ISSUES PAPER:

APPLYING A RIGHTS-BASED ANALYSIS TO

THE DEVELOPMENT OF SOCIAL POLICY IN NEW ZEALAND

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My delegation . . . attaches equal importance to all the articles . . . At the same time we regard with particular satisfaction the place which is given in the declaration to social and economic rights. Experience in New Zealand has taught us that the assertion of the right of personal freedom is incomplete unless it is related to the social and economic rights of the common man. There can be no difference of opinion as to the tyranny of privation and want. There is no dictator more terrible than hunger.

Address to the United Nations General Assembly

by Colin Aikman on behalf of New Zealand
on the adoption of the Universal Declaration of Human Rights,
Paris, 1948.

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EXECUTIVE SUMMARY

I Introduction (paras 1 - 9)

i. This issues paper aims to promote discussion about the implications of taking a rights-based approach to social policy-making. It is aimed at government officials and is not written as a public discussion paper. All conclusions drawn by the authors are preliminary.

ii. We do not attempt in the paper to justify from first principles the utility or legitimacy of using a rights-based framework to conceptualise the State's responsibilities vis-à-vis socio-economic needs and entitlements. Rather, the paper takes as its starting point the network of international human rights obligations undertaken by the New Zealand government and binding upon it at international law. It seeks to explore:

- what these obligations require in the context of social policy; and
- how they might better be given effect to.

iii. The difficulties associated with this task stem, in particular, from the extent to which questions of social policy require engagement with that category of human rights traditionally referred to as "economic, social and cultural rights". The scope of such rights and the nature of the State's obligations with respect to them are not, we believe, well understood within the New Zealand polity. This paper attempts to grapple with those questions. In particular, the paper explores in some detail the language of "progressive realisation" found in article 2(1) of the International Covenant on Economic, Social and Cultural Rights, and its implications for the policy-making process.

II Limits of the inquiry: social policy / social rights (paras 10 - 19)

iv. The paper focuses on a subset of New Zealand policy making: "social" policy. It also chooses as a particular (but not exclusive) focus, a subset of New Zealand's human rights obligations: economic, social and cultural rights. This focus is dictated principally by pragmatic considerations. In particular, the need for improved levels of understanding within the New Zealand policy-making process of what economic, social and cultural rights require. Having settled on that focus, however, it is important constantly to bear in mind the multifaceted connections that exist between "civil and political" and "economic, social and cultural" rights and the significance of the full range of human rights for the New Zealand policy-making environment. The chosen focus is intended to illuminate rather than obscure a wider point, that is, that a rights-based approach, potentially encompassing *all* human rights, should be seen as a valuable frame of reference for *all* policy.

III Needs versus rights (paras 20 - 39)

v. The paper notes that the idea of "rights" complements the idea of "needs" in a number of respects. It stresses the moral importance that is placed on the interests that are at stake, the priority that is to be accorded to them in the process of resource allocation, the status of the rights-holder (as an autonomous and empowered holder of entitlements) and the directory (rather than merely aspirational) nature of the duties imposed on the State with respect to realisation.

IV Scope and sources of relevant rights at international law: an overview (paras 40 - 74)

vi. It is important to understand the relevant sources of international law and the key relevant rights as sketched in outline in the paper. However, we suggest that a rights-based approach to policy-making requires an ongoing and dynamic engagement on the part of policy-

makers with evolving international understandings as to the scope and effect of relevant rights (see, esp, paras 85-91 below).

V The State's protective obligation (paras 75 - 119)

vii. The language of "progressive realisation" found in article 2(1) of the Covenant on Economic, Social and Cultural Rights poses a conundrum. The relativity and flexibility of the language invoked in article 2(1) is consistent with a large measure of discretion being retained by States parties to decide how to allocate scarce resources over a period of time. Given that is the case, how is the content of a rights-based approach to social policy-making to be ascertained?

viii. On our view, the language of article 2, read in context, imposes a number of constraints on the processes of policy formation. We suggest that a rights-based approach to social policy-making requires the following:

- an ongoing engagement with the international human rights normative framework and the formulation of a coherent and coordinated programme designed to progressively realise relevant rights (including the sensible prioritisation of resources). At a minimum, policy-makers must therefore remain actively engaged with the following questions:
    i. what is the scope of protected rights?;
    ii. to what extent are they currently realised?;
    iii. what is the extent of the State's current capacity to realise the rights?;
    iv. how might relevant rights be capable of fuller realisation within current resources?
- a prohibition on deliberately retrogressive measures;
- an absolute obligation to "respect" (in the sense of not interfering with) relevant rights;
- an obligation to ensure satisfaction of minimum essential levels of each right;
- active engagement with civil society (and, in particular, affected groups) in the process of policy-making;
- some degree of governmental accountability for performance with respect to fulfilment of rights;
- special protection for the most vulnerable or disadvantaged;
- freedom from discrimination in the enjoyment of rights, including the removal of structural barriers to the enjoyment of rights by disadvantaged groups; and
- compliance with human rights obligations of immediate effect found in other treaties, such as the International Covenant on Civil and Political Rights.

VI Impact of a rights-based approach on social policy-making (paras 120 - 142)

ix. The paper sketches the "dominant" approach to social policy-making taken by New Zealand government departments and invites discussion amongst officials as to the implications of a rights-based approach. In order to facilitate such discussion, we pose to policy-makers a number of questions based on our earlier suggestions as to what a rights-based approach might require (para viii, above). Engagement with those questions would, we suggest, cast further light on the extent to which the approaches taken by particular

government agencies are consistent with a rights-based approach and the extent of changes that would need to occur to make them so.

x. The substantive results of a large portion of New Zealand policy analysis would, we suspect, live quite happily within the boundaries set by a rights-based approach. In some cases, however, the utilisation of rights-based analysis will require a departure from existing strategies and a re-ordering of priorities. The obligatory nature of human rights compliance means that on those occasions, a rights-based approach must take precedence as a framework of analysis.

xi. In order to explore further the impact a rights-based approach would have on policy analysis, we suggest it may be appropriate to conduct, on the basis of several specific case studies, a detailed comparison of current New Zealand policy approaches to particular issues with the application of a rights-based approach to those same issues.

VII Implications of a rights-based approach for the process and structure of Government (paras 143 - 174)

xii. The paper briefly canvases the range of institutions and processes of New Zealand government and identifies options for enhancing the government's capacity to bring a rights-based analysis to bear on social policy-making.

xiii. For maximum impact, a rights-based approach to policy making must be integrated into the policy-making process at an early stage of policy development. We discuss options for enhancing the departmental capacity that would be necessary to facilitate this.

xiv. We suggest that the Cabinet decision-making process is not currently well geared towards consideration of, in particular, economic, social and cultural rights and suggest accordingly that, if Ministers wish to ensure the advice they receive is informed by economic, social and cultural rights, that will probably need to be made explicit.

xv. A potential means of enhancing public engagement with rights is by raising awareness amongst legislators. We suggest that the mechanisms currently built into the legislative process to ensure consideration of rights (most especially, the system of legislative vetting under s 7 of the Bill of Rights Act) are currently skewed towards consideration of civil and political rights. There are several options for enhancing legislators' engagement with human rights but we suggest that the most important one in the foreseeable future is through improved education and information.

xvi. The wider State sector (most particularly, the Human Rights Commission itself) may be able to play an ongoing role in ensuring greater understanding and appreciation of human rights implications in the process of social policy formation.

xvii. Finally, we briefly discuss the role of the courts. As is well known, economic, social and cultural rights are currently subject to less robust judicial scrutiny than civil and political rights. We do not address the question of justiciability of economic, social and cultural rights but do suggest that it be made the subject of detailed governmental consideration in the near future (within the next three years).

VII Where next? (paras 175-178)

xviii. In order to focus and provoke discussion, the final section of the paper suggests for discussion some steps that the Human Rights Commission could pursue, in discussion with government, to make more effective New Zealand's engagement with relevant international human rights obligations.

I INTRODUCTION

1. This paper aims to facilitate debate about the implications for the New Zealand policy-making environment of taking a rights-based approach to the development of social policy. It has been commissioned by the Human Rights Commission, from the authors, through the New Zealand Centre for Public Law. It seeks to provoke informed discussion, particularly amongst government officials. It is not cast as a public discussion paper.

2. It may be helpful to begin by signalling what this paper is not.

3. First, this paper is intended to initiate and facilitate, not to pre-empt, a process of consultation with interested officials as to the implications of taking a rights-based approach to social policy. All conclusions drawn by the authors are, therefore, preliminary.

4. Second, although the role of the courts is necessarily touched on, this paper does not attempt to unravel the issues surrounding judicial enforcement of social and economic rights. We understand that those important issues are to be separately addressed by the Human Rights Commission.

5. Third, we do not attempt in this paper to justify from first principles the legitimacy or utility of using a rights-based framework to conceptualise the State's responsibilities vis-à-vis socio-economic needs or entitlements. We are spared the necessity of engaging with the issues on that level by the simple fact that a rights-based approach to the development of social policy is required of the New Zealand government as a matter of binding international law. Over the last three decades, New Zealand has ratified a number of international treaties that recognise human rights of individuals subject to its jurisdiction and that place obligations on the New Zealand government concerning the protection and promotion of those rights. It is therefore incumbent on New Zealand policy-makers, as a consequence of New Zealand's binding international legal obligations, to engage with the content of relevant treaties and to address the rights contained in them in the process of policy formation.

6. Simply put, then, the questions this paper seek to explore are:

   - What do New Zealand's international human rights obligations require in the context of social policy?; and

   - How might they better be given effect?

