(i) There is a need for a NHRI that is strategically focussed on the following:

a) increasing public understanding of the importance of civil, political, economic, social and cultural rights in underpinning a free, democratic and cohesive society that respects and values difference;
b) leading constructive discussion within the community of the various dimensions of human rights issues;
c) encouraging positive interaction between different individuals, groups, communities and cultures within society.

This community leadership role in human rights cannot be achieved effectively within existing organisational models that are, for the most part, small and fragmented and are structured around the need to make determinations in respect of individual complaints.

(ii) A redesigned organisation will require a structure, systems and accountability arrangements that support the strategic focus of the organisation and encourage the development of overall organisational capability. The design of the organisation must ensure, inter alia, a clear separation of governance and management.

(iii) A key feature of the proposed redesigned organisation would be a Governance Council of 7 or 9 part time members. The Governance Council should be reflective of New Zealand society and of the various aspects of human rights and communities of interest in human rights that require particular attention. All members of the Council would be expected to bring a broad awareness of human rights and their importance to their work as well as an understanding of the importance, in the New Zealand context, of the Treaty of Waitangi. However, through their particular backgrounds, they should also be able to contribute to the task

of ensuring that the organisation gives appropriate attention to all aspects of human rights.

(iv) On another dimension the Council will need amongst its members the full mix of skills for competent oversight including expertise in human rights, finances, human resources, legal, public relations, strategic thinking and practical oversight of operations. More generally they need to have the capability to undertake an effective community leadership role and to maintain high level contacts with all stakeholder interests including NGOs. The Governance Council should operate as a collegium that collectively directs management through approval of strategies, plans, policies and budgets. Individual Council members should not interfere in the day to day management of staff. In view of the range of activities needed in the short to medium term to achieve an effective community leadership role for the organisation and in particular the need to build relationships with all stakeholder groups the Council should initially be led by a full time President.

(v) Because of the need to finely balance the collective capability of the Governance Council, the selection process should be very carefully conducted. Consideration should be given to discussing possible nominees for Council with the President to ensure that a well functioning team is established in accordance with the criteria outlined above. The process should ensure that the independence, capability and stature of the Council is recognised in the community.

(vi) The Council would be supported by a chief executive who would be accountable to the Council for the performance of the organisation across all its activities including the maintenance of sound working level relationships with stakeholder interests including NGOs. The Chief Executive must be selected using modern competency based processes conducted by recruitment professionals.

(vii) The Governance Council should be accountable for its own performance both to the community in terms of its effectiveness and to the government for efficient use of public funds. The accountability arrangements should be as described in this report. In essence they should be based on high

level discussion and analysis of the effectiveness of the organisation in implementing its agreed strategy in changing circumstances. They should not be based on a mechanical ex ante specification and ex post measurement of outputs as that will serve only to remove the accountability of the organisation to think strategically.

(viii) The proposed new NHRI should include from the outset the present Human Rights Commission and Race Relations Office.

(ix) The role of the Commissioner for Children is currently under review. If as a result of the review process a decision is reached that the organisation should be rights-based and/or there should be a system for considering complaints in respect of children's rights similar to that available in respect of other human rights, the case for including the Office would be very strong in view of the linkages in purpose. In that event it would be necessary for the Council to include one or more members whom children's interest groups could identify as having the knowledge and concern to ensure an appropriate focus on children's interests. If further work and consultation is thought necessary before any final decision is reached on this question the organisational design work could be undertaken in a manner that would allow the Office to be included at a later date.

(x) Although privacy is recognised as an important international human right, in practice the purpose of the work of the Privacy Commissioner does not connect closely with the work of the other main agencies dealing with human rights. In fact the purpose of the work would seem to bear a closer connection to the freedom of information work of the Ombudsman's Office.

(xi) Different considerations again apply in respect of the Office of the Health and Disability Commissioner. In the longer term, and after the proposed new organisation has established itself and its public reputation, the obvious connections between the work of the Health and Disability Commissioner and other human rights work may well deserve further consideration. At the present time, however, the Office is in the process of reorientation under a new Commissioner and is operating in an

environment that has been experiencing major change over an extended period. With a staff of 45 it has a critical mass and in the absence of pressing reasons for change should probably be allowed to settle down where it is.

PART FIVE: THE DISPUTE RESOLUTION MODEL

"For many NHRIs a complaints-led approach will not be sustainable. A thematic approach will enable NHRIs to concentrate their resources on areas of acute need, while improving accountability and communication with the public. Individual complaints should not be ignored but the objective should be to focus resources where need is greatest. Staff should link actions to resolve individual cases with general policies of prevention."

Performance and legitimacy: national human rights institutions
International Council on Human Rights 2000

The present system:

197. All of the present human rights institutions have taken steps to divert resources from their complaints processes in order to meet more strategic demands. However, the requirement in the Human Rights Act 1993 that Commissioners personally determine whether complaints have substance has lent the complaints process a quasi-judicial character. The demands of natural justice which attach to such a process have led to an elaborate and protracted system of provisional and final opinions giving reasons for the determination. While the Commissioners do not personally spend a great deal of time on the Complaints Division, the process lends a sense of importance and priority to Part II powers. The lack of formal complaints jurisdiction over a matter may have tended to obscure the Commission's broader mandate to pursue issues under its Part I functions. And even if jurisdiction exists under Part II, and an individual reaches a successful conciliation, the result is usually confidential and the benefits seldom shared by other individuals similarly affected. Such matters may often have been more suitable for inquiry or informal educational processes.

