

KIDS MISSING OUT



It's time to make progress
on **children's rights**

A summary of the first twenty years of the UN Convention
on the Rights of the Child in Aotearoa New Zealand.

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Foreword

This year marks twenty years since New Zealand ratified the United Nations Convention on the Rights of the Child (UNCROC). At the time of ratification, in 1993, the then Minister of External Relations and Trade, Rt Hon Don McKinnon stated:

*Although no legislative changes were necessary to enable the Government to take this step, future policy development affecting children – including proposals for new legislation – will need to be considered in the light of the Convention. **The Convention will help ensure that the interests of the children are fully considered in the future.***¹

Kids Missing Out examines the extent to which these aspirations under UNCROC have been met in Aotearoa New Zealand. Unfortunately New Zealand has been slow to realise the potential offered by UNCROC to enhance the position of children in New Zealand society. This matters because the continued failure to meet obligations under UNCROC has very real, everyday consequences for children, individually and as a group. It also matters because it is harmful to New Zealand's standing in the international community. Our country has often emphasised that it takes seriously human rights and its commitments under international human rights conventions.

UNCROC aims to ensure that every child has a healthy, happy childhood. The fact that over 190 countries in the world have ratified it underscores the universality of what is needed for every child to have "... a life of dignity and self-fulfilment."² This means: having enough food; access to medical care; being kept safe; spending time with, and being guided by, parents and family; playing and being with friends; being listened to and treated with respect; going to school; having a warm place to live; and being part of a supportive community.

Since New Zealand ratified UNCROC and promised to respect the human rights of all children in New Zealand an entire generation has grown up. Over that time, it seems, it has been too easy to overlook what we promised as a nation we would provide and do for all children in New Zealand.

There have been some positive advances such as the repeal of section 59 of the Crimes Act removing the entitlement of parents to use physical force to punish or correct their children, and the Children's Commissioner's Act 2003 which gives limited statutory recognition UNCROC. However, overall UNICEF believes progress in the implementation of UNCROC has been patchy and too slow. Increasingly, it has become clear that actioning what was promised in UNCROC will not happen in New Zealand without concerted action by Parliament and all government entities.

Our hope in publishing this report is that it will prompt some reflection and, more importantly, create the action necessary to ensure that all children growing up in New Zealand have their rights respected and protected to the fullest extent possible.

Dennis McKinlay
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¹ Media release from the Minister of External Relations and Trade, 13 March 1993.

² Nelson Mandela, taken from a statement on Building a Global Partnership for Children, Johannesburg, 6 May 2000, quoted in foreword to third edition of *Implementation Handbook for the Convention on the Rights of the Child*, unicef, p xiii.



The key recommendations of Kids Missing Out –

Kids Missing Out reflects on what has been done to realise the rights of children since New Zealand ratified the United Nations Convention on the Rights of the Child (UNCROC) 20 years ago. Up until now progress has been slow, especially in responding to the recommendations of the United Nations Committee on the Rights of the Child.

What is needed is a way to ensure, from now on, that UNCROC rights become real in New Zealand.

Kids Missing Out calls for:

1. A permanent mechanism to facilitate and co-ordinate UNCROC implementation.

New Zealand needs a framework or group that allows people to work together to ensure children's rights are met through implementing UNCROC. It is suggested that something similar to the mechanism under the United Nations Convention on the Rights of Persons with Disabilities be established for children.

2. An UNCROC Plan of Action, which identifies those areas where children's rights are not being met and sets out:

- what needs to be done to realise and protect the rights of children
- who will do the work required
- timeframes for when rights will be realised or protected
- how progress will be monitored.

3. Two specific areas of inconsistency with UNCROC to be addressed:

- i. Adoption law reform;
- ii. The upper age of the Children, Young Persons and their Families Act 1989 to be raised to 18 years.



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Introduction

The United Nations Convention on the Rights of the Child (UNCROC) is the most widely ratified human rights treaty in history. With over 190 States Parties it demonstrates universal recognition that children warrant special protection and care, and that they must be treated with dignity and respect as human beings.

While UNCROC recognises the inherent vulnerability of children and the importance to their wellbeing of realising economic and social rights, it gives equal weight to their civil and political rights, particularly their right to have a say in matters that affect them. Its basic aim is to ensure, through social and legal reform, that every child has a happy, safe and fulfilling childhood and acquires the habits of freedom and productive citizenship.

Twenty-three years ago the editor of The Dominion newspaper described the Convention as “...a useful and comprehensive touchstone for children’s rights both here and abroad.”³ At the same time a caution was issued: “Noble declarations, however, achieve nothing without the determination to translate them into action.”⁴

Although rights themselves are abstract concepts, the effect of recognising them is not. Meeting children’s rights means creating a society where every child is well cared for, has friends and a chance to play, and gets to know and be part of a family and community with the freedom to enjoy their own culture and religion. Through fully complying with UNCROC, every child in New Zealand will have an education enabling their personality, talents and abilities to develop to their fullest potential, no child will have their physical, mental, spiritual, moral or social development limited by, for example, an inadequate standard of living, and each child will enjoy the highest possible standard of health and be able to access treatment and care when ill.

To achieve these aims, and give effect to children’s rights, mechanisms must be established to implement the Convention. Respect for children’s rights needs to be an integrated part of policy and legislative development, as well as service delivery. This requires planning with specific goals and targets, reporting deadlines and transparent monitoring of progress.

There have been positive developments since ratification: section 59 of the Crimes Act has been repealed, the Care of Children Act 2004 covers children up until they are 18, there are free health visits for under six year olds and the introduction of the Working for Families package has helped some low income families. Nevertheless, overall progress on implementing UNCROC has been slow.⁵

Twenty years on an estimated 270,000 New Zealand children live in poverty which, from the child’s point of view, means things like not being able to have friends to a birthday party, go to the doctor or get medicine, go on school trips or taking part in music, dance, art, kapa haka and sport.⁶ There have also been significant increases in hospital admissions for children suffering from poverty-related conditions especially rheumatic fever⁷ and skin conditions,⁸ and high rates of child maltreatment which are known to be associated with poverty.⁹

³ Editorial, The Dominion, October 4, 1990.

⁴ Ibid.

⁵ For an overview of UNCROC progress since 2011 see the UNCROC Monitoring Group’s submission to NZ’s second (13/14) Universal Periodic Review available on the Human Rights Commission’s website at <http://www.hrc.co.nz/international-human-rights-new/upr-1314-nzs-second-universal-periodic-review/civil-society-and-ngo-submissions>

⁶ Children’s Commissioner’s Expert Advisory Group on *Solutions to Child Poverty* *Solutions to Child Poverty in New Zealand: Evidence for Action* Children’s, December 2012, page 9.

⁷ Milne, R., Lennon, D., Stewart, J., Vander Hoorn, S., Suffham, P. (2012) *Incidence of acute rheumatic fever in New Zealand children and youth*. Journal of Paediatrics and Child Health, 48, 8, 685-691.

⁸ Children’s Social Health Monitor 2012 update, page 44. Available at: http://www.nzchildren.co.nz/document_downloads/Childrens%20Social%20Health%20Monitor%202012%20Update.pdf.

⁹ Brooks-Gunn, J., Schneider, W., Waldfogel, J. (2013) The Great Recession and the risk for child maltreatment. Child Abuse and Neglect, 37, 10, 721-729. See also Wynd, Donna *Child abuse: an analysis of Child Youth and Family data* CPAG, July 2013. Available at <http://www.cpag.org.nz/assets/Publications/130729%20CPAG%20Child%20Abuse%20Report%202%20July%202013.pdf>.