7. If the questions are straightforward, the answers are not. In examining the implications of a rights-based approach for the development of social policy, it is necessary to focus principally (although not exclusively) on the category of rights that has become known as "economic, social, and cultural" rights (ESCRs). The difficulties that attend any attempt to establish with precision the scope and effect of this category of rights are widely acknowledged. Those difficulties result from two principal factors:

   - First, the language in which many (but by no means all) ESCRs are cast is somewhat imprecise. Many ESCRs have not yet been exposed to the extensive (almost exhaustive) process of international standard setting that has characterised the international regulation of civil and political rights (CPRs). This lack of detailed textual elaboration is compounded by a dearth of institutional settings, whether international or domestic, in which ESCRs have been subject to sustained interpretation.

- Second, the international obligations placed on governments to secure ESCRs are sometimes (but again, not always) cast in relative rather than absolute terms. Thus, article 2(1) of the International Covenant on Economic, Social and Cultural Rights (the ESCR Covenant) requires States parties to "take steps" towards the "progressive realisation" of the protected rights, "to the maximum of [their] available resources." This language connotes flexibility and relativity and envisages a significant degree of latitude or discretion for States parties to decide how to meet their obligations under the Covenant. This can be seen as a deliberate response to the often fraught political environment that surrounds fulfilment of ESCRs. The full protection of the interests underlying ESCRs will often entail a major outlay of economic resources by the State concerned. In a situation of scarce resources – and no government has unlimited resources – democratically elected governments understandably but jealously guard their considerable discretion in fixing resource priorities.

8. The content and scope of ESCRs and the precise extent of the State's obligations with respect to them are, thus, both contestable and controversial. These difficulties of interpretation and application do not, however, exempt States parties to the relevant treaties from the obligations contained in them. By ratifying the ESCR Covenant, for example, New Zealand has undertaken to give effect to its obligations, whatever that might require. It is therefore incumbent on government officials to engage with those obligations and to attempt to give them meaning and effect in, amongst other settings, the process of social policy development.

9. This discussion paper contributes to that process by providing a framework within which, we hope, an in depth conversation about the impact of international human rights on the development of social policy will be able to occur.

II LIMITS OF THE INQUIRY: SOCIAL POLICY / SOCIAL RIGHTS

10. Before proceeding, it is necessary to explore a little further the parameters of the inquiry we have undertaken.

A Social Policy

11. First, the focus of this report is on "social" policy. At its simplest level, social policy can be understood as the principles and mechanisms by which government seeks to affect the development of New Zealand society, particularly in relation to health, education and welfare. In its concern with these aspects of the well being of people, social policy is integrally related to, but distinct in focus from, other areas such as economic and environmental policy.

12. This definition is somewhat narrower than the definition used by the Ministry of Social Development in *The Social Development Approach* (June 2001, p 1), in which social policy is defined to include "all policy that has an influence on desirable social outcomes". We do not, however, consider that the difference has material implications for the analysis that follows.

13. Understood in this way, it is almost a truism to say that a principal concern of social policy is the satisfaction of certain basic human (or social) needs: the need for food, for shelter and for access to health services, for example. The issues explored in this paper concern what difference it might make to the formation of such policy if the human interests at stake are conceived as owed to individuals within our society as a matter, not of

beneficence, but of "human right"; and what the implications of such an orientation might be for the existing processes of policy formation.

14. This focus on "social policy" is not intended to detract from the importance of human rights to other areas of New Zealand policy formation. Human rights obligations have the potential to impact across all areas of government activity and regulation and, accordingly, much of what is said in this report will be applicable in a wider policy context.

B The Indivisibility of Rights

15. Second, as already signalled, we have focussed in this report principally (but by no means exclusively) on the scope and impact of ESCRs. The reason for this focus is largely pragmatic. Despite the rhetoric of "indivisibility", the international and domestic framework for the protection of ESCRs is neither as well established nor as well understood as the comparable CPRs framework. The background against which this paper is written is that there are already a number of legislative, executive and judicial mechanisms by which the rights traditionally regarded as CPRs (and in particular, those that are protected by the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act)) are brought to bear on the policy making process. The same cannot be said of the majority of rights found in the ESCR Covenant. Further, what is required of policy makers with respect to ESCRs, in particular in light of the language of "progressive realisation" found in article 2(1) of the ESCR Covenant, is not well understood. This paper attempts to step into that gap.

16. As the Vienna Declaration and Programme of Action (1993) reminds us, however, all human rights are indivisible, interdependent and interrelated. *All* human rights are potentially relevant to *all* policy-making. Taking a rights-based approach to policy issues is a wider task than focussing only on ESCRs. To the extent this paper draws a line between ESCRs and CPRs, that line is thus a permeable one.

17. For example, there is substantial overlap between the subject matter of the two principal United Nations human rights treaties, the ESCR Covenant and the International Covenant on Civil and Political Rights (the CPR Covenant). The rights to self-determination and to freedom from discrimination, for example, appear in both Covenants. Further, the Human Rights Committee (the United Nations treaty body responsible for monitoring the CPR Covenant) has interpreted a number of rights in the CPR Covenant to involve dimensions more naturally associated with ESCRs. It has said, for example, that the right to life protected by article 6 of the CPR Covenant renders it "desirable" for States parties to take all possible measures to reduce infant mortality and to increase life expectancy (General Comment 6).

18. CPRs may additionally impact on the process by which social assistance is delivered. Thus, for example, in the process of assessing prospective beneficiaries for benefit entitlement, the State must respect the full range of rights and freedoms protected in the CPR Covenant. The State cannot plead the need to realise ESCRs as an excuse for the consequential denial of CPRs.

19. In summary, then, the focus in this paper on ESCRs is dictated by pragmatic considerations, principally, the current lack of visibility of ESCRs in the New Zealand policy-making process and the need for improved levels of understanding within New Zealand of what ESCRs require. This focus is intended to illustrate rather than obscure the wider point that a rights-based approach, whether based on ESCRs or CPRs, needs to be

one of the approaches taken to *all* policy analysis in New Zealand government. Indeed, because of New Zealand's international obligations, a rights-based approach is essential.

III NEEDS VERSUS RIGHTS

20. From our discussions with officials and examination of some departments' policy frameworks, we understand that many of New Zealand's social policy agencies characterise their current approach to policy formation as "needs-based" rather than rights-based. We have been asked to suggest how the two approaches differ.

21. In short, a rights-based approach to social policy formation is one that is explicitly based upon the norms and values set out in the international law of human rights. It constitutes a particular technique or logic for approaching the resolution of competing priorities in relation to social policy, with consideration of the inherent dignity of the individual at its heart. The implications of taking such an approach are discussed in further detail below. It may, however, be helpful to offer some preliminary thoughts on the conceptual differences between a focus on "needs" and a focus on "rights".

A What difference does it make?

22. We begin by observing that needs-based and rights-based approaches to social policy formation inevitably have much in common. In our view, though, the language of "rights" emphasises particular dimensions of the interests, entitlements and duties that are at stake.

23. We say that "John needs food" if we believe that in the absence of food, John's well being will suffer in some way that we regard as fundamental. We are identifying the predicament (neediness) that John will face if deprived of food (Waldron,1996, p 105).

24. A similar assessment of the predicament (neediness) faced by John may well also underlie the statement "John has a right to food". The idea of rights, however, complements the idea of neediness in a number of respects.

25. First, the language of "rights" is the language of demand or entitlement. To say that "John needs food" tells us nothing about the moral or legal obligations of others in relation to John's need. In contrast, as a matter of definition, "John has a right to food" means that someone else (in the case of international human rights law, the State) has a *duty* to ensure that John's right is protected (Waldron, 1996). Thus, the language of rights places the State in a fundamentally different position with respect to John's predicament than the language of needs; it places the State in a position of obligation. That obligation attaches not only to the State as an amorphous entity, but to the particular State officials whose responsibilities have the potential to impact on realisation of human rights.

26. This is partly why discussion of a rights-based approach to ESCRs is often bound up with the issue of justiciability. Justiciability of rights is one of the primary means that our legal and constitutional system uses to ensure that the State fulfils its duty to protect rights - through scrutiny by an independent court system or administrative tribunal system. But justiciability is only a means to an end. A rights-based orientation to the development of social policy is not synonymous with justiciability of ESCRs (although we will argue that the notion of obligation does compel some form of enhanced, governmental accountability for failure to protect rights).

27. Second, the language of demand also has implications for how we view the bearer of the right. To say that John "needs" food is to present John as a passive victim and potential

recipient of charity. To say that John has a right to food is to conceptualise John as a holder of entitlements. The language of rights is thus the language of empowerment. In the language of rights, John is a self-sufficient and independent rights-bearer whose assertion of rights amounts to a vindication of his autonomy, personhood and dignity (Waldron, 1996). Further, John the autonomous rights-bearer does not have to "earn" his right to food. As a "human right" it is owed to him by virtue of his humanity. The concept of "deserving" and "undeserving" poor is largely absent from human rights thinking.

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

B Does this distinction hold when ESCRs are at stake?

29. It is sometimes suggested, however, that this comparison between "rights" and "needs" is not apt when the category of rights known as ESCRs is at issue. After all, as already acknowledged, the "positive" nature of the obligation placed on States with respect to ESCRs may require a substantial outlay of resources to give the rights full effect. ESCRs can thus implicate questions of resource capacity (what if the State cannot afford to protect the right?) and can intrude into the democratic arena of economic and social policy choices (shouldn't the State be free to decide how to best satisfy its citizens' needs over a period of time?) As this paper explains, the ESCR Covenant responds to these difficulties by granting substantial discretion to States parties as to how they go about realising the rights and by making the duty to provide such rights contingent on economic capacity.

30. In light of these features, how can it be maintained that an ESCR amounts to a "demand" and that States have a duty – a specific duty owed to the individual concerned – to satisfy that demand? Has not the distinction between rights and needs collapsed?