198. A different approach is suggested involving robust front-end conciliation followed by direct referral of unconciliated complaints to the Proceedings Commissioner. The process of conciliation of complaints would be carried out within the organisation by experienced and capable staff backed by the necessary powers to bring the parties together and obtain documents. If the conciliation

process is unsuccessful then, without further investigatory work and the present practice of forming provisional and final opinions, the matter would be referred directly to the Proceedings Commissioner for consideration as to whether proceedings should be initiated before the Complaints Review Tribunal.

199. There is quite a widespread perception that the Human Rights Organisation acts as conciliator, judge and prosecutor. It has been some time since the Proceedings Commissioner has also served on the Complaints Division. Nevertheless, a number of stakeholders perceive that the prosecutorial role sometimes interferes with the more general educational mandate of the Commission, and that the Proceedings Commissioner may be overly influenced by what has taken place in the conciliation process. At the same time, it is clear that a complaints function is necessary so that the Commission maintains the ability, in a timely fashion, to identify and respond to emerging problems.

200. For these reasons, there would be an advantage in creating a standalone office for the Proceedings Commissioner. The Proceedings Commissioner should not be a member of the Council nor be located within the organisation. Its principal function would be to ensure consistency of standards in the cases submitted to the Complaints Review Tribunal. It would have a broad discretion as to which matters should proceed. An independent check on this function could be undertaken from time to time. The Proceedings Commissioner would have the role of public defender under the Human Rights Act, Privacy Act and perhaps the Health and Disability Commissioner Act. For certain purposes, such as a test case of strategic importance, the new NHRI may wish to retain its own counsel rather than to direct matters through the Office.

201. As the Proceedings Commissioner could be involved in cases against the Crown, it would not be appropriate for it to be attached to or funded through the Crown Law Office. To mitigate the problems of funding small agencies, the Proceedings Commissioner should share the same funding stream as the NHRI. The NHRI would allocate funds to the Office as part of the annual budgetary cycle.

202. The Complaints Review Tribunal hears matters under the Human Rights Act, Privacy Act and certain matters under the Health and Disability Act. Stakeholder opinions were divided on whether the Complaints Review Tribunal should be

replaced by District Court Judges presiding under a special human rights warrant. It is considered that at this point the case for a change of this type has not yet been substantiated. The ability of the Tribunal to respond quickly and in a less formal setting was valued, and the Tribunal appeared to be well served by Tribunals Division. On the other hand there was general support for the view that the Tribunal should be given increased status and the ability to respond to higher volumes of cases involving difficult legal issues. At present there is only one person appointed for her legal expertise, who sits with a number of lay people. Two or three District Court Judges should sit on the Tribunal. It should be renamed to reflect its greater status. Stakeholder opinion was divided on whether and how much lay people contributed to decisions. It was suggested that certain parts of the jurisdiction were under-represented in this respect, e.g. the Privacy jurisdiction.

203. Greater doubt was expressed about the value of having lay people from the Tribunal sit on matters concerning questions of law referred to the High Court. High Court Judges should have the freedom to elect in a particular case whether to sit with lay people with appropriate expertise or on a bench of 2 or more judges.

Recommendations:

(i) The present elaborate process should be replaced by a robust system of front-end conciliation. This should be supported with necessary statutory powers to compel the production of information, and to bring people together for compulsory conciliation.

(ii) There should be a broader discretion at the front end not to formally "receive" a complaint. The Health and Disability Commissioner made a similar suggestion in her Report of October 1999. There should also be discretion to pursue the matter by a more suitable process if conciliation is not considered appropriate. For example, an education programme in the workplace (with the consent of the employer) may be considered a more appropriate response to a particular type of problem. If a matter is considered of broad importance, the Commission may, through its own

legal counsel take a case directly to the Tribunal. Such cases will usually involve novel questions, systemic problems, or establish jurisprudence.

(iii) Complaints data should be collated and the trends systematically reported to the Chief Executive and Governing Council. The systems should identify novel and systemic problems and those likely to attract media publicity.

(iv) If conciliation processes are appropriate and the parties fail to reach agreement, a low-level decision should be made whether to refer the matter on to the Proceedings Commissioner. If the decision is no, the complainant could take the matter him or herself – possibly under legal aid.

(v) The file that goes to the Proceedings Commissioner should not contain statements made "without prejudice for the purposes of conciliation". Any NHRI generated notes of investigation should also remain with the NHRI (and be subject to the usual rules of discovery).

(vi) The Proceedings Commissioner should be institutionally separate and have very broad discretion as to what cases he or she takes. The Proceedings Commissioner (perhaps renamed) would instruct a number of barristers. The Office should be funded through the same stream as the new NHRI. The NHRI would allocate funds to the Office as part of the annual budgetary cycle.

(vii) The conciliation and education process would be assisted by a more through going system of case notes such as those available from the Employment Tribunal. These should be generated on behalf of the Complaints Review Tribunal. The new NHRI should generate guidelines, case notes, and codes of practice on a more regular basis than presently. Such codes and guidelines would be subject to challenge in the Tribunal.

(viii) Two or three District Court Judges should sit on the Tribunal. It should be renamed to reflect its greater status.

(ix) High Court Judges should have the freedom to elect in a particular case whether to sit with lay people with appropriate expertise or on a bench of 2 or more judges.

PART SIX: EARLY CONSIDERATION OF HUMAN RIGHTS ISSUES AND OBLIGATIONS IN POLICY MAKING

"Sound and vibrant national governance institutions – legislatures, executives, and judiciaries – are crucial to establishing enabling environments for eliminating poverty, promoting equality, and protecting the environment. Strengthening governance through human rights-related capacity development will help achieve these goals."