We live in a country which, despite being committed to upholding human rights, still allows situations to arise where children are hurt at work,¹⁰ detained in police cells¹¹ and tried in the adult justice system.¹² Adoption of children is governed by legislation that dates back to the 1950s and reflects the social mores of that time. They can be adopted without having a say in the decision and they cannot access information about their natural parents. Many children experience and witness violence. In 2010/11 96,627 children (aged 0-16) were present or living with a victim of family violence when Police attended¹³, and rates of child abuse and neglect are amongst the highest in the OECD.¹⁴ Poor health undermines the quality of life for many children, especially Māori and Pacific children¹⁵, and access to health services and education can vary across the country and between children with different needs.¹⁶

Implementation of UNCROC is an evolving process influenced by a variety of factors. Although some progress has been made many of the “noble declarations” contained in the Convention still need to be translated into action. It is timely therefore, 20 years after ratifying UNCROC, to reflect on New Zealand’s progress, draw lessons from the past and think about what might be done to better meet the aspirations agreed to in 1993. This report provides some background on UNCROC and the reporting process as well as an assessment of New Zealand’s record on children’s rights. Consideration is then given to some of the challenges to implementation and some possible solutions. As recommended by the United Nations Committee on the rights of the Child (the Committee), New Zealand needs to, as a matter of priority, establish a permanent mechanism to implement the Convention and ensure proper attention is given to respecting the rights of New Zealand children.

¹⁰ http://www.dol.govt.nz/publications/research/schoolchildren-in-paid-employment/youthreport_01.asp.

¹¹ Independent Police Conduct Authority, Human Rights Commission, Children’s Commissioner *Joint Thematic Review of Young Persons in Police Detention*, 2012.

¹² New Zealand’s youth justice system only applies to those aged up to 17, not all those under 18 as the Convention requires and children as young as 12 years can be tried for certain serious crimes in the adult justice system.

¹³ http://www.areyouok.org.nz/files/statistics/ItsnotOK_recent_family_violence_stats.pdf.

¹⁴ Brooks-Gunn, J., Schneider, W., Waldfogel, J. (2013) *The Great Recession and the risk for child maltreatment*. *Child Abuse and Neglect*, 37, 10, 721-729.

¹⁵ Above, n8.

¹⁶ For example children in care can have difficulty accessing health and education services. See Atwool, N *Children in Care: a report into the quality of services provided to children in care* Office of the Children’s Commissioner, September 2010, page 223 and recommendation 18.



UNCROC and the reporting process

THE STATUS OF UNCROC IN NEW ZEALAND LAW

When New Zealand ratified UNCROC in 1993 it took on an international legal obligation to implement UNCROC's minimum standards for children's rights. However, that did not automatically make UNCROC part of New Zealand's domestic law. In New Zealand law UNCROC should be taken into account but New Zealand does not have to comply with it. Although it is attached as a schedule to the Children's Commissioner Act 2003 this is for public information and reference purposes only.¹⁷

Parliamentary sovereignty means that laws can be passed in New Zealand that conflict with UNCROC. In such circumstances the domestic law prevails, even though that law may breach New Zealand's undertaking to abide by the Convention's principles. If there is any ambiguity in the law, the law should be interpreted in a way that is consistent with UNCROC¹⁸, to make real for children in New Zealand the rights set out in UNCROC. The presumption is that Parliament would not have intended to breach its own international legal obligations in passing a law.

By ratifying UNCROC New Zealand agreed with the United Nations and other countries that:

- the rights set out in the Convention would be implemented¹⁹
- everyone, adults and children alike, should know about what the Convention says and the principles it contains²⁰
- New Zealand will report regularly to the United Nations Committee on the Rights of the Child (the Committee) on what has been done to give effect to the rights in UNCROC and what progress has been made on children's enjoyment of their rights.²¹

PROGRESSIVE IMPLEMENTATION

UNCROC is founded on the belief that children have the same inherent dignity and equal and inalienable rights as all other members of the human family²² and as a party to the Convention New Zealand has agreed, under article 4, to take all appropriate legislative, administrative and other measures to implement these rights.

New Zealand is obliged not only to protect children's welfare and interests but to proactively advance their rights, as set out in the Convention, to the fullest extent possible. This is known as "progressive implementation".

¹⁷ Children's Commissioner Act 2003, section 36.

¹⁸ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

¹⁹ UNCROC, Article 4.

²⁰ UNCROC, Article 42.

²¹ UNCROC, Article 44.

²² For the rationale behind the Convention see the preamble to UNCROC.

UNICEF has summed up the notion of progressive implementation as follows:

There are no specific right or wrong implementation measures, however the Convention should be the main benchmark and inspiration for all government action. In its reviews of States' reports, the Committee urges all levels of government to use the Convention as a guide in policy-making and legislation, to:

- Develop a comprehensive national agenda;
- Develop permanent bodies or mechanisms to promote coordination, monitoring and evaluation of activities throughout all sectors of government;
- Ensure that all legislation is fully compatible with the Convention and, if applicable the Optional Protocols, by incorporating the provisions into domestic law or ensuring that they take precedence in cases of conflict with national legislation;
- Make children visible in policy development processes throughout government by introducing child impact assessments;
- Analyse government spending to determine the portion of public funds spent on children and to ensure that these resources are being used effectively;
- Ensure that sufficient data are collected and used to improve the situation of all children in each jurisdiction;
- Raise awareness and disseminate information on the Convention and the Optional Protocols by providing training to all those involved in government policy-making and working with or for children;
- Involve civil society including children themselves – in the process of implementing and raising awareness of child rights; and
- Set up independent national offices – ombudspersons, commissions, focal points within national human rights institutions, or other institutions – to promote and protect children's rights.²³

THE REPORTING PROCESS

Under the Convention States parties agree to submit periodical reports to the Committee on the Rights of the Child (the Committee). New Zealand has filed three UNCROC reports since ratification. The Committee considered New Zealand's first report in January 1997, the second in October 2003, and the third (a combined third and fourth report) in January 2011.

The Committee is made up of eighteen independent experts on children's rights who serve in their personal capacity and are drawn from many different nationalities and professional backgrounds. The function of the Committee is to examine country reports in order to assess what progress they have made in realising their obligations under the Convention.²⁴ As well as referring to the government report, the Committee seeks further information on some topics, asks questions, and looks to the issues raised in the independent reports filed by non-government organisations²⁵. After considering the various reports submitted to it the Committee issues its

²³ See UNICEF webpage on implementation http://www.unicef.org/crc/index_30208.html.

²⁴ UNCROC, Article 43.1.



concluding observations, which note positive developments and areas of concern, and make recommendations in relation to the reporting country's performance.

There is no mechanism in UNCROC that enables the United Nations or its committees to force New Zealand to take, or abstain from taking, any action. It has no power, for example, to make a country pass or repeal any law or change any policy in order to bring itself into full compliance with UNCROC.

Neither is there currently any way in which a child (or a person acting on behalf of a child) can bring a complaint to the Committee in respect of any non-compliance although there is currently a move to introduce a "communications procedure" whereby complaints can be made by or on behalf of children, in respect of alleged breaches of UNCROC and the matter will be considered by the UN Committee.²⁶ The government has not yet made a decision whether to ratify this Optional Protocol.

The Committee recommended in 1997 that New Zealand collect data in respect of complaints registered by children but there are few effective complaints mechanisms available to children and information on the number and nature of complaints is rarely publicised.

Over time the Committee has built up procedures and practices in relation to the reporting process. With initial comments on a country's progress the Committee tends to raise only general concerns and make suggestions and recommendations advising what actions are necessary to bring that country into compliance. If the Committee's recommendations are not implemented, the Committee will usually use stronger language expressing "disappointment", "deep disappointment", "concern" or "serious concern". This has been the pattern of the Committee's responses to New Zealand's UNCROC reporting, with the Committee making recommendations on particular topics each time New Zealand has reported and using progressively stronger language to express their concerns.²⁷

Other UN Treaty Bodies can comment on matters pertaining to children's rights. For example, the Committee on Economic, Social and Cultural Rights made some substantive comments and recommendations on the situation of bullying in schools in its most recent concluding observations on New Zealand. The Human Rights Council could also make comment and adopt recommendations related to children in New Zealand too.²⁸

²⁶ The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure was adopted by the General Assembly of the United Nations in December 2011 and opened for signature in February 2012. It will come into force after ten countries have ratified it. For updated status see: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=no-IV-11-d&chapter=4&lang=en>.