31. In responding to this concern the first point to note is that, as is now widely recognised, the relevant distinction is not so much between CPRs and ESCRs as between the "positive" and "negative" components of rights. Indeed, a still more nuanced (and now widely accepted) approach suggests that all rights give rise to three discrete categories of duty: the duty to respect, the duty to protect and the duty to fulfil (eg, Maastricht Guidelines, 1997, para 6, p 31).

32. The duty to "respect" entails a "negative" obligation to refrain from violating the right in question. ESCRs as well as CPRs have this negative component. Thus, for example, the right to housing requires the State and its agents to refrain from forcibly evicting a person from housing if they have no other means of shelter.

33. The duty to "protect" requires the State to respond to the spectre of third party infringement of rights. Thus, for example, the State might be required to pass legislation regulating the exploitative activities of private landlords.

34. Finally, the duty to "fulfil" is the "positive" obligation to establish systems that provide meaningful access to the guaranteed right. The State might, for example, be required to take positive measures to render housing affordable to those of its citizens that could not otherwise access it. To repeat, CPRs as well as ESCRs entail positive components. The right to a fair trial, for example, entails considerable positive outlay by the State (remuneration of judges, provision of legal aid, and so on). Admittedly, the outlay required to fully realise ESCRs (health, housing, education, etc) will, in general, far exceed the outlay required to "fulfil" CPRs. The difference, though, as Paul Hunt has observed, may well be one of degree rather than of kind (1996, p 60).

35. The second point to note is that notwithstanding the different parameters of the duties imposed on the State under article 2(1) of the ESCR Covenant (as compared with, say, the duty to "respect" and "ensure" rights placed on States parties to the CPR Covenant) the concept of "rights" as invoked by the ESCR Covenant is still consistent with most of what has been said above about the conceptual differences between "rights" and "needs".

36. The full implications of the duties provision in the ESCR Covenant (article 2) are discussed below (paras 75-116). It should at once be noted, however, that article 2 is entirely consistent with the notion that the "rights" contained in the Covenant are morally compelling and are to be accorded priority in the process of resource allocation. The clear underlying aim of article 2 of the ESCR Covenant is full realisation of ESCRs, albeit over a period of time. Although the possibility of a shortfall in available resources is expressly contemplated, the priority given to protected rights is manifested in the direction to States parties to take steps to the "maximum" of their available resources. The State is not entitled, for example, to privilege my interest in fashion over John's right to food.

37. The language of rights in the ESCR Covenant thus signals the international community's judgment as to the morally compelling nature of the interests to be protected and the priority they must be given in the process of resource allocation. Even where resource limitations intrude on the State's ability to fully realise a particular right, the State may well be required to fulfil a range of residual duties in relation to the right. Jeremy Waldron has suggested in this respect that any given right will generate a wave of duties, both positive and negative. Even if the State is prevented from meeting its primary duty (to fully realise the right) it will nevertheless still have a range of lesser obligations. Thus, even if the State cannot afford to provide Jane with permanent housing, it might nevertheless be required to refrain from violating Jane's right to housing through the actions of its agents, to regulate private landowners in a manner consistent with Jane's right, to provide Jane with temporary shelter, to allow Jane an opportunity to participate in the formation of government policy on housing issues, and so on. The right "remains in the picture and must be taken seriously as a residual source of other duties" (Waldron, 1993, p 215).

38. The general point, then, is that even where ESCRs are concerned, the idea of "rights" complements the idea of "needs" in a number of respects. It stresses the moral importance that is placed on the interests that are at stake, the priority that is to be accorded to them in the process of resource allocation, the status of the rights-holder and the directory (rather than merely aspirational) nature of the duties imposed on the State with respect to realisation of the right.

39. Against that background, we turn to consider the scope of the international human rights obligations undertaken by the New Zealand government that impact directly on the development of social policy.

IV SCOPE AND SOURCES OF RELEVANT RIGHTS AT INTERNATIONAL LAW : AN OVERVIEW

A Where are the relevant international standards to be found?

40. As the sources of CPRs at international law are relatively well understood, this section concentrates on the international standards relating specifically to ESCRs.

41. The binding obligations undertaken by the New Zealand government in respect of ESCRs are found in two sets of international treaties: the United Nations human rights treaties and the treaties of the International Labour Organisation (the ILO).

42. The ILO Conventions primarily (although not exclusively) concern labour rights. There are 185 such Conventions of which, 50 are currently in force for New Zealand. The centrepiece of the ILO treaty regime, however, is the eight "fundamental Conventions." These are grouped into four key areas of concern: forced labour (C29 and C105), freedom of association and the right to collective bargaining (C87 and C98), workforce discrimination (C100 and C111) and child labour (C138 and C182). New Zealand has ratified six of the fundamental Conventions (all excepting C87 - the Freedom of Association and Protection of the Right to Organise Convention; and C138 - the Minimum Age Convention).

43. Of the United Nations human rights treaties, the cornerstone as far as ESCRs are concerned is the ESCR Covenant, ratified by New Zealand in 1979. It builds on and develops the ESCRs contained in the Universal Declaration of Human Rights (the Universal Declaration).

44. New Zealand has also ratified four treaties that aim at the protection of particular, vulnerable groups within the community, each of which has important implications for the realisation of ESCRs. These are:

    - the Convention relating to the Status of Refugees (the Refugee Convention), acceded to by New Zealand in 1960;

    - the Convention on the Elimination of All Forms of Racial Discrimination (the Race Convention), ratified by New Zealand in 1972;

    - the Convention on the Elimination of All Forms of Discrimination Against Women (The Women's Convention), ratified by New Zealand in 1985; and

    - the Convention on the Rights of the Child (the Children's Convention), ratified by New Zealand in 1993.

45. A further group-specific United Nations human rights treaty raising potential social policy implications, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (the Migrant Workers' Convention), has recently entered into force but has not been ratified by New Zealand.

46. Finally, as already discussed, the relevance to social policy development of the more familiar obligations contained in the CPR Covenant (ratified by New Zealand in 1979) must also be borne in mind.

47. The ESCR Covenant (concluded in 1966) contained an express textual reference to the need for further binding treaties to be concluded in order to promote the achievement of

ESCRs (article 23). With the exception of the five group specific treaties detailed above (of which two were, in fact, concluded prior to the ESCR Covenant) and the valuable standard setting contribution of the ILO (primarily in the context of labour rights) this anticipated process of detailed, textual elaboration has never occurred. Specifically, there has been no further systematic elaboration of binding international standards with respect to particular categories of ESCRs. Some elaboration of non-binding international standards has occurred. There is, however, much work still to be done on defining and elaborating ESCRs. The absence of an established tradition of judicial or quasi-judicial elaboration of ESCRs, either in domestic or international settings, further compounds the problem.

48. Accordingly, in seeking to establish the emerging consensus as to the meaning and scope of a particular right contained in, for example, the ESCR Covenant, it is necessary to cast the net widely and to consider a range of possible sources. International material that can provide valuable and, in some cases, legally authoritative insights into the meaning and impact of particular rights might include (but is not necessarily confined to):

- the general comments and other documents produced by the United Nations human rights treaty bodies (which are committees of experts with special responsibilities to oversee the implementation of their respective treaties);

- various forms of jurisprudence produced by the ILO monitoring system, including the reports of the Conference Committee on the Application of Conventions and Recommendations, the reports and observations of the ILO Committee of Experts, the reports of the ILO Commissions of Inquiry and the views and recommendations of the Committee on Freedom of Association.

- reports by independent experts or rapporteurs appointed over the years by the United Nations Human Rights Commission (such as the recent report by Mr Hatem Kotrane, independent expert on the question of a draft optional protocol to the ESCR Covenant, 2003);

- resolutions of the United Nations Human Rights Commission itself;

- statements by the United Nations Sub-Commission on the Promotion and Protection of Human Rights (formerly, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities);

- reports by other, respected international organisations (such as the International Commission of Jurists' *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* and the subsequent *Maastricht Guidelines*);

- non-binding commitments (such as "declarations" or "principles") entered into by the international community in settings such as the United Nations General Assembly, the ILO or at world conferences on human rights issues;

- commitments entered into by regional human rights organisations to which New Zealand does not belong (for example, the European Social Charter) and the jurisprudence of associated regional human rights bodies (such as the European Committee of Social Rights).

- non-binding standards elaborated by specialised agencies of the United Nations such as the World Health Organisation;

- judicial guidance from courts and other adjudicative bodies in the growing number of domestic jurisdictions that have moved to make ESCRs justiciable (for example, South Africa); and

- elaboration by United Nations agencies of human rights "indicators" – statistical markers by which the progressive realisation of ESCRs can be measured over time.

49. Sources of this kind form an essential part of the normative framework of international human rights law. It should be stressed that unlike the international treaties discussed at paragraphs 41-46, none of the sources enumerated in paragraph 48 create binding obligations on the New Zealand government. All of them, however, contribute to a dynamic and ongoing process of elaboration, interpretation and evolution of ESCRs and thereby provide valuable insights into the meaning, scope and application of the rather vague legal standards contained in binding instruments such as the ESCR Covenant. In that sense, they can be seen as interpretive aids to the binding commitments undertaken by States parties, including New Zealand.

B Brief outline of the substantive framework

50. It is not possible in a discussion document of this kind to do justice to the substantive content of international human rights law as it impacts on social policy. We understand that the Human Rights Commission is preparing (or commissioning) separate reports on some relevant rights (including health and education). We suggest below that the Commission, in coordination with relevant government departments, should consider engaging in further and on going work to explore the substantive content of relevant rights. For the purposes of this report, however, we confine ourselves to a brief outline.

51. The relevant rights that are currently protected by international law can be divided into the following main (but not exclusive) categories.