Integrating Human Rights with Sustainable Development
UNDP policy document

Human rights make good policy:

204. This section outlines various measures which are designed to enhance the integration of New Zealand's international human rights obligations into its policy making processes. However, it should be noted that international human rights law is one part of public international law and several of the suggestions made in relation to international human rights law have broader application. As the Legislative Advisory Committee (LAC) has noted, about one quarter of New Zealand's public Acts raise international treaty issues (LAC, Report No 6, 1991, paragraph 44). Accordingly, this report endorses the LAC's encouragement of a greater appreciation of the place of international law generally in legislative and policy processes.

205. There are many different strategies by which a state may promote and protect international human rights. One approach is to permit the prosecution of human rights cases before domestic courts and international bodies. Another less adversarial approach is to integrate human rights into the state's policy-making processes. Both approaches are legitimate responses to the binding nature of international human rights law. Obviously, the policy approach depends less on the courts than the existence of good policy-making processes within government. Paragraph 5 of the Terms of Reference requires the consideration of this non-judicial, policy-oriented approach to the promotion and protection of human rights.

206. If taken into account early in the policy making process, human rights tend to generate policies that ensure reasonable social objectives are realised by fair means. They contribute to social cohesion and, as the Treasury's Briefing to the Incoming Government (1999) observes: 'Achieving and maintaining a sense of social cohesion and inclusion is an important aspect of welfare in the broadest sense.' The Briefing emphasises that social cohesion includes a sense of fairness: 'Fairness to all parties involved extends both to the processes by which things are done and to the outcomes themselves. Social cohesion is low when individuals or groups feel marginalised'.

207. Policies which respect and reflect human rights are more likely to be inclusive, equitable, robust, durable and of good quality. Critically, such policies will also be less vulnerable to domestic and international legal challenge. Accordingly, domestic and international human rights provisions should inform or animate all relevant policy. For this to occur, human rights need to be taken into account early in the policy making process. Thus, one needs appropriately trained officials operating good processes that are informed by reliable data.

208. Of course, consideration of human rights early in the policy process does not guarantee good policy, but it makes ill-considered policy, with all its attendant difficulties, less likely.

209. Today, international human rights are seldom taken into account early in New Zealand's policy-making processes. For the most part, the practice appears to be patchy, uneven and unsystematic. If it does occur, it may be on the initiative of a particular official or Minister. Thus, it is appropriate to consider what can be done to ensure that due regard is given, at an early stage of the policy making process, to New Zealand's binding international human rights.

210. New Zealand has ratified the major international human rights treaties: ICCPR, ICESCR, CERD, CEDAW, CAT and UNCROC. New Zealand's practice is to ratify a treaty only when it considers domestic laws and policies are in conformity with the treaty's provisions. This ensures that, at the time of ratification, NZ is in broad conformity with its new international obligations. Of course, mechanisms are needed to ensure that legislation and policies, which are developed after ratification, are also consistent with New Zealand's international obligations.

Without such internal or administrative mechanisms, New Zealand could become non-compliant and subject to proceedings before domestic courts and international bodies, such as the UN Human Rights Committee. Presently, New Zealand has internal arrangements, in the Cabinet paper process, that are designed to ensure that all new legislative proposals are 'vetted' for conformity with existing international obligations.

211. When legislative proposals are 'vetted', the exercise tends to have a negative orientation. Geared towards technical compliance, 'vetting' is designed to check that the proposal does not breach New Zealand's international obligations. It reflects a risk management strategy, the primary aim of which is to minimise the risk of legal proceedings. 'Vetting' and compliance are corollaries of the court-based approach to the promotion and protection of human rights. This approach is important but paragraph 5 of the Terms of Reference is based upon a less adversarial, policy approach to the realisation of human rights. While 'vetting' has a negative orientation, the integration of human rights into policy is a much more positive approach to human rights implementation.

212. It should be emphasised that there is not a single, simple arrangement by which international human rights can be integrated into policy-making processes. A number of complementary initiatives and approaches are needed, several of which are set out in this report. None of these, however, will flourish without political commitment and leadership that recognises the value and importance of human rights in the public sector and society at large.

Compliance: the role of the Cabinet Office:

213. At present, the primary mechanism for ensuring that international human rights obligations are taken into account in the development of the government's policies and legislation is provided by processes arising from the submission of papers to the Cabinet Office. In some circumstances (e.g. requesting the inclusion of a bill in the legislative programme, requesting the introduction of a draft bill, and requesting authorisation for the submission of regulations to the Executive Council), the Cabinet Office requires those responsible to:

"Indicate whether the bill [regulation] complies with each of the following with reasons if the bill [regulation] does not comply:

a. the principles of the Treaty of Waitangi;
b. the New Zealand Bill of Rights Act 1990;
c. the principles and guidelines set out in the Privacy Act 1993. (If the legislation raises privacy issues, indicate whether the Privacy Commissioner agrees that it complies with the relevant principles.);
d. relevant international standards and obligations;
e. guidelines in the Legislation Advisory Committee report, 'Legislative Change: Guidelines on Process and Content' (revised edition, 1991);
f. Human Rights Act 1993."

In the Cabinet Office Manual, this requirement comes under the rubric 'Compliance'. The Legislation Advisory Committee Report mentioned in (e) adverts to the possibility that "there might be an international standard, especially in the human rights area, which is relevant" (see para 44).

214. Three observations may be made regarding this Cabinet Office requirement:

(i) Consultations have indicated that, in practice, the requirement often generates a relatively superficial departmental consideration of the human rights implications of the bill/regulation.

(ii) While the Cabinet Office requirement extends to consideration of international human rights obligations, especially in relation to (d) (international law) and (e) (LAC Guidelines), international human rights are not explicitly mentioned. It appears that, notwithstanding the Cabinet Office requirement, international human rights standards and obligations seldom receive the level of attention they deserve. No doubt there are a number of reasons for this, but it seems reasonable to assume that one of them is the absence of an explicit reference to New Zealand's international human rights obligations.