²⁷ The Committee's concluding observations on New Zealand are available on the OHCHR website: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx.

²⁸ Progress on children's rights is also being considered as part of NZ's 13/14 UPR, see above, n5.



NEW ZEALAND'S RECORD ON UNCROC

Since 1993 the Committee has made a range of recommendations as to how New Zealand might better implement the Convention raising, often repeatedly, over thirty-five different issues. Some of these recommendations have related to specific issues such as the priority given to children in budget allocations, child poverty, disparities in child health, education and welfare, adoption, child abuse and neglect, child participation, refugee children, the age of criminal responsibility, and the recovery and re-integration of child victims. Other recommendations have been about the general measures of implementation that have been developed by the Committee over the years and provide guidance on what it takes to give effect to UNCROC.

GENERAL MEASURES OF IMPLEMENTATION

The general measures are fundamental to implementation of UNCROC because they provide a starting point from which areas of non-compliance can be identified and steps towards full compliance can be undertaken and monitored.

In order to implement the Convention, States need to know what is going on for children (by collecting good information and data, including listening to children), plan to advance children's rights, and have the processes and procedures to put those plans into action. Conversely, without adequate attention being paid to these fundamentals it is extremely difficult to progress specific rights, or to identify and address shortcomings in children's enjoyment of their rights.

While there is a degree of flexibility as to how the Convention should be implemented the Committee has made it clear that States Parties need to be proactive. The Committee has recommended that New Zealand:

- incorporate UNCROC into domestic law
- review all legislation, policy and practice to identify areas of non-compliance with UNCROC
- develop a global policy and plan of action to implement UNCROC
- ensure local and regional government know about and are meeting their obligations to implement the Convention
- make sure government agencies co-ordinate their work with and for children
- collect disaggregated data on children and their use of complaints mechanisms
- work with business to ensure children's rights are respected
- give priority to children in budget allocations and address child poverty
- take effective steps to raise awareness of the Convention, and
- extend the Convention to Tokelau.

During consideration of New Zealand's third and fourth UNCROC report the government clarified that the Ministry of Social Development (MSD) is the department responsible for leading implementation of the Convention and that New Zealand's approach is to use a collaborative work programme, overseen by a forum of Social Sector Chief Executives, rather than develop a national plan of action²⁹. The Children's Commissioner has a statutory responsibility to monitor and promote UNCROC and, since the 2011 report, that Office has established

²⁹ CRC/C/NZL/Q/3-4/Add.1 *Written replies by the Government of New Zealand to the list of issues (CRC/C/NZL/Q/3-4) related to the consideration of the combined third and fourth periodic reports of New Zealand (CRC/C/NZL/3-4)*, 15 December 2010, paras 1-5. Available on the MSD website <http://www.msd.govt.nz/what-we-can-do/children-young-people/uncroc/uncroc-examination-info.html>.



an UNCROC Monitoring Group, which has engaged with the government via a Deputy Chief Executives Social Sector Forum. The membership and workings of this group are discussed below.

RESERVATIONS

Article 51 of UNCROC allows countries, at the time of ratification, to advise the United Nations of reservations. A reservation is a statement that a country is unable to comply with a specific aspect of the Convention. Sometimes a country will enter a *general reservation*, which applies across all UNCROC articles. More often, a country will enter a *limited reservation*, which applies to a particular article or to part of an article.

New Zealand retains all three of the reservations it entered into upon ratifying the Convention. These reservations specifically limit the rights of some children and in doing so risk calling into question New Zealand's commitment to the object and purpose of UNCROC. New Zealand continues to:

- reserve the right to deny children without proper immigration status protections and services, such as education and healthcare (New Zealand's general reservation)
- assert current protections for child workers are sufficient, therefore nothing more needs be done (reservation to Article 32(1) and (2))
- allow those under eighteen to be mixed with adults in some places of detention (reservation to Article 37(c)) .

Reserving the right not to comply with the Convention's standards in these three respects means that New Zealand is not obliged to address the underlying policy issues, which can have serious ramifications for the children affected. Under the general reservation New Zealand is not obliged to provide education, health care, housing and other social assistance to children in New Zealand who do not have the necessary immigration status. It is not known how many children are affected by the general reservation but in the first full year of an electronic enrolment and tracking system in schools (introduced in 2007) approximately 1500 children were unable to present the documentation required for enrolment (although not all of those would have been cases where the child's immigration status was in question).³⁰ Recent changes have made it easier for children without the necessary immigration status to attend school³¹, and guidelines are in place to assist with access to health care³² but government has indicated that further work is required before it will be possible for New Zealand to remove the reservation³³ which means not all children within New Zealand are covered by the Convention.

Improvements have also been made in relation to children who work through initiatives under the Children's Employment Work Programme.³⁴ Nevertheless a 2010 research report found that school children are more vulnerable to economic exploitation and injury than older workers.³⁵ In the year before that research was published one-sixth of the 280,000 secondary school students in part-time work reported being injured at work. This amounts to approximately 19,000 young people, one-sixth of whom had injuries serious enough to warrant a visit to a medical professional or hospital.³⁶

³⁰ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention, third and fourth periodic reports of States parties due in 2008: New Zealand*, CRC/C/NZL/3-4, page 10, para 28.

³¹ Section 352 Immigration Act 2009.

³² The Health and Disability Services Eligibility Direction 2011, <http://www.health.govt.nz/new-zealand-health-system/eligibility-publicly-funded-health-services/eligibility-direction>.

³³ New Zealand's third and fourth consolidated report to the Committee on the Rights of the Child, 2008, paras 1.2 and 1.3. Available on the MSD website <http://www.msd.govt.nz/what-we-can-do/children-young-people/uncroc/uncroc-examination-info.html>

³⁴ Above, n32, para 1.18.

³⁵ http://www.dol.govt.nz/publications/research/schoolchildren-in-paid-employment/youthreport_01.asp.

³⁶ Ibid.



The risks of age-mixing in places of detention were tragically highlighted in 2009 by the killing of Liam Ashley by an adult prisoner while they were being transported in the same vehicle from court to prison.³⁷ Again work has been done to reduce the amount of age mixing that occurs and to mitigate the risks associated with the practice³⁸ but it still happens and New Zealand's reservation remains in place.

NON-DISCRIMINATION

The Committee has long been concerned about the unequal enjoyment of rights by children in New Zealand despite "non-discrimination" being a fundamental general principle under Article 2 of UNCROC. Although there has been some progress made in health and education, significant inequities remain, particularly in these areas of children's lives. Māori and Pacific children and those living in deprived areas experience a disproportionate burden of morbidity and mortality, for example.³⁹ Addressing these inequities, especially child poverty and its impact, is crucial to implementation of UNCROC and to achieving positive outcomes for children.

CHILD POVERTY

Three Articles of UNCROC highlight children's basic rights to health, social security and a standard of living adequate to their physical, mental and social development⁴⁰. New Zealand has not entered reservations to these Articles (except in respect of children who do not have New Zealand immigration status).

In its first set of concluding observations on New Zealand (1997), the Committee expressed concern at the lack of a concerted strategy to address the needs of children being brought up in single parent families, and also expressed concern that Māori children lagged behind in most statistics as to children's health and wellbeing.⁴¹ In its concluding observations on New Zealand's second periodic report (2003) the Committee voiced concern that, despite the persistence of child poverty, New Zealand had not taken a comprehensive survey of the impact of economic reforms on children and recommended that the government prioritise budgetary allocations to ensure the rights of children (particularly those in economically disadvantaged groups) to the maximum extent of available resources. It again referred to the particular disadvantage suffered by children in single parent families and Māori and Pacific children. The Committee reiterated these concerns in its combined third and fourth report (January 2011). While commending New Zealand on introducing tax credits for working families, the Committee expressed concern that budgetary processes did not enable identification of the children in greatest need and that about 20 percent of New Zealand children were living below the poverty line. It recommended that government take all necessary measures to provide appropriate support to allow disadvantaged families and their children to move out of poverty in a sustained way.⁴²

Despite the strong recommendations of the Committee in each of its three reports on New Zealand, and a wealth of data showing that child poverty is detrimental to the health and wellbeing of the children concerned⁴³, at least a fifth of New Zealand children continue to live in poverty and the groups most affected remain the children of single parent families dependent on social security, and Māori and Pacific families.