The right to an adequate standard of living

52. This includes the rights to food, housing, clothing and water.

53. The right to housing is "the right to live somewhere in security, peace and dignity" (the Committee on Economic, Social and Cultural Rights (ESCR Committee), General Comment 4). It is the right to safe, habitable, accessible and affordable housing and to a degree of security of tenure, including protection from forcible evictions (ESCR Committee, General Comments 4 & 7).

54. In the view of the United Nations treaty body responsible for monitoring the ESCR Covenant, the right to adequate food is realised when every human being has physical and economic access at all times to adequate food or means for its procurement (ESCR Committee, General Comment 12). The ESCR Covenant also obligates States parties to cooperate in the equitable distribution of the world's food supplies.

55. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses (ESCR Committee, General Comment 15).

(See, esp, Art 25 Universal Declaration; Art 11 ESCR Covenant; Art 14(2)(h) Women's Convention; Art 5(e)(iii) Race Convention; Art 27 Children's Convention; and Arts 20, 21 & 23 Refugee Convention).

Labour rights

56. This is one of the most well elaborated categories of ESCRs. It includes the right to work, the right to just and favourable conditions of work (including adequate and equitable remuneration, safe and healthy working conditions, equal opportunity in the workplace and rest and leisure), freedom to organise and bargain collectively, the right to social security and protections from forced labour and from other forms of economic exploitation.

57. The ILO Fundamental Conventions contain extensive elaboration of some labour rights. As already discussed, these are grouped into four key areas of concern: forced labour (C29 and C105), freedom of association and the right to collective bargaining (C87 and C98), workforce discrimination (C100 and C111) and child labour (C138 and C182) of which, C87 and C138 have not been ratified by New Zealand.

    (See, also Arts 4, 20 & 22-24 Universal Declaration; Arts 6-9 ESCR Covenant; Art 8 & 22 CPR Covenant; Art 11 Women's Convention; Art 5(e)(i)-(ii) Race Convention; Arts 32, 34 & 38 Children's Convention; and Arts 15, 17-19 & 24 Refugee Convention).

The right to health

58. The right to the highest attainable standard of physical and mental health extends not only to timely and appropriate health care, but also to the underlying determinants of health, such as clean air and water, adequate sanitation, and healthy occupational and environmental conditions (Report of the Special Rapporteur, Paul Hunt, 13 February 2003, para 23; ESCR Committee, General Comment 14).

    (See, esp, Art 25 Universal Declaration; Art 12 ESCR Covenant; Arts 6 & 7 CPR Covenant; Arts 11(1)(f), 12 & 14(2)(b) Women's Convention; Art 5(e)(iv) Race Convention; and Arts 6, 19, 23-25 & 39 Children's Convention).

The right to education

59. The right to education includes the right to free and compulsory primary education, and the right to generally available and accessible (and progressively free) secondary and higher education. It also guarantees parents and legal guardians a degree of freedom of educational choice for their children.

    (See, esp, Art 26 Universal Declaration; Arts 13 & 14 ESCR Covenant; Art 18(4) CPR Covenant; Arts 5(b), 10, 14(2)(d) & 16(1)(e) Women's Convention; Arts 5(e)(v) & 7 Race Convention; Arts 28 & 29 Children's Convention; and Arts 4 & 22 Refugee Convention).

Protections accorded to the family unit

60. The family unit is singled out for special recognition and protection. The right to marry is protected, as are the equal rights and responsibilities of spouses within marriage.

    (See, esp, Arts 12 & 16 Universal Declaration; Arts 17 & 23 CPR Covenant; Art 16 Women's Convention; Arts 5, 9, 10, 16, 18 & 20 Children's Convention; and Art 12(2) Refugee Convention).

Rights concerning participation in public affairs

61. Rights concerning participation in the conduct of public affairs are found in a number of forms in the international human rights treaties (see, esp, Art 21 Universal Declaration; Art 25 CPR Covenant; Art 5(c) Race Convention; Arts 7, 8 & 14(2)(a) & (f) Women's Convention; and Arts 9(2), 12 & 17 Children' Convention; see, also, Art 13(1) of the ESCR Covenant, invoking participation as an underlying purpose of the right to education). Such express rights of participation are additionally bolstered by the freedoms of association, assembly and expression protected by Arts 19, 21 & 22 of the CPR Covenant, as well as elsewhere in international law.

62. The significance of the right to participation for the State's obligations regarding protection of ESCRs is explored further below (paras 98-102).

Other rights concerning cultural life

63. These can be found in a number of disparate forms, including:

- a general right to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from authorship of scientific, literary or artistic production;

- religious freedom;

- the right of persons who belong to a minority, in community with others, to enjoy their culture, profess and practise their own religion and use their own language; and

- obligations on States parties to combat cultural factors that contribute to inequalities within society.

(See, esp, Art 27 Universal Declaration; Art 15 ESCR Covenant; Arts 18 & 27 CPR Covenant; Arts 2(f), 5 & 13(1)(c) Women's Convention; Arts 30 & 31 Children's Convention; Arts 5(d)(vii), 5(e)(vi), 5(f) & 7 Race Convention; and Art 14 Refugee Convention).

The right of all peoples to self-determination

64. This right is common to both the ESCR Covenant and the CPR Covenant (common Art 1). It belongs to "peoples" rather than individuals. It guarantees the right of peoples to freely determine their political status and to freely pursue their economic, social and cultural development.

Freedom from discrimination, equality and protection of vulnerable groups

65. We come, then, to one of the central themes of international human rights law, the protection of freedom from discrimination and the right to equality before the law.

66. Under article 2(2) of the ESCR Covenant, States parties undertake to guarantee the rights enunciated in the Covenant "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The right to equality in the exercise of the rights protected by the ESCR Covenant is also guaranteed by article 3 of that Covenant (which relates to gender equality) and article 26 of the CPR Covenant, which contains a general guarantee of equality before

the law, equal protection of the law and freedom from discrimination (see *Broeks v The Netherlands* Human Rights Committee Communication No 172/1984, A/42/40 (1987) in which, the Human Rights Committee acknowledged the overlap between the protection offered by Art 2(2) of the ESCR Covenant and Art 26 of the CPR Covenant; see also Arts 2 & 7 of the Universal Declaration).

67. Articles 2(1) & 3 of the CPR Covenant guarantee the equal enjoyment of the rights protected by that Covenant; and article 2 of the Children's Convention serves the same function. Finally, the Race Convention and the Women's Convention are substantially directed towards securing equality for racial minorities and women, respectively.

68. See, also ILO Conventions 100 (1951) on equal remuneration and 111 (1958) on discrimination in employment and occupation.

69. The concept of equality found in these international instruments is one of substantive (*de facto)* rather than formal (*de jure*) equality. In other words, the State is not only obliged to ensure that formal rights and entitlements are extended without discrimination but must also act to eliminate structural inequalities and actual social and economic disparities. This may well require affirmative action designed to ensure the positive enjoyment of rights by historically disadvantaged groups (see on this, for example, Arts 1 & 3-5 Women's Convention; Arts 1(1) & (4), 2(1)(c) & (e), & 2(2) Race Convention; Human Rights Committee General Comment 18; and the Limburg Principles, paras 37-39).

70. The pervasiveness of the equality guarantee in the international human rights treaties reflects a particular preoccupation with individuals and groups who are vulnerable, marginal, disadvantaged or socially excluded. Vulnerable groups that have been singled out for special attention and protection within the express framework of international human rights law include:

    - women (see, esp, Arts 2(2), 3, 7(a)(i) & 10 ESCR Covenant; Arts 2(1), 3, 23 & 26 CPR Covenant; the Women's Convention in its entirety; and ILO Fundamental Conventions 100 (1951) and 111 (1958));

    - rural women (Art 14 Women's Convention);

    - children (see, esp, Arts 10(3), 12(2)(a) & 13 ESCR Covenant; Art 24 CPR Covenant; Arts 5(b), 11(2)(c), 12(2), 16(1)(d)-(f) & 16(2) Women's Convention; the Children's Convention in its entirety; and ILO Fundamental Conventions 138 (1973) and 182 (1999), although note that C138 has not been ratified by New Zealand);

    - ethnic minorities (see, esp, Art 2(2) ESCR Covenant; Arts 2(1), 26 & 27 CPR Covenant; the Race Convention in its entirety; Art 30 Children's Convention; and ILO Fundamental Convention 111 (1958)); and

    - refugees (see, esp, the Refugee Convention).

71. Additionally, the human rights treaty bodies have drawn particular attention to the plight of other vulnerable groups including disabled persons (ESCR Committee, General Comment 5; see, also, Art 23 Children's Convention), the elderly (ESCR Committee, General Comment 6) and indigenous peoples (ESCR Committee, General Comment 14 and the Committee on the Elimination of Racial Discrimination, General Recommendation XXIII).

72. The significance of the equality guarantee and the preoccupation of international human rights law with vulnerable or disadvantaged groups are discussed further below.

Other civil and political rights

73. It will be clear from the above discussion that many of the rights contained in the CPR Covenant have dimensions that are of direct relevance to the substance of social policy. Examples are the right to life (relevant to the right to health), the right to join trade unions (relevant to labour rights) and the right to freedom from discrimination (of relevance across all social policy).

74. In addition, the full range of rights and liberties protected in the CPR Covenant, elsewhere within the framework of international human rights law and, domestically, in the Bill of Rights Act must be respected in the process of social policy formation and delivery. If a rights-based approach is to be taken to the development of social policy, relevant officials must, accordingly, familiarise themselves with the full scope and application of international and domestic human rights law in all its dimensions.

V THE STATE'S PROTECTIVE OBLIGATION

75. What, then, are the obligations imposed on States parties with respect to protection of these international human rights and how might they impact on the development of social policy?