(iii) The requirement to consider human rights comes late in the policy making process when the relevant policy will have already taken shape.

215. The Cabinet Office human rights requirement in relation to the submission of 'standard papers', such as policy papers, is different from the above - and represents a significant improvement on it. Further to a Cabinet Office Circular of December 1998 (CO (98) 19), all policy submissions to Cabinet shall provide the following:

> "Human rights
>
> All policy submissions must include a statement about whether there are any inconsistencies between the proposal and the Human Rights Act 1993. If there are inconsistencies, provide a summary of the implications and comment on whether and how the issues may be addressed or resolved. The aim of this requirement, which came into effect on 1 January 1999, is to provide Ministers with information on the implications of any policy proposals that are inconsistent with the Human Rights Act 1993 before proposals reach the legislation or implementation stage. Each department needs to carry out its own assessment on any potential inconsistencies."

216. Some features of this requirement for policy papers improve upon what is required in relation to bills and regulations (see above). In particular, as the Cabinet Office Circular of December 1998 puts it:

> "[existing] mechanisms require consideration of human rights issues only once the proposals have reached the legislative or regulatory stage. Cabinet considered it would be *desirable to improve official processes to ensure that human rights issues were also considered at the earlier policy development stage*." (italics added)

It should also be noted that the Circular emphasises:

> "A key feature of the process is that it will remain the responsibility of each department ... to assess and sign off on human rights implications in the department's area of responsibility."

The Circular continues:

> "In carrying out this assessment government departments should consider, where appropriate, consulting on the proposal with agencies that have experience or an interest in human rights issues. Examples of agencies with

> an interest or experience in human rights include the Ministry of Justice (policy assistance), Crown Law Office (legal advice) and the Human Rights Commission."

217. Equally, however, the Cabinet Office requirement in relation to policy papers is, in some respects, less favourable than those required for bills and regulations. For example, the policy paper requirement makes no mention of international standards and obligations.

218. The Cabinet Office human rights requirement for bills/regulations and policy papers should be made more simple, clear and consistent. The same requirement should apply to both bills/regulations and policy papers. The requirement should address both national and international human rights. There should be an explicit reference to the major international human rights treaties ratified by NZ. Departments should continue to be required "to assess and sign off on human rights implications in the department's area of responsibility" and to consult others with human rights expertise. They should be encouraged to identify the human rights implications of a particular initiative early in the policy making process.

219. Drawing upon existing wording, the Cabinet Office's human rights requirement might be along the following lines:

> "National and international human rights
>
> > All policy submissions [bills/regulations] must include a statement which confirms that the relevant national and international human rights law was taken into account early in the policy making process. Particular attention should be given to the NZ Bill of Rights Act 1990, Human Rights Act 1993 and the major international human rights treaties ratified by New Zealand e.g. ICCPR, ICESCR, CERD, CEDAW, CRC and CAT. If there are inconsistencies, submissions should provide a summary of the implications and comment on whether and how the issues may be addressed or resolved. Each department needs to carry out its own assessment on any potential inconsistencies. In an appropriate case, a department should attach its human rights assessment of a particular policy initiative."

220. In conclusion, it should be emphasised that this recommendation is designed to simplify Cabinet Office processes by replacing different human rights requirements with a single consolidated human rights requirement that applies to all situations.

Additional recommendations:

221. If introduced in isolation, a revised Cabinet Office human rights requirement is unlikely to enhance significantly the quality of governmental policy making. As already observed, there is not one arrangement whereby human rights can be appropriately integrated into departmental policy making. Rather, a range of realistic, practical and complementary arrangements are needed. Moreover, an appropriate arrangement in one Department might be less suitable in another. Further, while all Departments will sometimes have policies and programmes with significant human rights implications, some Departments will be dealing with them on a much more regular basis than others, such as Justice, Social Policy, Health, Education, Labour, Children, Women, TPK, Treasury, MFAT, Police and Immigration. Accordingly, if human rights are to be integrated at an early stage in policy making processes, all Departments will have to adopt some of the following recommendations, but some Departments, depending on the nature of their work, will have to adopt more of the recommendations than others

222. Chief Executives have a general obligation to ensure that their departments provide high quality advice on a wide-range of policy issues. To be of good quality, advice must take into account relevant international law at an early stage in the policy-making process. Thus, Chief Executives have an obligation to put appropriate arrangements in place to provide for the integration of relevant international human rights norms in the early stages of departmental policy-making processes. Such arrangements will help to ensure that the department consistently delivers good quality policy advice. Accordingly, it is recommended that each Chief Executive charges a senior official with particular responsibility for ensuring that realistic, practical and effective arrangements are in place for the integration of international human rights into the relevant departmental policy-making processes.

223. It is recommended that the State Services Commission produce revised, generic policy making guidelines that underscore the role of domestic and international human rights in the formulation of good policy.

224. Departments undoubtedly tailor policy-making guidelines to their particular needs. These guidelines should explicitly acknowledge that relevant international human rights norms inform the Department's policy because consideration of human rights helps to generate good policy. They should also draw attention to the specific international human rights instruments especially relevant to the Department. Further, Guidelines should outline the arrangements which are in place to facilitate the integration of international human rights into departmental policy-making processes e.g. the possibility of preparing a departmental human rights impact assessment in relation to a particular policy proposal (see paragraph 227 below).

225. In this context, training has a crucial role to play. Departments should ensure that officials - especially those primarily responsible for policy - are provided with the appropriate level of training and development in relation to human rights. Accordingly, as appropriate, the induction of new staff should include a module on human rights. From time to time, training updates will be needed concerning new international human rights instruments and other relevant developments. This training might be conducted either in-house or by others e.g. the Human Rights Commission or its successor. The advisers' consultations revealed that at least one Department has already introduced human rights training along these lines.