Twenty years after ratification of UNCROC, and 17 years after the UN Committee's first report on New Zealand,

³⁷ See for example *Investigation by John Belgrave, Chief Ombudsman and Mel Smith, Ombudsman of the Department of Corrections in relation to the transport of prisoners*, 29 August 2006.

³⁸ Above, n32, paras 1.2–1.26.

³⁹ *Children's Social Health Monitor 2012 update*, page 41. Available at: http://www.nzchildren.co.nz/document_downloads/Childrens%20Social%20Health%20Monitor%202012%20Update.pdf.

⁴⁰ UNCROC, Article 24 (Health and Health Service), Article 26 (Right to benefit from social security) and Article 27 (Right to adequate standard of living).

⁴¹ CRC/C/15/ADD.71, *Concluding Observations of the Committee on the Rights of the Child: New Zealand*, 24 January 1997, paras 15 and 18.

⁴² CRC/C/15/ADD.216, *Concluding Observations of the Committee on the Rights of the Child: New Zealand*, 19 January 2011 paras 16, 17, 42, 43.

⁴³ See reports from the Child Poverty Action Group at <http://www.cpag.org.nz>, Every Child Counts at <http://www.everychildcounts.org.nz>, and the Office of the Children's Commissioner's Experts Advisory Group report on Solutions to Child Poverty, Above, n6.



child poverty has remained low on the priorities of successive governments, with responses tending to illustrate shortcomings in the ability of government processes to take into account the interests of children. In 2012 the Children's Commissioner's Expert Advisory Group on Child Poverty (EAG) made 78 recommendations for alleviating child poverty in New Zealand⁴⁴. The government has issued a brief response that identifies a range of activities that will help to reduce the impact of poverty on children and stated that its' "*consistent priorities have been to build a stronger economy, support people off welfare and into work, and to protect vulnerable children*"⁴⁵. It has not committed to implementing the EAG's recommendations.

CHILD PARTICIPATION IN DECISION-MAKING

Child participation, another of the Convention's general principles, is also an area where the Committee has recommended improvement. Initiatives to allow children to have a say in matters that affect them have not always been sustained, there are very few processes for eliciting children's views on legislative and policy development, and children's ability to participate in judicial and administrative proceedings is variable. For example, under-18s have no say in relation to an application for their adoption, and changes in the law to come into force in 2014 will limit the appointment of lawyers for children whose parents are in dispute about their care and upbringing.⁴⁶ The role of such lawyers has been changed as well – while they still have to advise the court of their young client's views they will be expected to advise the court on the child's best interests rather than pressing for an outcome consistent with the child's wishes. This new role does not fully meet the requirement of Article 12 of UNCROC that children must have the opportunity to participate in court proceedings either directly or through a representative.⁴⁷

HARMONISATION OF LEGISLATION

Progress in harmonising New Zealand law with the Convention has been mixed. There is increasing recognition of childhood extending to 18 years of age with both the Care of Children Act 2004 and the Vulnerable Children Bill 2013 adopting this definition. In contrast the Children, Young Persons and their Families Act 1989 treats 17 year olds as adults in both child protection and youth justice laws.

Another area of good progress has been the repeal of section 59 of the Crimes Act 1961, which had allowed parents to use reasonable force to discipline their children (although this resulted from a private member's bill not from a government initiative).

In other areas inconsistencies between domestic law and the Convention have not been remedied. For example, adoption law is based on an Act passed in 1955 which is out of touch with modern attitudes and values and which, in several of its provisions, discriminates on grounds which are unlawful under the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990. The Law Commission, the judiciary and persons affected by adoption have all called for reform. Despite this, and recommendations made in 2003 and 2011⁴⁸ by the Committee for reform, the changes needed to bring adoption legislation into line with UNCROC have not been made. Similarly, the government elected in 2008 decided not to bring 17 year olds within the ambit of care and protection and youth justice provisions when the Children, Young Persons, and Their Families Amendment Bill (No6) was discharged in 2012.

⁴⁴ Above, n6.

⁴⁵ Government Response to the Children's Commissioner's Expert Advisory Group on Solutions to Child Poverty, 28 May 2013, page 1. Available at <http://www.beehive.govt.nz/gallery/child-poverty>.

⁴⁶ Family Court Proceedings Reform Bill 2012.

⁴⁷ New section 7 of the Care of Children Act 2004 inserted by section 5 Care of Children Amendment Act (No 2) 2013.

⁴⁸ CRC/C/15/Add 216, *Concluding Observations of the Committee on the Rights of the Child: New Zealand* 3 October 2003, paras 33,34; CRC/C/NZL/CO/3-4, *Concluding Observations of the Committee on the Rights of the Child: New Zealand* 4 February 2011, paras 32,33.



The reality is that in New Zealand, in some instances there has actually been regression in protecting children's rights through legislation being passed that is inconsistent with the Convention. For example, in 2010 New Zealand, which already had an internationally unacceptable age of criminal responsibility, lowered the age of prosecution and allowed criminal proceedings to be brought against some 12 and 13 year olds.⁴⁹ Previously only 14 year olds could be prosecuted and brought before the Youth Court except for the most serious crimes of murder and manslaughter. Changes to bail laws that came into effect in September 2013 give the police a new power to arrest children aged 10-16 years for breach of bail.

Why has progress on UNCROC been so slow?

The process of reporting to the Committee offers an opportunity for self-review and to seek expert advice about how to translate the rights agreed to under the Convention into a reality for children. New Zealand has a good record of ratifying international human rights treaties and New Zealand delegations to the various UN Human Rights Committees have consistently made an opening statement that it takes its human rights obligations seriously. New Zealand's poor record in meeting the recommendations of the Committee is therefore somewhat puzzling. Why have successive governments either ignored or equivocated in responding to the Committee's advice and why has such a low priority been placed on implementation of children's rights?

There is likely to be a range of opinions as to why New Zealand's performance has not matched its rhetoric. It could be argued that the diffidence successive governments have shown towards UNCROC recommendations may be explained, in part, by New Zealand's general approach to its human rights obligations. Former Attorney-General and Prime Minister, Sir Geoffrey Palmer, has made the following observation:

New Zealand has always prided itself on respecting fundamental human rights ... the rhetorical political tendency was to say that New Zealand always honoured fundamental human rights without looking to see whether the claim was valid. Too often it was not. Administrative convenience, a tendency to trust the state and the use of its powers, and a homogenous political culture with a unicameral legislature made New Zealand in historical terms rather self satisfied and uncritical about rights.

This approach to human rights obligations is compounded, in the case of children's human rights, by the tendency to overlook or override children's interests in political and policy debates. Children cannot vote and have little influence on decisions of local or central government. It follows that changes have to be made to legislative and policy development processes if New Zealand is to meet its obligations under the Convention and its promise to children. Attitudes towards implementation need to change and effective mechanisms to implement the Convention need to be established.

⁴⁹ Children, Young Persons, and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010.

⁵⁰ Palmer, Geoffrey, "Foreword" in Butler and Butler *The New Zealand Bill of Rights Act: A Commentary*, quoted in Krommendijk, J Can *Mr Zaoui* freely cross the foreshore and seabed? *The effectiveness of UN human rights monitoring mechanisms in New Zealand* (2012) 43 VUWLR 579, page 609.



Attitudes towards UNCROC implementation

COMPLIANCE VERSUS IMPLEMENTATION

New Zealand's official position is that it will not sign international treaties unless satisfied that its laws, policies and practices are fully compliant. The logic that follows is that, because New Zealand fully complies on ratification, nothing more needs to be done to implement the obligations undertaken. This view has tended to prevail even when the reality demonstrates this is not the case.

Concluding observations are seldom raised or debated in parliament, or taken into account by government or the courts.⁵¹ There is no requirement that concluding observations of Treaty Bodies such as the Committee on the Rights of the Child are formally tabled in Parliament, and New Zealand does not have a Human Rights Select Committee. If human rights obligations are considered during the policy development process it is usually to assess compliance or to avoid a breach rather than considering how the initiative might further the implementation of human rights.