76. The State's obligations within the traditional framework of CPRs (for example, the State's protective obligations under article 2 of the CPR Covenant) are comparatively well understood and, accordingly, we do not focus on them in this report.

77. Article 2 of the ESCR Covenant, however, poses more of a puzzle. It provides as follows:

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

78. Two key features of article 2(1) establish that the obligation undertaken by States parties to the Covenant is something less than immediate and absolute. First, the language of article 2(1) is programmatic and progressive. States parties do not undertake to "respect" and "ensure" the rights contained in the Covenant from the moment of its entry into force (as do States parties to the CPR Covenant). Rather, States undertake to "take steps" towards the progressive realisation of the rights.

79. Second, the terms of article 2(1) expressly contemplate the possibility of resource limitations that might preclude full realisation of all the Covenant rights for all States parties. The "steps" that States parties are obliged to take to progressively realise the rights are expressly confined to steps within the State's resource capacities.

80. We have already suggested that the relativity and flexibility of the language invoked in article 2(1) is consistent with a large measure of discretion having been retained by States parties to decide how scarce resources are to be allocated and how the rights contained in

the Covenant are to be best protected over a period of time. The ESCR Committee has described it as "a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of [ESCRs]" (General Comment 3).

81. This, then, is the conundrum posed by article 2(1): if the nature of the obligation imposed on States parties under the ESCR Covenant changes over time (in accordance with resource capacities and progressive implementation) and if article 2(1) reposes a large measure of discretion in States parties to decide how to meet their Covenant obligations, how is the content of a rights-based approach to social policy-making to be ascertained? Is there any "bottom line" below which, States parties to the Covenant are not entitled to drop? What, if anything, might a rights-based approach to the development of social policy require?

82. Some tentative answers to these questions are explored below. In short, when article 2(1) is read in the context of the wider framework of international human rights law and in light of general understandings of the implications of "rights" language (explored above), in our view, a picture begins to emerge of what a rights-based approach to social policy may require. Notwithstanding the relative and contingent language in which article 2(1) is cast, this picture includes:

- substantive parameters established by international human rights law that act as a constraint on State actions or omissions;

- an orientation towards the policy-making process in which, amongst other things, the State's capacity to further promote and protect ESCRs is constantly being re-evaluated.

A The language of article 2(1) reconsidered

83. We return, again, to the language of article 2(1) itself. If read with an eye to the outer parameters or constraints imposed on policy-makers by the ESCR Covenant, the following points emerge:

- The obligation to "take steps" to "progressively" realise the rights contained in the Covenant envisages a linear progression towards ever increasing realisation of the protected rights. Article 2(1) does not allow States parties to tread water where rights are concerned. Rather, it requires States parties to take "deliberate, concrete and targeted" steps to continuously improve people's enjoyment of ESCRs (ESCR Committee, General Comment 3).

- Article 2(1) states that the steps taken must be with a view to achieving "full realisation" of the Covenant rights. The ESCR Committee has suggested that article 2(1) imposes an obligation on States parties to move as expeditiously and effectively as possible towards that goal of full realisation (General Comment 3; see, also, Report of the Special Rapporteur, Paul Hunt, 13 February 2003). We note, though, as a caveat to the concept of "full realisation" that some of the rights in the ESCR Covenant are expressed as permanent states of aspiration rather than achievable, ultimate goals. For example, article 10 speaks of the "widest possible protection and assistance" for the family, article 11 refers to the "continuous improvement of living conditions" and article 12 refers to the "highest attainable standard of physical and mental health".

- States parties must take steps to the "maximum" of their available resources and by "all appropriate means". This effectively amounts to a direction to States parties to accord ESCRs high priority in the process of resource allocation. The ESCR Committee has

thus suggested that the flexibility inherent in article 2(1) coexists with an obligation on each State party to use "all the means at its disposal" to give effect to the protected rights (General Comment 9). "Appropriate means" may include judicial remedies where appropriate and will also include a range of administrative, financial, educational and social measures (General Comment 3).

- Finally, the notion of "full realisation" is clearly not limited to "respect" for the Covenant rights but requires States parties to take positive measures to ensure the enjoyment of the rights by individuals subject to their jurisdiction.

B What, then, does article 2(1) require of social policy-makers?

84. In light of this language, we suggest that a rights-based approach to social policy-making requires the following.

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

85. A rights-based approach to social policy must, we suggest, require explicit recognition by policy-makers of the international human rights normative framework, an ongoing engagement by policy-makers with the scope and effect of relevant rights and the formulation of ongoing strategies and programmes for the promotion of such rights. With this in mind, the article 2(1) obligation to take steps towards the progressive realisation of ESCRs would seem to require policy-makers to remain actively engaged with at least four questions:

    85.1. What is the scope of the protected rights?

    85.2. To what extent have the protected rights been realised?

    85.3. What is the extent of the State's current capacity to realise the rights?

    85.4. How might the protected rights be more fully realised within current resource constraints?

86. As to the first, we have already identified, above, a degree of imprecision in the language in which many of the ESCRs found in international law are cast. This does not mean that the relevant rights can be ignored. Rather, if ESCRs are to be given the priority within the process of social policy formulation that their status as "rights" demands, it is incumbent on relevant officials to keep abreast of current developments in their relevant field that might contribute to an evolving international consensus as to what is required to realise the relevant rights. For example, to the extent relevant to their work, policy-makers should be familiar with the General Comments periodically issued by the United Nations human rights treaty bodies. In our view, this will necessarily be an ongoing and dynamic process, requiring policy-makers to constantly update their understanding of the content of international law and to incorporate any fresh insights into their framework for policy development.

87. As to the second, the ESCR Committee has said that diagnosis and knowledge of the existing situation is the essential first step towards promoting the realisation of ESCRs. Effective, regular, transparent and accessible monitoring of ESCRs is an essential feature of a human rights approach to policy development. Further, if the progressive realisation of rights is to be effectively monitored, patently, the government must have in place mechanisms to measure the extent of its progress. This can be done through the combined

application of human rights "indicators" (measures of the extent of realisation) and "benchmarks" (targets) (see, for example, ESCR Committee General Comments 1, 3, 5 & 14; Human Rights Committee General Comment 28; Report of the Special Rapporteur, Paul Hunt, February 2003, para 36).

88. Note, also, that if the State's obligations to promote equality and to offer particular protection to vulnerable groups (discussed further at paras 109-116, below) are to be met, collection of relevant statistical data must be appropriately disaggregated so that the conditions of disadvantaged groups are captured. A rigorous human rights approach to policy-making demands an analysis of the distributional impact of reforms on the well being of different groups in society, especially the poor and vulnerable (see on this, Report of the Special Rapporteur, Paul Hunt, February 2003, paras 36, 51 & 82).

89. As to the third, article 2(1) would seem to require that any shortfall in the State's realisation of ESCRs be positively justifiable on grounds of insufficient resources. It is, therefore, incumbent on policy-makers to keep under constant review the explanations for any such shortfall.

90. As to the fourth, it almost goes without saying that the obligation to "take steps" and use "all appropriate means" requires constant re-evaluation of existing strategies for meeting the Covenant obligations.

91. Finally under this head, we suggest that the strategies employed to realise the protected rights must be "reasonable" in the sense employed by the Constitutional Court of South Africa in *South Africa v Grootboom* 11 BCLR 1169 (2000) (and followed, subsequently, in *Minister of Health v Treatment Action Campaign* (2002) 10 BCLR 1033 (*TAC)*). In *Grootboom*, interpreting a constitutional provision similar in structure to article 2(1) of the ESCR Covenant, the Constitutional Court held that "reasonable" measures included the sensible prioritisation of resources and a coherent and coordinated programme designed to realise the protected right. Other, specific characteristics of this concept of "reasonableness" are discussed below.

No retrogressive measures

92. The article 2(1) requirement to take steps towards the progressive implementation of ESCRs would seem to preclude States parties from introducing deliberately *retrogressive* measures, at least in the absence of truly exceptional circumstances. The ESCR Committee has said that retrogressive measures are prohibited in the absence of clear justification and a background of severe resource constraint (ESCR Committee, General Comments 3 para 9, 14, para 32 & 15 para 19; see, also, Maastricht Principles, para 14(e)).

Obligation to "respect" the rights

93. Likewise, the obligation to take steps towards the progressive realisation of ESCRs would seem to be inconsistent with any breach by the State of its negative obligation to "respect" the protected rights. The leeway for States parties envisaged by article 2(1) relates to positive measures that are required to "protect" or "fulfil" rights. It is these positive measures that have resource implications for the State concerned. Conversely, an immediate prohibition on *interferences* by the State or its agents with protected rights is, in our view, implicit in article 2(1). This is also the view that has been taken by the Constitutional Court of South Africa in *Grootboom* and *TAC* (and see, also, on this point, Maastricht Principles, para 11; Report of the Independent Expert, 2003, para 19).

94. For the sake of completeness, we note that the parameters of the prohibition on State interferences with protected rights are mediated by article 4 of the ESCR Covenant, which provides that States may subject the Covenant rights "only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

An obligation to provide minimum levels of realisation?

95. The ESCR Committee has suggested (and some commentators agree) that the leeway given to States parties under article 2(1) needs to be read subject to a minimum core obligation to ensure satisfaction of "minimum essential levels" of each right. The Committee posits, for example, that a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing or of basic education is *prima facie* failing to discharge its obligation under the Covenant. In order to absolve itself, the State would need to demonstrate that every effort has been made to use all the resources that were at its disposal as a matter of priority (General Comment 3; see, also, ESCR Committee, Poverty Statement, May 2001, para 15; Report of the Independent Expert, 2003, para 24; Report of the Special Rapporteur, Paul Hunt, February 2003, para 51).