226. As appropriate, departmental work programmes should expressly refer to the promotion and protection of international human rights in their projected activities for the coming year. Four illustrative examples of what a Department's work programme might include are:

(i) The preparation of a periodic human rights treaty body report;
(ii) Consideration of, and responses to, a human rights treaty body's recent Concluding Observations;
(iii) In appropriate cases, preparation of human rights impact assessments on departmental policy initiatives (see paragraph 227 below);

(iv) Arrangements which are designed to ensure that staff keep abreast of relevant human rights developments, such as new international instruments, General Comments recently promulgated by treaty bodies, and current domestic case law.

227. In some cases, it will be appropriate and helpful for a brief human rights impact assessment to be prepared by the department as a new policy begins to take shape. This would identify how the proposed policy initiative might enhance human rights (e.g. by reducing poverty and the economic marginalisation of vulnerable groups) and how it might be inconsistent with human rights (e.g. discrimination). As already mentioned, an impact assessment might be appended to a departmental submission to the Cabinet Office (see paragraph 219 above). It would be helpful if a few illustrative impact assessments were prepared and made available to Departments. These illustrative examples might be prepared by the inter-departmental human rights officials' network referred to in paragraph 229 below.

228. Having identified the key international human rights instruments that bear upon its responsibilities, the Department should publish this list in its annual report or other public document that reports on the Department's recent activities. Further, this annual report or equivalent document should include a section that outlines how the Department's recent initiatives have advanced the realisation of international human rights. The activities of many Departments are relevant to the reports periodically required by human rights treaty-bodies, such as the UN Human Rights Committee and UN Committee on Economic, Social and Cultural Rights. Thus, in appropriate cases, the human rights section of a departmental annual report could feed into the Department's eventual contribution to a human rights treaty-body periodic report.

229. Because international human rights instruments do not fall neatly into the purview of just one Department, a permanent inter-departmental network of officials with particular responsibility for international human rights issues should be established. During consultations it became clear that at least one such network is already beginning to emerge in the context of children's rights. A more formalised network would facilitate the preparation of New Zealand's reports, which have to be periodically submitted to human rights treaty-bodies. To one degree or another, these reports require inter-departmental collaboration. Further,

the treaty-bodies' Concluding Observations invariably require inter-departmental consideration. This officials network could enhance inter-departmental co-operation in relation to policies with an international human rights dimension. For example, while such a policy might be of particular concern to one Department (e.g. Youth Affairs in relation to UNCROC, and Women's Affairs in relation to CEDAW), its effective implementation might require the active co-operation of other Departments. The network can help to generate this inter-departmental co-operation. This network might also provide illustrative human rights impact assessments for Departments (see paragraph 227), consider human rights impact assessments or provide comments for the human rights analyses required by the Cabinet Office (see paragraph 219). Either MFAT or DPMC should be charged with responsibility for maintaining this inter-departmental network of officials working on international human rights issues.

230. In relation to the preparation of periodic reports to UN human rights treaty bodies, the current position is as follows. Youth Affairs has primary responsibility for UNCROC; Women's Affairs for CEDAW; and MFAT for ICCPR, ICESCR, CERD and CAT. There are advantages if Departments, which are working especially closely to a particular area, also have primary responsibility for the preparation of the relevant treaty body report, as in the case of Youth Affairs/UNCROC and Women's Affairs/CEDAW. This is likely to enhance a sense of departmental 'ownership' of, and knowledge about, the relevant international human rights law. Accordingly, it is recommended that primary responsibility for ICCPR, ICESCR, CERD and CAT be assigned to other Departments. For example, primary responsibility for ICCPR, CERD and CAT might be assigned to the Ministry of Justice and ICESCR to the Ministry of Social Policy. Other Departments would retain a continuing responsibility to make a significant contribution to the preparation of the reports e.g. the Ministries of Health and Education in relation to ICESCR. Given its overarching responsibilities in the field of international human rights, MFAT would retain some key responsibilities for the reports, along the lines of its existing obligations in relation to Youth Affairs/UNCROC and Women's Affairs/CEDAW. In the preceding paragraph, it was noted that an inter-departmental network of officials working on international human rights could facilitate the collaborative preparation of these treaty body reports.

231. Consultations revealed a situation which warrants further consideration by the relevant departments. If a Department, such as Health, determines that one of its policy initiatives has national and international human rights implications, it may wish to seek advice from elsewhere within government. In relation to the national human rights dimension of the issue, it should consult with the Ministry of Justice. If the national human rights dimension has an international aspect, this too may be considered by the Ministry of Justice. However, MFAT is the Government's legal adviser on international matters. As the line between national and international law is increasingly blurred, there appears to be some lack of clarity about the overlapping roles of the Ministry of Justice and MFAT. From the standpoint of the Department seeking human rights advice, it is not immediately clear where it should go. It should also be noted that, if the Ministry of Justice is to fully discharge its responsibilities, it has to be familiar with the broad range of relevant international human rights law - and not just ICCPR. Further, if Departments enhance their integration of international human rights into policy making, it is probable that the Ministry of Justice and MFAT will both be increasingly called upon to tender domestic and international legal advice, which will have obvious resource implications. In these circumstances, it is recommended that the Ministry of Justice, MFAT and Crown Law consult with each other on this issue and report to their Ministers with agreed proposals for resolving this issue.

Summary of recommendations:

(i) All departments to review the arrangements which are designed to ensure that international human rights are integrated early in departmental policy making processes. While it is anticipated that all departments will be assisted by the adoption of some of the following recommendations, given the varied nature of departmental work, it is not expected that all recommendations will be adopted by all departments. The recommendations have particular relevance to those departments with policies and programmes with significant human rights implications, such as Justice, Social Policy, Health, Education, Labour, Children, Women, TPK, Treasury, MFAT, Police and Immigration.