...human rights obligations are generally only taken into account in the government policy-making process at a relatively late stage. When they are considered at an early stage, which seldom happens, the practice is "patchy, uneven and unsystematic" and dependent upon a particular government official or minister. The process operates primarily in a negative way, whereby it is considered whether the Bill does not contravene international obligations.....In addition, human rights issues are only considered rather superficially. This is what Claudia Geiringer and Matthew Palmer termed a "checklist" approach to human rights protections.⁵²

This is as true for UNCROC as it is for the other human rights treaties to which New Zealand is a party. There has been little explicit acknowledgement that implementation of UNCROC is a useful means of enhancing child policy. As with other human rights instruments, UNCROC tends not to be used as a policy tool but rather, come time to report on New Zealand's progress, initiatives are selected to fit the reporting guidelines. Consequently the measures reported on do not tend to truly reflect specific rights, the indivisible and interdependent nature of children's rights or the Convention's general principles. This is because often the legislative, policy and practice initiatives that are reported on will have been developed without applying UNCROC.

Such an approach is contrary to the United Nations expectation that parties to international human rights treaties will adopt a course of progressive implementation of the protections and provisions agreed to. Article 4 requires that parties to *UNCROC undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in (UNCROC)*. The Convention is a living document. If all ratifying countries were fully compliant at the time of ratification, ratification would serve little purpose.

The claim of full compliance at the time of ratification became, through repetition, part of the government's received wisdom. It has engendered a sense of self-satisfaction that has stood in the way of any serious attempt to identify deficiencies in laws, policies and practices and it continues to influence government decisions. For example, one reason for the reluctance to withdraw the three reservations has been New Zealand's assertion that it wishes to ensure its laws, policies and practices are fully compliant before a reservation is withdrawn.

⁵¹ Krommendijk, J *Can Mr Zaoui freely cross the foreshore and seabed? The effectiveness of UN human rights monitoring mechanisms in New Zealand* (2012) 43 VUWLR 579, 583.

⁵² *Ibid*, page 587.



However, as noted above there are a number of areas where New Zealand does not fully comply with the Convention⁵³ and examination of the review undertaken prior to ratification indicates some serious shortcomings. In February 1989, before UNCROC was adopted by the UN General Assembly, New Zealand's Ministry of External Relations and Trade (MERT) sent a memorandum to government agencies forwarding them a copy of the final text of the Convention and asking them to look at those provisions relevant to their work and to assess whether any legislative changes were necessary to ensure compliance. Most government agencies were slow to respond to MERT's letter, and those that did respond, offered little information about steps had been taken to review the legislation and policies for which they were responsible to assess compliance.

The then Department of Social Welfare (despite being the government agency working at the front line on child welfare) took three years to respond and sent only a brief facsimile message saying they had no difficulty with ratification. The then Department of Labour opposed ratification on the grounds that New Zealand's employment law did not comply. The then Justice Department identified adoption law and age-mixing in prisons as areas where New Zealand law did not comply. The Human Rights Commission identified a number of areas of non-compliance including corporal punishment in the home and at school, school expulsion procedures, lack of religious freedom for children in prison, and the minimum age for joining the armed forces. New Zealand's first Commissioner for Children, who took office in early 1989, was not asked to be closely involved in the process.⁵⁴

However, more recently, there does seem to be increasing recognition that UNCROC can help to improve the lives of children. MSD say on their website:

*We want to make sure all New Zealand children get the best deal in life. It's in all of our interests to make this happen. UNCROC provides a good platform for this.*⁵⁵

Such recognition is to be strongly welcomed, especially as there are signs that it is beginning to influence legislative, policy and practice development. The 2012 Green Paper on Vulnerable Children referred to UNCROC⁵⁶ and the resulting Vulnerable Children Bill reflects many of the Convention's principles, especially clause 6 which identifies measures to promote the best interests of children and improve their well-being.

Although there would seem to be a gradual change in attitude towards UNCROC there is a need to continue raising awareness and understanding about the Convention, and to bring about a wider, more systemic attitudinal shift, especially amongst parliamentarians and government officials. This would help ensure the Convention is regarded not as a set of standards with which New Zealand already complies but as a living document; a set of aspirations and obligations which can be used to enhance the status and wellbeing of children.

ACCEPTING CRITICISM FROM THE COMMITTEE

Another consequence of New Zealand's position that it complies with human rights instruments is the assumption that it is above criticism from an international body. This defensive stance can be an obstacle to implementing UNCROC and it has gained some traction with members of the community who are resistant to the notion of children's rights. Such groups opposed the move to abolish corporal punishment in schools and in the home, for example.⁵⁷

⁵³ Examples include adoption law, the fact that neither the care and protection or youth justice systems apply to 17 year olds, and the inadequate standard of living for 270,000 children.

⁵⁴ It should be noted that the Commissioner did not have statutory functions relating to children's rights and UNCROC until 2003 when the Children's Commissioner's Act 2003 was passed.

⁵⁵ Ministry of Social Development at <http://www.msd.govt.nz/what-we-can-do/children-young-people/uncroc/how-uncroc-is-improving-the-rights-of-children-and-young-people-in-nz.html>.

⁵⁶ Ministry of Social Development *Every Child Thrives, Belongs, Achieves: the Green Paper for Vulnerable Children* 2011, page 3.

⁵⁷ Wood, B., Hassall, I., Hook, G., Ludbrook, R (2008) Unreasonable force: *New Zealand's journey towards banning the physical punishment of children*. Wellington: *Save the Children* New Zealand. P 100-107, 142-146.

In the past, politicians too have tended to be dismissive of criticisms from UN Committees and also the Universal Periodic Review process on the grounds that people from countries with poor human rights track records compared to New Zealand are sitting in judgment. Recently, in response to a suggestion that proposed Family Court reforms would reduce compliance with the child's right under UNCROC to have a say in matters that affect them, the Minister of Justice commented that:

UNCROC does not specify or limit mechanisms by which a child's views may be expressed. Compared to other countries, New Zealand has extensive state funded legal representation of children in family disputes.⁵⁹

UNCROC recognises and accepts that the ability of each State party to implement economic, social and cultural rights will vary and will be influenced by available resources⁶⁰ but this is not a comparative obligation. Each State Party has agreed to implement the Convention to the maximum extent of its own available resources. The level of resourcing committed by other states is irrelevant to the implementation of UNCROC obligations in New Zealand.

⁵⁹ Letter from Hon Judith Collins, Minister of Justice, to Mr Garry Collin, Chair, Family Law Section, New Zealand Law Society, dated 12 October 2012, page 2. Available at http://www.familylaw.org.nz/_data/assets/pdf_file/0008/56834/1-JCollins-FCReview-12.10.12.pdf.

⁶⁰ UNCROC, Article 4.



The mechanics of implementation

RESPONSIBILITY FOR LEADING IMPLEMENTATION

Until 2011, it was unclear which government agency was the lead agency responsible for co-ordinating and overseeing efforts to implement UNCROC, as opposed to leading development of the UNCROC report (possibly another consequence of not distinguishing between compliance and implementation).

The then Ministry of External Relations and Trade was the agency that led moves towards ratification and, after ratification, the Ministry of Youth Affairs (MYA) was assigned responsibility for co-ordinating the government reports.

MYA was a small, relatively new stand-alone agency presided over by a Minister outside Cabinet. It had the added disadvantage that it was charged with giving policy advice to government in relation to young people between the ages of twelve and twenty-four and providing services to that age group. Two-thirds of those entitled to rights under UNCROC were outside MYA's designated client group.

Although it was given the task of preparing New Zealand's first and second reports to the United Nations, MYA was not well-placed to ensure full implementation of the Convention or to influence the large government agencies of Education, Health, Justice and Social Welfare/Development which were in a position to implement it.