96. The nature and content of such minimum obligations require further elaboration. In our view, however, the imposition of a minimum core obligation to ensure basic satisfaction of ESCRs is consistent with the tenor of article 2(1) and its requirement that all States parties "take steps" towards realisation of the rights. It is also, in our view, consistent with the general implications of "rights" language discussed above, in particular, the notion of prioritising morally important interests and the idea that residual obligations may subsist even when full realisation of ESCRs is impracticable.

97. We note, though, that the notion of a minimum core obligation was rejected by the Constitutional Court of South Africa in *Grootboom* and *TAC* as unworkable in the South African context.

Participation of rights-holders in policy development

98. The language of article 2(1), read against the background of general understandings of what "rights" require (in particular, the notion of the rights-bearer as autonomous, self-sufficient, entitled and empowered) also says something about the *process* of policy formation. It requires active engagement as part of the process of policy-making with civil society and, in particular, with affected groups.

99. The rights found in the international human rights treaties to take part in the conduct of public affairs have been detailed above. Drawing in part on these rights, the ESCR Committee and the Office of the High Commissioner for Human Rights, amongst others, has stipulated the need for consultation with affected persons and groups in the process of formulating relevant policies (eg, ESCR Committee, General Comment 4; OHCHR, *Draft Guidelines*, 2002, guideline 5).

100. Encouragement of such consultation is, the ESCR Committee suggests, one of the principal objectives of the State reporting system (General Comment 1). The Committee has attempted to foster participation by directing States parties to publicise the text of the ESCR Covenant, to seek the participation of non-governmental organisations in the drafting of State reports and to disseminate those reports as widely as possible at the national level (General Comment No 1).

101. While the State reporting system is one mechanism through which participation of affected groups can be fostered, the Office of the High Commissioner for Human Rights suggests a rights-based approach requires engagement with affected groups at *all* stages of policy development, from the initial conception of policy goals through to implementation, monitoring and assessment of the success and failure of policies (OHCHR, *Draft Guidelines*, 2002, guideline 5).

102. (See, also, ESCR Committee, "Poverty Statement", 2001, para 12; Limburg Principles, para 11; and Craven, 1995, p 121).

Forms of enhanced accountability

103. Some degree of governmental accountability for its performance with respect to fulfilment of human rights is essential to a rights based approach. If human rights are owed to human beings as a matter of obligation rather than beneficence, so, governments (as duty holders) should be accountable for their performance.

104. Of course, New Zealand's system of democratic government provides a base level of governmental accountability for its performance with respect to human rights. The literature, however, discloses a growing consensus that a human rights approach to social policy requires some degree of additional accountability (see, eg, ESCR Committee, "Poverty Statement", 2001, para 14; OHCHR, *Draft Guidelines*, 2002, guidelines 16 & 17; Report of the Special Rapporteur, Paul Hunt, 2003, para 53).

105. There is a range of potential mechanisms for enhancing governmental accountability for breaches of ESCRs, from full judicial accountability (justiciability of all ESCRs) to forms of political accountability (for example, enhancing the attention given to ESCRs in the Parliamentary process). In between these two extremes sit, for example:

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

106. The ESCR Covenant does not require the utilisation by States parties of any particular mechanism or mechanisms for enhancing governmental accountability of ESCRs. However, the call in article 2(1) to use "all appropriate means" to move towards full realisation of the Covenant rights is clearly wide enough to encompass the deployment of *some form* of enhanced accountability. In our view, the obligation under article 2(1) would seem to be to consider *all* available options and to provide the particular mix of accountability mechanisms that is judged to be both "appropriate" (using the language of article 2(1)) and consonant with the extent of available resources. At minimum, however, such accountability mechanisms must be effective, transparent and accessible.

107. One aspect of the wider question of accountability that requires separate consideration is the provision of effective remedies for breach of ESCRs. In our view article 2(1) requires States parties to "take steps" to the "maximum available resources" and to the extent

"appropriate" to make provision for effective remedies to individuals for breach of ESCRs. The ESCR Covenant should be read, in this respect, against the background of article 8 of the Universal Declaration of Human Rights, which sets out the right to an effective remedy by competent national tribunals for acts in violation of fundamental rights, and in light of the legal maxim that where there is a right, there is a remedy (discussed, for example, by McKay J in *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 at p 717). The ESCR Committee has suggested in this respect that administrative remedies may in many cases be adequate, as long as they are accessible, affordable, timely and effective. The Committee has, however, called for special consideration to be given to the adoption of judicial remedies to reinforce or complement administrative ones (General Comment 9; see, also, Limburg Principles, paras 8 & 19).

108. We do not seek, in this report, to resolve the vexed question of the extent to which judicial or quasi-judicial remedies for violation of ESCRs in New Zealand are either "appropriate" or economically viable (we understand that the justiciability of ESCRs is to be, in any event, the subject of a separate report). We note, however, that in our view, a rights-based approach to social policy requires that question to be confronted and addressed in a principled manner (see, also, the further discussion of this topic at paras 165-174, below).

Special protection for the disadvantaged

109. The ESCR Committee has suggested on a number of occasions that where resource constraints restrict the State's ability to provide for full realisation of ESCRs, special attention or priority must be given to the most vulnerable or disadvantaged (see, eg, General Comments 3 and 4). In other words, responses to social and economic need must be from the bottom up. The obligation in relation to vulnerable or disadvantaged groups is, the Committee has suggested, to take positive action to reduce structural disadvantages and to give appropriate preferential treatment in order to achieve the objectives of full participation and equality (General Comment 5).

110. A failure to provide relief for the most needy formed the nub of the finding by the Constitutional Court of South Africa in *Grootboom* of violation of ESCRs. Specifically, the Constitutional Court found that the State's long-term plan to provide low-income shelter was violative of ESCRs because it was not accompanied by a system to facilitate access to temporary relief for those people in desperate need. The obligation of progressive realisation was thus found to require sensible priority setting with particular attention to the plight of the most disadvantaged.

111. This focus on improving the situation of the most disadvantaged is, we suggest, consonant with the general notion of "progressive realisation" of rights.

C Article 2(2): non-discrimination and equality

112. The call to attend to the predicament of the most disadvantaged and vulnerable naturally calls attention away from article 2(1) of the Covenant and refocuses it on article 2(2): the equality provision. Article 2(2) has been set out above (para 77; see, also, paras 65ff). What, though, is its significance for the nature of the State's obligation to protect ESCRs?

113. The important point is that the article 2(2) obligation is additional to (rather than subject to) article 2(1). Accordingly, the obligation to provide the Covenant rights "without discrimination of any kind" is neither progressive nor subject to resource constraints. It is immediate and absolute (see, eg, Limburg Principles, para 22).

114. If there were any doubt about this from the structure of article 2 itself, it is confirmed by the general equality protection found in article 26 of the CPR Covenant, which provides an absolute guarantee of equality before the law, equal protection of the law and freedom from discrimination (on this, again, see *Broeks v The Netherlands* (above)). It is further cemented by the two anti-discrimination treaties: the Race Convention and the Women's Convention.

115. The significance of this absolute obligation to guarantee the rights enunciated in the Covenant without discrimination is highlighted if one bears in mind the concept of substantive equality that informs the ESCR Covenant and the other human rights treaties. As has already been discussed, the concept of equality protected by international law is a substantive one. It not only obliges States parties to ensure that formal rights and entitlements are extended without discrimination but also requires States parties to act to eliminate structural inequalities and actual social and economic disparities.

116. Thus, development of social policy is constrained by a freestanding obligation undertaken at international law to remove structural barriers to the enjoyment of rights by disadvantaged groups.

D The State's obligations under the other treaties

117. Finally, it should be borne in mind that the leeway given to States parties under article 2(1) of the ESCR Covenant to realise rights progressively and within available resources does not apply to obligations undertaken under other international treaties (whether in the United Nations or ILO context). The obligation under the CPR Covenant, for example, is to "respect" and "ensure" rights. Thus, to the extent rights protected under the ESCR Covenant also receive protection elsewhere within the framework of international human rights law, the State cannot rely on the limited nature of the article 2(1) obligation.

E Conclusion

118. We conclude this section with a quote from the recent report of the Special Rapporteur, Paul Hunt, on the right to health. He says:

> In brief, human rights empower the poor; help to tackle discrimination and inequality; require the participation of the poor; underscore the importance of all rights in the struggle against poverty; render some policy choices (eg those which have a disproportionately harmful impact upon the poor) impermissible; … and introduce the notion of obligation and thus the requirement of effective, transparent and accessible mechanisms of accountability.

119. We have attempted, above, to explore these dimensions of a human rights approach. It remains now to consider how they might impact on the New Zealand policy environment.

VI IMPACT OF A RIGHTS-BASED APPROACH ON SOCIAL POLICY-MAKING

120. This section of the paper attempts to characterise the "dominant" approach currently taken to social policy within New Zealand government departments and invites discussion as to the implications of taking a rights-based approach. It should be read subject to a large qualification. It is based on an incomplete range of written sources that detail *some* current approaches to social policy-making in *some* government departments. It has not yet had the advantage of feedback from officials from those departments. It simplifies and generalises when that is undoubtedly unfair to officials. It represents a starting point for exploring the implications of a rights-based approach for social policy-making.