(ii) A single consolidated human rights requirement for submissions to the Cabinet Office;

(iii) A departmental senior official to be responsible for ensuring realistic, practical and effective arrangements are in place by which human rights are integrated into policy making processes;

(iv) State Services Commission to revise generic policy making guidelines so they give due regard to human rights;

(v) Departmental policy making guidelines to give due regard to human rights; such guidelines to list the international human rights instruments of particular relevance to that department's responsibilities;

(vi) Departments to ensure their staff, especially policy advisors, receive appropriate training in relation to human rights;

(vii) Departmental work programmes to identify the Department's activities which are designed to enhance the promotion and protection of human rights;

(viii) In some circumstances, a departmental human rights impact assessment should be prepared in relation to a particular policy;

(ix) Departmental annual reports (or their equivalent) to list the international human rights instruments of particular relevance to the department and to include a section which outlines how the Department's recent activities have advanced the realisation of human rights;

(x) To establish a permanent, inter-departmental network of officials with particular responsibility for human rights;

(xi) To assign, with consequential resource allocation, primary responsibility for the preparation of periodic reports to Departments working especially closely to the relevant area e.g. ICCPR, CERD and CAT to Justice and ICESCR to the Ministry of Social Policy;

(xii) The Ministry of Justice, MFAT and Crown Law should review their overlapping responsibilities for the provision of advice on international human rights law and report to their Ministers with agreed proposals for resolving this issue.

PART SEVEN: A NEW ZEALAND NATIONAL PLAN OF ACTION FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

"[N]ational action plans can be the concrete reflection of a deliberate policy to promote and protect human rights as well as a useful tool to coordinate between different government departments and authorities in this area. Indeed, the national plan of action can open communication for action amongst all relevant actors in society to identify and implement strategies for effective national progression."

Justice P N Bhagwati, Regional Adviser on International Human Rights Standards for the Asia-Pacific Region

Should New Zealand have a National Plan of Action?

232. Earlier in this report, it was observed that the importance of human rights is not well understood in New Zealand. The consultative preparation of a National Human Rights Plan of Action (NPA) could significantly enhance governmental and popular awareness of, and support for, human rights and the values they represent. Consultations revealed extensive support for the NPA proposal. Accordingly, it is recommended that the Government should initiate a process for the consultative preparation of a NPA in New Zealand.

233. NPAs gained currency at the World Conference on Human Rights held in Vienna during 1993. The Vienna Declaration and Programme of Action recommended "that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights" (paragraph 71). Since the World Conference, New Zealand and other countries in the Asia-Pacific region have reaffirmed on several occasions their commitment to the development of NPAs. This includes the Sixth Workshop on Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region (Tehran, 1998); the Seventh Workshop on Regional Arrangements (Delhi, February, 1999); the inter-governmental Workshop on National Plans of Action for the Promotion and Protection of Human Rights (Bangkok, July 1999); and the Eighth Workshop on Regional

Arrangements (Beijing, 2000). In view of its international endorsements of the NPA initiative, it is now timely for New Zealand to embark upon its own NPA process.

234. It should be noted, however, that relatively few states have formulated NPAs. While 171 states adopted paragraph 71 of the Vienna Declaration and Programme of Action in 1993, to date only some 12 states have finalised NPAs: Australia, Malawi, Philippines, Brazil, Ecuador, Indonesia, Mexico, South Africa, Venezuela, Bolivia, Latvia and Norway. Australia campaigned at Vienna for the adoption of paragraph 71 and was the first state to finalise a national plan of action (1994). Presently, Canberra is working on a new NPA. It is not proposed to subject these precedents to detailed analysis here. They differ significantly. For example, the existing NPAs vary in length from 3 pages to more than 150 pages, while their time-frames vary from 3-5 years to an indefinite period. The UN Office of the High Commissioner for Human Rights is finalising a 'Handbook on National Human Rights Plans of Action' which is likely to introduce a greater degree of consistency.

235. In essence, a NPA is a state's national strategy for the greater promotion and protection of human rights. The purpose of a NPA is to identify measures that develop or strengthen national and local human rights capacities. A NPA places human rights improvements in the context of public policy, so that government, individuals, groups, communities and others can endorse human rights objectives as practical goals, devise programmes to ensure their achievement, engage all relevant social actors, and allocate appropriate resources. Critically, the process by which a NPA is prepared can itself be a powerful device for the enhancement of human rights, and the greater appreciation of diversity, across society.

236. One of the advantages of the NPA approach is that it recognises each state has its own unique political, cultural, historical and legal context. Thus, a NPA can be crafted to suit the characteristics and needs of a particular society. Nonetheless, the evidence also suggests that some general principles apply to all NPAs, including the following:

- the NPA should be a truly national undertaking;
- the NPA demands both a consultative process and measurable outcomes;

- the NPA must be built around a commitment to universal human rights standards and implementation of a state's binding international human rights obligations;
- the NPA should adopt a comprehensive approach to human rights, giving equal attention to all categories of rights;
- the NPA should be action-orientated;
- the NPA should include mechanisms for monitoring and reviewing progress.

237. In brief, the benefits of using a NPA as a vehicle for improving human rights include the following:

- the consultative preparation of a NPA can raise awareness of, and support for, human rights within government and the wider community;
- the NPA can be a tool of sound public administration and good governance, leading to a stronger rule of law, greater national cohesion and respect for diversity, and an enhanced quality of life;
- the NPA lends itself to a non-confrontational approach to the consideration of human rights issues;
- the NPA can be practical: it can identify realistic activities which are designed to reach achievable targets;
- the NPA can effectively address the concerns of specific vulnerable groups;
- the NPA can strengthen institutions and groups dealing with human rights.