In the process of preparing comprehensive government reports to the Committee MYA consulted with non-government organisations (NGOs) and some young people. In the second report (submitted in 2000) it included comments from some of the fifty submissions received from individuals and NGOs. This report contained an admission that there had been criticisms within New Zealand of the length of time it had taken to respond to the Committee's recommendations and honestly acknowledged that progress had been slow. The report stated that a decision was made in April 2000 to deal with the Committee's concerns by developing a consolidated work programme. The work programme came on stream in December 2000 but was not released publicly nor did it set specific goals and timelines, delegate responsibility for implementation, or require public reports on progress.

MYA became a service line of the Ministry of Social Development in 2001 under the name of Ministry of Youth Development (MYD) and thus became part of a mega-agency. An important step forward was made in September 2004 when an UNCROC Five Year Work Programme was published and a commitment was made by MYD to make annual reports to government on progress. While there were some changes made to laws and policies in response to the Committee's recommendations, these tended to be on peripheral issues leaving the major concerns unaddressed. The one exception was the abolition of the right to parental physical punishment, which ironically was the result of a private member's bill introduced by a Green Party MP.

MYD no longer has responsibility for UNCROC. The Committee noted in its 2011 concluding observations that *...the Ministry of Social Development is responsible for leading the implementation of the Convention ...*⁶¹ and that a co-ordination role had been assumed by a Forum of Social Sector Chief Executives.

The responsibility for co-ordinating the work needed to meet UNCROC obligations has rested with a range of government agencies. However, what is urgently needed, as the Committee made clear in its recommendations following New Zealand's third and fourth report, is *a permanent mechanism to ensure high-level and effective co-ordination of the implementation of the Convention.*⁶²

⁶¹ Above, n48, CRC/C/NZL/CO/3-4, paragraph 12.

⁶² Ibid, para 13.



TRANSPARENCY

Compliance with UNCROC is an obligation assumed by New Zealand under international law and the extent to which it meets (or fails to meet) its obligations under international treaties is a matter of public interest. However, since the Five Year Work Programme ended in 2008, there have been no public updates on progress in making the changes in law, policy and practice recommended by the Committee.

The Five Year Work programme stated that there would be annual reports to government. The first report was made to Cabinet in July 2005 but copies were not made public or provided to interested organisations such as *Action for Children and Youth Aotearoa*, the NGO that took responsibility for compiling and presenting the NGO reports to the Committee in 1997 and 2003. It was not until August 2006, after requests had been made under the Official Information Act, that copies were provided. Copies of the second report on progress, due in July 2006, were not made publicly available either. In 2005 MYD set up an UNCROC advisory group but members of the group were asked to keep any material provided to them confidential. Minutes of the meetings of the advisory group were not made public.

If New Zealand is to move forward on implementing UNCROC there is a need for greater transparency; not only for accountability purposes but also to enable government and civil society to work together to identify and resolve issues in ways that serve children's best interests and meet New Zealand's obligations under the Convention.

CHALLENGES TO IMPLEMENTATION

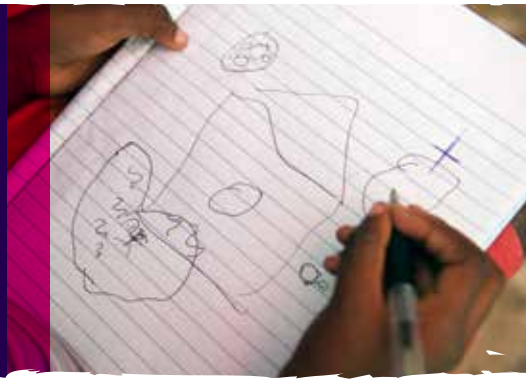
Openly and clearly discussing the challenges faced in implementing the Convention are part of increased transparency.

The 2004-2008 UNCROC Five Year Work Programme was a step forward in that it was a public document. It did not deal with all the recommendations made by the Committee in its first two reports on New Zealand but it did give an indication of work intended to be done on 17 of these recommendations. However, in many cases, the actions proposed to be taken by government were couched in bureaucratese with such expressions as: "further analysis will be undertaken"; "the issue will be further reviewed after ..."; "a report will be made to government on options"; "the (government agency) will continue to provide government with information"; "the (government agency) will monitor progress with this recommendation." A commitment to "review", to "further analyse", or "to monitor progress on" an issue of concern can be used to give the Committee the impression that something is happening when, in fact, nothing is happening.

An example of confusing wording can be found in the section on adoption reform. The Ministry of Justice (MoJ) is responsible for such reform and the New Zealand delegation had informed the Committee in October 2003 that the Adoption Act 1955 was being reviewed. The September 2004 UNCROC work programme stated, "the Ministry of Justice will monitor the progress of adoption reform in 2004-2008". (In fact, adoption reform had been taken off the Ministry's work programme from July 2003 and was not restored until July 2006.) The Ministry of Justice was, and still is, the government Ministry responsible for adoption legislation.

It is quite acceptable for government reports to the Committee to highlight new initiatives, laws and policies that are in line with the principles of UNCROC, but in addition to highlighting positive developments the UN guidelines for periodic reports require States parties to report on challenges to implementation⁶³. New Zealand has not always reported on whether action has been taken in respect of each recommendation nor identified what the challenges are that impede progress. Areas where there has been little or no action are sometimes passed over in the reports to the Committee and government has not always been upfront about the reasons for its failure to respond to recommendations. Identifying and acknowledging challenges is a necessary first step in overcoming them.

⁶³ Committee on the Rights of the Child General *Guidelines regarding the form and content of periodic reports to be submitted by States Parties under article 44, paragraph 1(b), of the Convention*, para 6.



Translating rights into reality

A permanent mechanism to facilitate and co-ordinate UNCROC implementation

Reflecting on New Zealand's progress on UNCROC over the last 20 years provides a strong foundation for looking ahead and finding ways to better respect and realise the rights of children. Much can be learnt not just from New Zealand's own experience but also, via the reporting process, from the knowledge and experience of the Committee. Unfortunately, New Zealand's position that it fully complied with UNCROC at the time of ratification, coupled with limited awareness and understanding of UNCROC amongst officials and ministers⁶⁴, has meant progress in responding to the Committee's concluding observations and implementing the Convention has, in the main, been patchy and slow.

Translating the rights in the Convention into a reality for children will require planning, a mechanism to facilitate and co-ordinate implementation of that plan, and to monitor and review progress. Steps need to be taken to harmonise law and policy with UNCROC and to provide remedies for any breach. To quote the Committee:

*While it is the State which takes on obligations under the Convention, its task of implementation - of making reality of the human rights of children - needs to engage all sectors of society and, of course, children themselves. Ensuring that all domestic legislation is fully compatible with the Convention and that the Convention's principles and provisions can be directly applied and appropriately enforced is fundamental.*⁶⁵

There are several possible avenues that New Zealand could pursue to establish a permanent mechanism to facilitate and co-ordinate UNCROC implementation, as recommended by the Committee.

(i) UNCROC Monitoring Group and Deputy Chief Executives Social Sector Forum

In February 2011, the Children's Commissioner convened a meeting of representatives from the non-government sector to address the Committee's concluding observations in its 2011 report. This UNCROC Monitoring Group included representatives from UNICEF NZ, Save the Children NZ, Every Child Counts, ACYA and Child Poverty Action Group. The Human Rights Commission was also represented. The group met with the Deputy Chief Executives Social Sector Forum on 31 August 2011 to discuss a framework for monitoring and co-ordinating the implementation of UNCROC. The group has since met quarterly and produced a report for the Social Sector Forum which recommended that steps be taken to establish an UNCROC co-ordinating mechanism within government, and noting the potential for Deputy Chief Executives Social Sector Forum to co-ordinate an UNCROC Plan of Action (administered by MSD) and regularly monitor its progress.⁶⁶ It is possible that this initiative could become a permanent mechanism to progress implementation.