A Social policy-making in New Zealand government

121. Social policy-making is a subset of policy-making more generally in government. There is not one monolithic policy framework that all government departments apply. Each department has its own perspective on the values which underlie its policy analysis, depending on the role of the department. However, the characteristics of good social policy are those of good policy advice more generally, as illustrated by the Ministry of Education's (2003) characterisation of the "quality" performance dimension of policy analysis and the policy development process:

> "Problem definition – the public policy problem, including the underlying causes, will be identified and supported by data or other evidence, and the policy objectives will be articulated.
>
> Analysis – incorporates the following aspects:
>
> A Range of Options will be identified and assessed for benefits, costs, risks (including strategic or long and medium-term risks as well as operational or immediate risks), and consequences to the Government and the community.[1]
>
> Consistency – linkages will be drawn with prior advice provided within the project through cross-referencing, trade-offs etc, or explicit variations will be made to improve prior advice.
>
> Cross-Sector Inter-relationships – linkages with Government policy directions and interventions across sectors, particularly the labour market, research and other social policy areas and within the broad education sector will be taken into account.
>
> Impact for Maori – the impact of the proposals on the achievement of Maori students and the participation of Maori in education will be taken into account, consistent with the Ministry's Policy Analysis Framework for Education of Maori.
>
> Stakeholder Impact – the impact of the proposals on relevant stakeholders will be taken into account, including, specifically, the achievement and participation of:
> - Disadvantaged or at risk groups of students
> - Pacific Islands students
>
> Assumptions/Principles will be explicit and robust, with logical argument supported by fact.
>
> Cost Implications – costs, in terms of the implications of the proposals for specific appropriations or appropriation types, will be identified; and methods and assumptions for costings will be transparent and robust, with risks explicitly identified.
>
> Implementation Implications – the proposals will include approaches for addressing any feasibility, timing, and change management issues, and associated legislative implications.
>
> Consultation – relevant Government agencies and other affected parties, where applicable, will be provided with reasonable opportunities to influence policy advice, and any comments on the analysis, options or proposals will be taken into account.
>
> Timeliness – policy advice will be provided to the Minister in sufficient time to enable the Minister and/or the Government to make decisions in a timely fashion.
>
> Presentation of Policy Advice – all policy papers, briefings to the Minister and initial promulgation of Government policy will meet the following presentation standards . . .
>
> Initial promulgation – will be delivered in accordance with the documented terms of reference/specifications for each notification, consistent with the objectives of those policies.

[1] Footnote in the original: "A 'range of options' will be judged in the context of well-established analytical and legal frameworks, relevant research and evaluation, existing (empirical) data held by the Ministry of Education, previous government decisions within the policy project, and a sound knowledge of the sector."

122. The documentation from social policy agencies that we have seen suggests that most policy advice on social policy issues is formulated in accordance with this sort of standard, generic framework for policy advice.

123. Occasionally, however, a more specific policy framework is developed to handle policy issues that require particular consideration. Often, these frameworks are cross-sectoral – they are developed to take account of the policy implications of specific characteristics of a population group, such as Maori, Pacific peoples or women, in all areas of policy, whether social, economic or environmental.

124. Specific policy frameworks may also be developed by specific departments for their own internal quality assurance reasons. For example, the Ministry of Education refers to its own Policy Analysis Framework for Education of Maori.

125. Sometimes, specific policy frameworks are required by Cabinet to be included in certain categories of Cabinet papers. Over the last four years, examples of these have related to human rights themselves as well as to particular dimensions of the population (gender and disability), a particular sectional interest (business) and a particular area of policy that cuts across different policy sectors (occupations):

- In 2003, effective 1 May, Cabinet updated its requirement that all Cabinet papers must include a separate section on the consistency of any proposals with the Human Rights Act 1993 and Bill of Rights Act. Formulation of this advice is the responsibility of the relevant officials who may consult with the Ministry of Justice and/or Crown Law Office (Step by Step Guide, 3.41-3.44).

- In 2002, Cabinet required that a gender implications statement be included with all submissions to the Cabinet Social Equity Committee. This grows out of gender analysis, as developed by the Ministry of Womens' Affairs, as "a method of examining systematically and consistently how gender differences are affected by government action, and communicating that information to decision-makers" (CAB (02) 2: para 7).

- In 2001, Cabinet agreed that papers submitted to (what is now) the Cabinet Social Development Committee be required to include a disability perspective, considering the impact of the paper's proposals on disabled people (Step by Step Guide, para 3.50).

- In 2001, Cabinet added to the established requirement for a Regulatory Impact Statement (included in all policy papers to Cabinet Committees that result in legislation, as well as in resulting government Bills) an additional requirement for a Business Compliance Cost Statement (CAB (01) 2).

- In 1999, Cabinet agreed to a policy framework for regulating occupations and required Cabinet papers proposing alternative approaches to explain the reasons for that (CAB (99) 6).

126. The most wide-ranging recent endeavour to develop a policy framework relevant to social policy that we have seen is the Ministry of Social Development's *Social Development Approach* of June 2001. It notes:

> "Historically social policy analysis has been organised around functional interventions such as economic, education, housing, and health policies. The balkanised nature of this policy advice risks poorly co-ordinated and integrated policy. Policy advisors may fail to analyse either the positive or negative effects of proposed policies in other sectors. The framework for cross sectoral

social policy aims to overcome this problem and improve the overall coherence of policy analysis."

127. We have taken the following as key points of the Ministry's Social Development Approach. The approach:

- follows the Royal Commission on Social Policy in using the notion of "well being" to formulate desirable social outcomes that are the goals of social policy;

- notes that goals of social policy are about improving both the level and distribution of well being;

- notes that "[t]he New Zealand literature is marked by a strong assertion that an important aspect of the goals of social policy is a guarantee of some adequate level of well being for all people." It also notes the Royal Commission's conclusion that social, legal and political freedoms as well as aspects of culture and identity are relevant dimensions of an adequate level of well being; and

- uses a "social investment" approach to social policy that considers the impact of government policies and interventions on social policy goals, including the impact on all desired outcomes. In relation to evaluating specific policy proposals, key elements of the model used by the approach are: the measurement of desired social outcomes; understanding direct and indirect effects of policy on these outcomes; and coping with uncertainty.

128. It is important to note that a framework for policy analysis is different from a policy strategy. A framework for analysis is a conceptual tool for analysing issues. A policy strategy, which may be developed using one or more frameworks for analysis, is a high level approach to a particular set of interconnected policy issues.

129. An example of a policy strategy is the New Zealand Housing Strategy being developed by the Housing New Zealand Corporation "that will set out a vision and strategic direction for housing in New Zealand for the next 10 years". It identifies desired long term outcomes, takes a "whole of government" approach to the issues that it links to sustainable social and economic development, and is comprised of 11 reports of working parties on particular aspects of housing policy.

130. We make two final points.

131. First, generic approaches to policy-making are already, to some extent, constrained by existing structural mechanisms some of which attempt to bring a rights-based approach to bear on policy initiatives. These existing mechanisms, and their limitations with regard to implementation of ESCRs in particular, are discussed in Part VII.

132. Second, we understand that at least one government department (the Ministry of Health) is currently conducting its own assessment of the possible implications of taking a rights-based approach to policy-making.

B Implications of a rights-based approach for social policy development

133. How, then, does the general approach to development of social policy outlined above measure up to a rights-based approach?

134. It is important to begin by refocusing on the degree of recognition that is accorded, within the international human rights framework, to the entitlement of democratically elected governments to pursue the progressive realisation of ESCRs in their own way and choosing their own policy frameworks. The ESCR Covenant is, the ESCR Committee has stressed, "neutral" as to political and economic systems.

135. That said, we have suggested, above, that a rights-based approach creates certain parameters or boundaries (both substantive and procedural) that act as a constraint on social policy. Below, based on our tentative conclusions reached in the previous discussion as to what the international framework of human rights law seems to require of policy-makers, we offer a framework of questions intended to aid and to focus officials' discussions of the extent to which rights-based requirements are currently being met in New Zealand social policy-making.

i) To what extent do social policy-makers engage explicitly, as part of an ongoing and dynamic process, with the scope of relevant human rights, including relevant ESCRs, as determined by the international framework? How much capacity currently exists within relevant government agencies to support such an engagement? How much if any additional capacity would be required?

ii) To what extent do social policy-makers engage in effective and regular monitoring of the level of realisation of human rights? How much if any additional capacity would be required to support such an engagement? What indicators are employed to measure progress in the fulfilment of human rights and how effective are they? What changes to existing indicators would be necessary to support rights-based analysis?

iii) Do social policy-makers regularly re-evaluate the State's economic capacity to realise relevant rights? If so, how? If not, how costly would be it be to do so? How much if any additional capacity would be required?

iv) Do social policy-makers regularly re-evaluate existing strategies for realising human rights, in light of their changing understandings of (i) – (iii)? If so, how? If not, why not? What additional capacity would be required?

v) How can we tell that the strategies employed to realise human rights are "reasonable", in the sense of involving coherent and coordinated programmes designed to realise human rights and a sensible prioritisation of resources?

vi) Do social policy-makers actively avoid <u>retrogressive</u> measures that lessen the extent of realisation of human rights? Is this a reasonable expectation?

vii) Do social policy-makers ensure that the State and its agents "respect" (ie, do not interfere with) human rights, including ESCRs? What assurances are there that any such positive interferences are restricted to those that are determined by law, compatible with the nature of the rights, and for the purpose of promoting the general welfare?

viii) Do social policy-makers ensure that the State provides certain minimum essential levels of each protected right? If so, what are the minimum levels of relevant rights that are regarded as essential? What would be the implications of recognising, in the process of policy-formation, such a minimum entitlement?

ix) To what extent and how do policy-makers involve civil society (and in particular, affected groups) in the process of social policy formation? What level of participation is viable and at what stage or stages of the policy process?

x) What mechanisms of accountability are social policy-makers currently subject to where human rights, including ESCRs, are concerned? Are social policy-makers investigating mechanisms for further State accountability? What are policy makers' views as to "appropriate" methods of enhanced accountability?

xi) To the extent full realisation of particular rights is not yet able to be achieved, how do social policy-makers ensure that social policy strategies offer special protection for the most needy?

xii) To what extent and in what ways do social policy-makers ensure that to the extent human rights, including ESCRs, are capable of being realised, they are realised on an equal basis? How actively do social policy-makers address the structural causes of inequality?

xiii) Are any of the, above, proposed facets of a rights-based approach unworkable in the New Zealand context? If so, why? Are there any additional facets that should form part of a rights-based approach?