All of these benefits could accrue to New Zealand if it were to initiate a NPA process.

238. In this context, there are four related initiatives. First, New Zealand has not yet prepared a plan of action for children as anticipated by both the World Summit for Children (1990) and the UN Convention on the Rights of the Child. Second, the UN General Assembly has designated 1995-2004 as the UN Decade for Human Rights Education. The General Assembly has welcomed a Plan of Action for the Decade, paragraph 11 of which calls upon Governments to develop a national plan of action for human rights education. Paragraph 58 suggests that a plan of action for human rights education should form "an integral part of a

comprehensive national plan of action for human rights." While the Terms of Reference focus on a national plan of action for human rights, it is recommended that New Zealand integrate such a project with national plans of action for both children's rights and human rights education.

239. Thirdly, the Race Relations Office has initiated a strategic race relations Agenda for New Zealand. Thirty community consultations have already been conducted. "It is expected that this strategy will inform a decade of education in homes, schools, communities and the work place. Likewise it will inform public policy development for a racially-harmonious society." Fourthly, a committee has recently been established to provide advice to the Minister for Disability Issues "on goals, barriers, priority action areas and targets for the New Zealand Disability Strategy." These two important initiatives, and others like them, should inform New Zealand's NPA which is the focus of this report.

Recommendations on the NPA development process:

240. Having considered whether or not New Zealand would benefit from a NPA, the Terms of Reference request "a process for the development of a New Zealand National Plan of Action". Practice suggests that there are four phases in relation to a NPA: a *preparatory* phase, *development* phase, *implementation* phase and *monitoring* phase. (Guidance on each phase will be available from the UN Handbook to which reference has already been made.) The following general remarks relate to the preparatory and developmental phases:

The role of government

From the outset, it is crucial that the government's role in relation to the NPA is both central and clear. It is not necessary for government to drive the NPA, but all levels of government - including the highest – should make a genuine and sustained commitment to the project's success. For example, this commitment might be signalled by Cabinet approval, a Prime Ministerial launch and the availability of adequate resources.

A consultative process

Throughout the process, civil society (non-governmental organisations, community groups and others not directly associated with government) should be widely consulted. From the outset, modalities must be found for appropriate consultation with Mäori. At the end of the day, much of the plan will probably depend upon governmental implementation. A plan characterised by unrealistic (and subsequently unrealised) expectations is unhelpful and may even be counter-productive. A genuine process of consultation, however, should produce an understanding that provides the basis for a realistic, but challenging, plan that enjoys broad community support.

A focal agency

A specific agency must be charged with primary responsibility for driving the project. This agency could be an arm of government, such as the Ministry of Justice, or an organ beyond government, such as a NHRI. For reasons outlined below, the focal agency for New Zealand's NPA should be the new NHRI proposed in this report.

Preparatory principles

After appropriate consultations, the focal agency should prepare some principles relating to the initial stages of developing the plan. These preparatory principles should be brief and address preliminary issues, e.g. who should be involved in the initial NPA process and what form the preparatory process should take. The principles might signal the organisation of initial consultative meetings about the NPA process.

Steering Group

Although primary responsibility for the NPA will lie with the focal agency, the agency will need the active support, guidance and advice of a high-level Steering Group. This Group should be as representative as possible of all relevant actors, including government, parliamentarians, the judiciary, Mäori, civil society, vulnerable groups, the business community and the media. The Steering Group might establish thematic or other working groups. Broadly, the Steering Group will help the focal agency prepare and consider a baseline study (see below), develop priorities and strategies, identify key components of the NPA and, in due course, comment on drafts of the NPA.

Baseline study (or national human rights status report)

At an early stage, the focal agency will have to prepare a baseline study that sets out the existing human rights context in New Zealand. This need not be a scholarly and original piece of work; rather, it could pull together existing information and data (from government, NHRIs, NGOs, UN treaty-bodies etc). It is difficult to see how a NPA can plot the way forward without the focal agency first establishing roughly where the New Zealand human rights environment is today.

241. Perhaps the most finely balanced judgement to make about the NPA proposal is selection of the appropriate focal agency responsible for the initiative on a daily basis. Experience overseas gives no clear guidance on this issue. In Australia and Norway, the process was led by the government. In the Philippines and Mexico, NHRIs played the central role. In some other cases, it is difficult to identify a single lead agency (South Africa). Significantly, however, even if the lead agency was not governmental, invariably government was intimately involved in the NPA process.

242. In the New Zealand context, there are two main candidates for the focal agency. First, a department of government (e.g. Ministry of Justice, DPMC, MFAT) and second the proposed new NHRI. With one important qualification, the NHRI would be the most appropriate focal agency for the development of New Zealand's NPA. Elsewhere in this report, it is noted that neither the Human Rights Commission nor human rights have a high profile in New Zealand. To address this state of affairs this report suggests measures, including institutional reforms. Accordingly, it would be appropriate to give the new NHRI primary responsibility for the NPA because the initiative provides the organisation with a unique opportunity to raise its public profile, build its networks, and shape the human rights culture of New Zealand. Successful completion of this task would firmly establish the new organisation as the country's pre-eminent and indispensable human rights agency.

243. The qualification to the above recommendation is that, if the NHRI is appointed focal agency, nonetheless senior representatives of government must be very closely involved at all stages of the NPA process. Inevitably, many elements of

the NPA, as finally adopted, will require governmental action or endorsement. It is critical, therefore, that government has a sense of 'ownership' of both the NPA process and outcome. Thus, it is only recommended that the NHRI is appointed focal agency, provided senior governmental representatives remain closely engaged throughout the process.