(ii) The CRPD model

Under the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which is a more recent instrument than UNCROC, States parties agree to establish a permanent mechanism to co-ordinate and monitor implementation.⁶⁷ New Zealand's mechanism consists of both government and independent agencies.⁶⁸ On the government side there is the Ministerial Committee on Disability Issues, the Chief Executives' Group on Disability Issues and the Office for Disability Issues. The independent agencies

⁶⁴ Above n51, page 585

⁶⁵ CRC/GC/2003/5 Committee on the Rights of the Child General Comment No.5 (2003) *General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para 6), para 1.

⁶⁶ UNCROC Monitoring Group *Monitoring the implementation of the United Nations Convention on the Rights of the Child in New Zealand* June 2012, page 3. <http://www.occ.org.nz/assets/Uploads/Reports/Child-rights/UNCROC-Monitoring-Group-DCE-SSF-report-2012>.

⁶⁷ United Nations Convention on the Rights of Persons with Disabilities, Article 33.

⁶⁸ *Making Disability Rights Real Whakatuturu nga Tika Hauatanga: Annual report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities 1 July 2011 – 30 June 2012*. Available on the Human Rights Commission website. The structure and workings of the mechanism are outlined on pages 6-8.



who promote, protect and monitor implementation within their existing mandates, are the Human Rights Commission, the Office of the Ombudsman and the Convention Coalition of Disabled People's Organisations. A similar framework could be established in relation to children's rights, perhaps building on the UNCROC monitoring group and CE's Forum described above.

(iii) Health Select Committee's recommended inter-agency children's action plan

In their 2013 report *Inquiry into improving child health outcomes and preventing child abuse, with a focus from preconception until three years of age* the Health Committee recommended:

- the Prime Minister be responsible for a whole of government, inter-agency Children's Action Plan for improving outcomes for all children, including a specific early intervention action plan from pre-conception to three years of age.
- a transparent monitoring system with published results to demonstrate progress on issues such as poverty, discrimination, healthy housing, optimal nutrition, access to health and education services, and safe home environments
- that cross-party agreement be sought on key priorities related to children to avoid electoral cycle disruption.⁶⁹

The Health Committee's recommendations underscore the importance of having cross-party commitment, at a senior level, to advancing children's interests. They also highlight the need for strategic planning that addresses the determinants of child wellbeing, and transparent monitoring of progress. All of which would be part of an effective UNCROC based action plan. Also, by covering all aspects of children's lives, an UNCROC Action Plan would encourage the sort of interagency approach called for by the Health Committee.

New Zealand's permanent UNCROC mechanism needs to be capable of creating legislative and policy settings that are conducive to respect for children's rights. Its own structure and method of operating should reflect the general principles of non-discrimination, best interests, maximum survival and development, and respect for children as active participants in society, including by looking for ways to make sure children's voices are heard on matters that affect them.

It would make sense to base a permanent UNCROC mechanism on the CRPD mechanism because it is a working model. Also the UNCROC Monitoring Group, which would be one part of the UNCROC mechanism based on the CRPD model, is already up and running.

⁶⁹ Available to download at http://www.parliament.nz/en-nz/pb/sc/documents/reports/50DBSCH_SCR6007_1/inquiry-into-improving-child-health-outcomes-and-preventing.



Plan of Action

As a Children's Action Plan is developed we don't accept a tinkering around the edges approach... we need to be bold and seek a vision of children as citizens in New Zealand – in their families, in their schools, in social and recreational activity and in public life. It is a vision of children who as citizens have their opinions and interests given weight in public life in a way that does not happen now.⁷⁰

There is scope to build on the engagement with UNCROC that already exists within government and the wider community in order to develop an effective plan of action that:

- identifies the specific changes needed to bring New Zealand into compliance with UNCROC
- allocates responsibility for making those changes
- sets time lines within which the identified changes must be made
- sets up a system for annual review and monitoring of implementation of those changes by an independent agency
- ensures annual reporting to NGOs and the public on progress made towards full implementation and any difficulties encountered in achieving the proposed changes.

A Vulnerable Children's Action Plan⁷³ arising out of the White Paper on Vulnerable Children is currently being implemented. It includes a number of initiatives aimed at protecting those children who are considered vulnerable and enhancing their well-being. The government's commitment to protecting vulnerable children is to be welcomed but an action plan for all children, that covers all aspects of their lives, is still needed.

The Health Committee has proposed an inter-agency Children's Action Plan for improving outcomes for all children but it is mainly focussed on health outcomes.

Without an effective UNCROC action plan, that covers all rights for all children, implementation efforts are likely to remain ad hoc, reactionary and potentially inconsistent with the Convention and each other.

The starting point for developing an UNCROC action plan should be the Committee's recommendations. The Children's Commissioner's UNCROC Monitoring Group has reported that it is unaware of any formal steps taken by the government to respond to the recommendations of the Committee in relation to New Zealand's third and fourth report and has recommended that New Zealand develop an UNCROC Plan of Action to cover the period 2012 to 2015 when New Zealand's fifth report is due, and that New Zealand publish its official position on the Committee's recommendations.⁷⁴

⁷³ See <http://www.childrensactionplan.govt.nz/children-s-action-plan>.

⁷⁴ Above, n66, para 12, recommendation 2.



Harmonising laws and policies with UNCROC

Reviewing current laws and policies to discover and rectify areas of non-compliance

A first step along the path of aligning New Zealand's laws, policies and practices with UNCROC is to review what exists currently to identify any areas of inconsistency. Despite Committee recommendations in 1997, 2003 and 2011 that this exercise be undertaken there has been no government audit of current laws, policies and practices.

Even without an audit some inconsistencies between domestic law and policy and the Convention can be identified. Adoption legislation is a prime example. Under current law children do not need to consent to their adoption, they have no say in name changes resulting from adoption, and their best interests are not required to be the paramount consideration. All of which is inconsistent with UNCROC.

Another example is the discrepancies between various age limits in New Zealand law and the definition of a child under UNCROC. Article 1 defines a child as *every human being below the age of 18 years*. Currently child protection, youth justice and intellectual disability laws all regard seventeen year olds as adults, denying them the protections they are entitled to under UNCROC. The Children, Young Persons, and Their Families Amendment Bill (No 6) would have removed this incompatibility and was underpinned by significant government work, but it was discharged in 2012 following a change of government.

Other failures to align age cut-offs with UNCROC unreasonably exclude children from the enjoyment of the legal rights or powers enjoyed by adults. An example is the exclusion of under 16 year olds from age discrimination protections in the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990. Another example is the denial of the basic minimum wage to all under-16s and to many 16 and 17 year olds. They do not enjoy equal pay for equal work. Again, the Adoption Act 1955 disadvantages those aged under eighteen in several ways. For example a young parent of the child can be pressured to give her or his consent to the adoption of the child without any recognition of the vulnerability of young people in such situations. Under -18 year olds who are adopted cannot access information about their biological parents because the Adult Adoption Information Act 1985 restricts such access to persons over the age of 20 years. The Committee made recommendations on this issue in 2003 and 2011 but it has not, as yet, been remedied.

VETTING NEW LEGISLATION BEFORE IT IS INTRODUCED

As well as reviewing existing laws there is a need to ensure new laws and policies are consistent with UNCROC. The Attorney-General has the role of monitoring all new legislation to assess whether it is consistent with the anti-discrimination provisions in the Human Rights Act. There is no equivalent requirement for drafts of proposed new legislation to be vetted to ensure consistency with obligations under international human rights treaties to which New Zealand is a party.

This failure has meant that new legislation (and Bills amending existing legislation) have been introduced to Parliament with provisions that are inconsistent with New Zealand's obligations in international law. On some occasions changes have been made in Select Committee after submitters have pointed out inconsistencies but there are many other cases where the legislation has been passed into law regardless. Examples of new legislation and policies, introduced since ratification, that fail to comply with UNCROC requirements include:

- Protective legislation that treats those under 18s who are married, civil unioned, or partnered as adults. Examples include the Children, Young Persons and their Families Act 1989, Domestic Violence Act 1995, the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, the Criminal Investigations (Bodily Samples) Act 1995, and the Evidence Bill 2005.



- Amendments to the Care of Children Act 2004 in the Care of Children Amendment (No 2) Act 2013 significantly attenuate the rights of children to have a say in relation to orders about their care and upbringing by
 - making no provision for their views to be heard and taken into account in the Family Dispute Resolution (mediation) provisions
 - limiting the situations when a lawyer will be appointed to represent a child in Family Court proceedings. The amendments bring further confusion to the already ambiguous role of lawyer for child.
- Youth justice policies and legislation such as laws which allow 17 year olds to be detained in degrading conditions in police cells which are intended only as a short term measure for adult offenders, and new government legislation⁷⁵ considerably increasing police powers of arrest of children who are in breach of a bail condition.
- Amendments to the Citizenship Act in 2005, which deny some New Zealand born children the rights of citizenship that they previously enjoyed.
- The Minimum Wage (Starting-out Wage) Amendment Act 2013 Act which reduced the number of sixteen and seventeen year olds who will qualify for the minimum wage payable to all adult workers.

Current checks and balances on the passing of new legislation inadequately protect children's rights. In each of the situations above submissions had been made to government that the proposed changes (or the failure to make changes) breached UNCROC. New laws and policies, which run contrary to UNCROC, are not always reported to the Committee in New Zealand's periodic reports. Neither are there any procedures that require an independent child impact statement to be prepared on each new Bill and Regulation or ensure that the Children's Commissioner, for example, be given the opportunity to scrutinise or comment publicly on any new or amending legislation which is likely to affect children.

ENSHRINING UNCROC RIGHTS IN NEW ZEALAND LEGISLATION

An option available to New Zealand as it seeks to harmonise law and policy with the Convention is to incorporate UNCROC rights into New Zealand legislation.

New Zealand committed to undertaking all appropriate legislative measures for the implementation of UNCROC rights (article 4). As New Zealand does not have a written constitution this obligation could most effectively be met by including the various articles of UNCROC in New Zealand's domestic law. There is precedent for such a move in the New Zealand Bill of Rights Act 1990, which gives domestic force to this country's obligations under the UN Covenant of Civil and Political Rights. The New Zealand courts have held that, while there is no enforceable remedy for proven breaches of NZBORA, persons who have suffered as a result of such a breach can claim damages.

Other countries (for example Belgium, Norway, Spain and Canada) have incorporated UNCROC in their domestic law. Research shows that, when this occurs, advocates for children's rights have greater leverage and policy- and law-makers are more likely to take UNCROC rights into account when developing new policies or legislation, or in reviewing existing laws or policies.⁷⁶

⁷⁵ Children Young Persons, and Their Families (Youth Court Jurisdiction and Orders) Act 2010.

⁷⁶ See *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries* Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang UNICEF (UK) 2012.

ENFORCING OBLIGATIONS AND PROVIDING REMEDIES WHEN RIGHTS ARE DENIED

At international law, countries that enter into international treaties are bound by the obligations they have assumed on ratification and must perform these obligations in good faith⁷⁷.

The Committee has emphasised that “*for rights to have meaning, effective remedies must be available to redress violations*” and that parties to the Convention must ensure that there are effective, child-sensitive procedures available to children and their representatives.⁷⁸

New Zealand has no enforcement mechanism by which government, local government and government-funded bodies can be forced to meet their obligations under UNCROC and/or provide compensation for any loss suffered by failure to do so. There are several (not very satisfactory) means by which some children or persons on their behalf might obtain redress under domestic law.

- If a child is discriminated against on one of the 13 grounds of unlawful discrimination (and several sub-grounds) listed in section 21 of the Human Rights Act 1993 a complaint may be made to the Human Rights Commission. If the complaint is unable to be resolved through the Commission’s complaint resolution processes (including mediation), a complainant can take their complaint to the Human Rights Review Tribunal which has various powers including the power to award damages for pecuniary loss or for humiliation, loss of dignity and injury to feelings. However, Section 21 discriminates against those aged under 16 on the grounds of their age in that “age discrimination” provisions do not apply to persons under 16 years of age.
- If any government or public body, by any act or omission (whether by the judicial, legislative or executive branch of government), discriminates on any of the grounds set out in section 21 of the Human Rights Act 1993 a child affected by that discrimination (or a person acting on behalf of the child) can bring an application to the Human Rights Review Tribunal for a declaration of inconsistency under section 92J of that Act. The process is complex and time consuming and there is no power to award compensation or damages if the claim is upheld. The only benefit in obtaining a declaration is that the matter must be considered by Parliament and the declaration is likely to put pressure on government to change the legislation or policy. Groups representing the interests of children (or a group of children) who have brought proceedings under section 92J include Child Poverty Action Group, IHC (an organisation representing the interests of people who are intellectually disabled), and Adoption Action Inc. (a group pressing for reform of adoption laws). The Tribunal is not bound to take into account NZ’s obligations under UNCROC in reaching its decisions and most claims relating to children’s issues have been unsuccessful or partially successful.
- The Children’s Commissioner has an obligation to promote the establishment of accessible and effective complaints⁷⁹ mechanisms and to monitor the nature and level of complaints. The Commissioner also has responsibilities as a National Preventive Mechanism under the Crimes Against Torture Act and its staff visit and speak to residents in Child, Youth and Family children’s residences (both child protection and youth justice residences).

In summary, there is no general mechanism by which complaints of breaches of rights assured to children under UNCROC can be made, adjudicated and remedied. While children have the same rights as adults to make specific complaints to the Ombudsmen, the Independent Police Conduct Authority and the Health and Disability Commissioner, each of these bodies can only deal with the matters defined in their empowering statute. In practice, few children initiate complaints to these bodies and it is difficult for them to do so without access to legal advice and support. One area in which there is an effective enforcement procedure is where the complaint relates to article 2 of UNCROC (freedom from discrimination) and where the discrimination falls within the heads of unlawful discrimination in section 21 of the Human Rights Act.

⁷⁷ This is recognised in the long-standing principle “*pacta sunt servanda*” and by articles 26 and 31 of the Vienna Convention on the Law of Treaties 1969.

⁷⁸ Above n65, para 24.

⁷⁹ Section 12(1)(c) Children’s Commissioner Act 2003.



Conclusion

It is time to move beyond a “checklist” approach to reporting on UNCROC and to harness the potential for children’s rights to ensure legislation, policy and practice impact positively on children.

What is needed is a way to ensure, from now on, that UNCROC rights become real in New Zealand. Although “a permanent mechanism to facilitate and co-ordinate UNCROC implementation” sounds complicated, its not. All that is required is a framework or group that allows people to work together to implement UNCROC and ensure children’s rights are met. Establishing a group similar to that already working under the CRPD would most likely be the best way forward, especially as the UNCROC Monitoring Group has already laid the foundation for such a mechanism to be built.

However, establishing an implementation mechanism is only part of the solution. An UNCROC Plan of Action is also required, which identifies those areas where children’s rights are not being met and sets out:

- what needs to be done to realise and protect the rights of children
- who will do the work required
- timeframes for when rights will be realised or protected, and
- how progress will be monitored.

In summary, establishing a permanent mechanism to facilitate and co-ordinate UNCROC implementation would encourage a rights-based approach to children’s issues. It would make it possible for New Zealand to begin taking the general measures of implementation, which, in turn, would enable specific areas of non-compliance to be addressed. Bringing adoption legislation into line with the Convention and ensuring 17 year olds can benefit from the CYPF Act would both be excellent first steps.

In doing so it must be remembered that children’s rights are indivisible and interdependent. Children’s wellbeing depends on their rights to healthcare, education and an adequate income being met. It is essential also that children are treated with respect and listened to, that they have the guidance and support of their families, opportunities to play and be with friends, and to be recognised and valued as part of their communities. That is the Convention’s strength. It can help to make sure we organise our society, especially our laws and policies, not only to meet the needs and interests of children, but to do so in ways that respect the inherent dignity and worth of the child as a person.

It is hoped that *Kids Missing Out* will encourage New Zealand to comply with UNCROC and use it as a means of enhancing respect for children and their rights. Having reflected on the slow rate of progress over the last 20 years it is time now to look ahead and begin doing the work needed to translate children’s rights into a reality for all children in New Zealand.