244. Given the consultative nature of the NPA process, it is anticipated that it will take between 12-18 months from beginning to end. It should be emphasised that the project's success will depend upon the availability of adequate resources. In this context and considering the need to make progress with creation of the new NHRI, planning for the NPA should commence in late 2000 so that funding can be secured for the 2001-2002 fiscal year. This would enable the NPA to be completed by December 2002.

Summary of recommendations:

(i) The Government to initiate a process for the consultative preparation of a National Human Rights Plan of Action (NPA) in accordance with the Vienna Declaration and Programme of Action (1993). A NPA is a state's national strategy for the greater promotion and protection of human rights. The consultative preparation of a NPA can raise awareness of, and support for, human rights within government and the wider community. It can be a tool of sound public administration and good governance, leading to a stronger rule of law, greater national cohesion and respect for diversity, and an enhanced quality of life. A NPA should effectively address the concerns of vulnerable groups.

(ii) To be effective, the NPA will require:

a) that all levels of government, including the highest, make a genuine and sustained commitment to the project's success;

b) adequate resources; and

c) wide public consultation.

(iii) The new NHRI proposed in this report should be the focal agency with primary responsibility for driving the NPA. A high-level, broad-based Steering Group should support the focal agency in this regard. Since many elements of the NPA, as finally adopted, will require governmental action or endorsement, senior representatives of government must be closely involved at all stages of the NPA process.

APPENDIX

Consulted Groups/Individuals

Individuals

Barnett, Tim – Chair of Justice and Electoral Select Committee
Bathgate, Susan – Complaints Review Tribunal
Bedggood, Professor Margaret
Bell, Sylvia – Office of the Race Relations Conciliator
Brereton, Ross – Human Rights Commissioner
Bulog, Gary – Office of the Privacy Commissioner
Butler, Andrew
Butler, Petra
Chen, Mai
Chiam, Sou Hong – Human Rights Commission
Dalziel, Hon Lianne – Minister of Immigration
Dodds, Sue
Dyson, Ruth – Minister for Disability Issues
Elwood, Sir Brian – Chief Ombudsman
Epati, Semi
Fenwick, Mark
Franks, Stephen – ACT Justice spokesperson
Goddard, Justice Tom
Gregg, Catherine – Office of the Health and Disability Commissioner
Handley, Richard – Human Rights Commission
Harre, Hon Laila – Minister of Youth Affairs and Women's Affairs
Hart, Rose
Holden, Anne – National Council of Women in NZ
Holden, Caroline – Ministry of Women's Affairs
Hoskings, Peter
Huscroft, Grant
Jefferies, Pamela
Joychild, Francis
Keith, Sir Kenneth
Koopu, Areta – Human Rights Commissioner
Ladley, Andrew – Independent Adviser to the Deputy Prime Minister

Lakshman, Karun – NZ Federation of Ethnic Councils
Lawrence, Chris – Proceedings Commissioner
Le Mesurier, Rachael - Citizens Advice Bureaux Inc
Lee, Melissa – Asia Vision
Lee, Sandra – Associate Minister of Mäori Affairs
Longworth, Elizabeth
MacCormack, Kevin - NZ Council for Civil Liberties
Mahony, Judge
Marshall, Deborah – Office of the Privacy Commissioner
McBride, Tim
McClay, Roger – Commissioner for Children
McNaughton, Trudi – Equal Employment Opportunity Trust
Newton, Bobby – Human Rights Commission
O'Regan, Sir Tipene
O'Shea, Sue – IHC NZ Inc
Paterson, Ron – Health and Disability Commissioner
Perese, Simativa
Prasad, Rajen – Race Relations Conciliator
Quentin-Baxter, Alison
Radford, Brenda – Office of the Race Relations Conciliator
Reeves, Sir Paul
Rishworth, Paul
Robertson, Justice Bruce
Robson, Matt – Coalition Consultation Partner on Justice issues
Ross, Jim – NZ Age Concern
Roth, Paul
Rushworth, Geoff – The Actuary
Satyanand, Justice Anand – Ombudsman
Shaw, Tony
Shueng, Wong Liu – Office of the Race Relations Conciliator
Simpson, Ced - Amnesty International NZ
Singham, Mervin – Office of the Race Relations Conciliator
Slane, Bruce – Privacy Commissioner
Smith, William – Auckland Refugee Council
Stevens, Bob
Stewart, Blair – Office of the Privacy Commissioner

Tanczos, Nandor – Green Party
Thompson, Rebecca – NZ Foundation for the Blind
Tuilotolava, Mary
Turia, Hon Tariana – Associate Minister of Mäori Affairs
Wallace KNZM, Hon Justice John
Whiteford, Geraldine – Human Rights Commission
Wicks, Wendi – Assembly of People with Disabilities
Williams, Hare
Wilson, Hon Margaret – Associate Minister of Justice

NGOs/Government Departments
Auckland Council for Civil Liberties
Caritas Aotearoa NZ
Citizens Advice Bureaux Inc
Department for Courts (Tribunals Division)
Department of Internal Affairs (Ethnic Affairs)
ECPAT NZ
Mäori Women's Welfare League
Ministry of Education
Ministry of Foreign Affairs and Trade
Ministry of Health
Ministry of Justice
Ministry of Social Policy
Ministry of Women's Affairs
Ministry of Youth Affairs
National Women's Refuge Inc
Newspaper Publisher Association
NZ Employers Federation
NZ Law Society
NZ Law Society's Human Rights Committee
NZ Society for the Intellectually Handicapped (Inc)
QWIL
Refugee and Migrant Services
Royal NZ Foundation of the Blind
State Services Commission
Te Puni Kokiri

The Salvation Army
The Treasury
United Nations Association of NZ (Inc)
Wellington Women's Lawyers Association
Women's Health Action Trust
Youth Law Project