136. We suggest that by addressing the above questions, in collaboration with the Human Rights Commission, the extent to which the approach taken by particular government agencies is consistent with a rights-based approach, and the extent of changes that would need to occur to make it so, will become more apparent.

137. While it is perhaps dangerous to speculate, we suspect that in practice there are varying degrees of expertise in relevant social policy agencies as to the international law framework of human rights in general and ESCRs in particular. We doubt, however, that existing policies are uniformly and routinely analysed by officials in human rights terms. For example, with respect to (ii) above, we note there is already widespread use of socio-economic "indicators" in New Zealand government to measure the progressive attainment of socio-economic goals (see, eg, the Social Report 2003). We are unclear, however, as to the extent to which those indicators can properly be seen as "human rights indicators" (in other words, indicators that derive from, reflect and are designed to monitor realisation of specific human norms with a view to holding the State to account for any shortfall (see OHCHR, "Draft Guidelines", 2002, para 37). There is also clearly regular re-evaluation of social policy strategies although, again, not necessarily through a human rights lens. We suggest in this respect that if officials' work on a Social Reporting Act is making progress, it would be important that it incorporate reporting on indicators framed in human rights terms.

138. Standing back from the minutiae, we suspect that the *substantive results* of a large portion of current New Zealand social policy analysis would live quite happily within the boundaries set by a rights-based approach and that much New Zealand social policy gives "unconscious" expression to at least *some of* the goals of a rights-based approach. For example, the Ministry of Social Development's *Social Development Approach* separately identifies human rights as a distinct "desirable social outcome". But in addition, the discussion of reducing social exclusion (in the Overview) and the discussion of increasing the overall level and distribution of well-being (in the Strategy section) are consistent with a rights-based understanding of these notions. Those discussions are not, however, explicitly cast in rights-based language.

139. Note, also, that we do not advocate a rights-based approach as the only approach that should be taken to social policy-making. Use of other approaches, whether needs-based, population-based, or evidence-based, can only enhance the richness of analysis that will result in good social policy. Our point is that, along with these other approaches, the New Zealand government needs the ability to engage in rights-based analysis. The incorporation of such an approach into policy development can only, in our view, serve to bring additional clarity to strategic social policy development and to detailed goal setting. Even if that were not the case, it is required of government as a matter of international obligation.

140. As the Office of the High Commissioner of Human Rights has suggested in its draft guidelines on poverty reduction (2002, para 17), the "value added" by a human rights approach is, in part, the way it reinforces and legitimises existing strategies. In some situations, though, the utilisation of a rights-based analysis will inevitably require a departure from existing strategies and a reordering of social policy priorities. The obligatory nature of human rights compliance means that on those occasions – where a rights-based approach comes into conflict with other approaches – the rights-based approach must take precedence as a frame of reference.

141. On the basis of the limited research we have undertaken, it is impossible to speculate on the extent to which a rights-based analysis will require a departure, in specific instances, from existing social policy priorities. In order to explore this question properly it would be necessary to undertake a detailed comparison of current New Zealand social policy approaches to particular issues with the application of a rights-based approach to those same issues. We have not done so although we believe such an inquiry, perhaps in relation to several specific case studies, would be of value in forming a more concrete picture of what a rights-based approach would add. Such a task would, of course, be best undertaken in cooperation with officials from relevant agencies.

142. Finally, we note that if a rights-based approach to social policy-making is to be taken by officials and by government in general there must be adequate procedural and structural mechanisms in place to ensure that this occurs. Cabinet decision-making processes, the legislative process, independent scrutiny, and the judicial process all have the potential to impact on the substantive dimensions of social policy-making. We turn now to these questions of process.

VII IMPLICATIONS OF A RIGHTS-BASED APPROACH FOR THE PROCESS AND STRUCTURE OF GOVERNMENT

143. In this section we briefly canvass the range of institutions and processes of New Zealand government and identify options for enhancing the government's capacity to bring a rights-based approach to bear on social policy-making.

144. We note that the significant reforms underway under the heading of the *Review of the Centre* may impact on these structures and procedures, but separate examination of that is beyond the scope of this paper.

A Executive Government

145. The Cabinet decision-making process is the key way in which social policy is formulated within the New Zealand government. There are several procedures and institutions involved that do or could bring a rights-based approach to bear on Cabinet decisions.

146. It is important to note that, as with any policy framework, application of a rights-based approach to social policy must be integrated into the policy-making process at an early stage of policy development. This is simply a matter of good policy-making practice.

147. For that to occur, the first necessary element is that there be, within relevant government departments, analytical capacity to understand, monitor and apply a rights-based approach to social policy. Each individual department or Ministry concerned with particular areas of social policy (such as education, health, or housing) should ideally have the capacity to apply a rights-based approach to the details of their policy area. It is not clear to us whether such capacity currently exists although, as already noted, we doubt whether, in particular where ESCRs are concerned, that capacity exists on a uniform basis.

148. The economic implications of capacity building would require further examination. It may be that the mainstreaming of a rights-based approach to social policy will need to be "progressively realised". We reiterate that article 2(1) leaves substantial discretion to government to weigh competing resource claims, as long as in the overall picture, realisation of ESCRs is being advanced.

149. A transitional approach to developing mainstreamed capacity could involve establishment of a more centralised capacity for the application of rights-based analysis to social policy. This could be located in one key department with an overview of issues from one perspective or another (eg the Ministry of Social Policy, the Ministry of Justice or the Ministry of Foreign Affairs and Trade). It could even be developed initially as a virtual team between these and other ministries such as the inter-departmental group led by the Ministry of Justice to promote and support the mainstreaming of human rights considerations in policy development across government.

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

- a willingness at senior levels in one or more departments to adopt a rights-based approach to social policy issues (along with other approaches);
- understanding of social policy and ability to engage in social science analysis;
- a critical mass (of, say 4 individuals) to sustain an ongoing capacity;
- high quality legal skills and experience in applying legal analysis to policy issues characterised by fluid and flexible parameters; and
- sufficient allocation of funding to ensure that the capacity is of sufficient quality to be credible and sustainable.

151. A capacity for rights-based analysis of social policy issues in one or more government departments is likely automatically to feed into the advice received by one or more Ministers and by Cabinet in formulating social policy. The principle procedural mechanisms by which a rights-based approach is already built into the Cabinet decision-making process are:

- Cabinet's requirement that policy proposals submitted to Cabinet Committees should include comment on the consistency of the proposals with the Bill of Rights Act and the Human Rights Act 1993;

- Cabinet's requirement that legislative proposals submitted to Cabinet Legislation Committee must confirm compliance with legal principles or obligations (as set out in the Legislation Advisory Committee Guidelines), including the implications of the proposed legislation for the principles of the Treaty of Waitangi, the Bill of Rights Act, the Human Rights Act 1993, the Privacy Act 1993 and international obligations;

- the vetting process by which the Ministry of Justice or Crown Law Office report to the Attorney-General on the consistency of draft legislation with the Bill of Rights Act (in order to facilitate the exercise by the Attorney-General of her responsibility to draw the attention of the House to any inconsistencies, under section 7 of the Bill of Rights Act).

152. To the extent the first of these mechanisms requires Ministers to account for "any aspects" of proposed legislation that "have implications for, or may be affected by…international obligations" it should, at least in theory, provide opportunity for consideration of the impact of proposed legislation on ESCRs. The efficacy of that mechanism, however, depends on the provision of high quality advice to Ministers on the scope and implication of ESCRs. We have insufficient information to comment on the extent to which such high quality advice is currently available. We suspect that the requirement to report on the implications of proposed legislation for "international obligations" is currently under-utilised as far as ESCRs are concerned. Further inquiry as to current practice on this point, however, would be of value (see, para 135 above).

153. With the exception of the requirement to report on "international obligations", the procedural mechanisms that currently apply as part of the Cabinet process are primarily focussed on CPRs.

154. In light of the current biases in the system towards CPRs (both explicit and subconscious) we suggest that if Ministers wish to ensure that the advice they receive includes advice from a rights-based approach that draws on ESCRs, that will probably need to be made explicit. The most straightforward way of doing that would be to include in the requirement that Cabinet proposals include comment on the consistency of the proposals with the Bill of Rights Act and Human Rights Act 1993, an express requirement that they also include comment on consistency with New Zealand's international obligations regarding ESCRs.

155. We note, though, one other significant limitation of the existing mechanisms that would not be remedied by simply adding ESCRs to the current requirements. The reports to Cabinet (and likewise the reports to the Attorney-General on which the section 7 vetting system is based) focus on what the relevant policy or legislation *does* do; not what the legislation *fails* to do. Accordingly, these mechanisms usually focus on *preventing* State interferences with protected rights (the State's "negative" obligations) rather than on promoting positive State action to ensure greater realisation of rights. Such mechanisms thus do not create incentives for policy-makers to address the State's positive obligations to protect rights (including the promotion of substantive equality) during the policy-making process. If that latter obligation is to be protected, ESCRs must be brought to bear at an earlier stage in the policy-making process.

156. Finally, as discussed above, a primary message of the international literature is the importance of engaging with civil society about the content of rights. This may present a challenge for individual government departments, but the Ministry of Foreign Affairs and Trade and the Human Rights Commission will have relevant experience and expertise to share in this regard.

B The Legislative Process

157. We consider that a potentially important long-term means of enhancing engagement with a rights-based approach that focuses on ESCRs as well as CPRs is by raising awareness amongst legislators of what ESCRs are and how they are applied.

158. The primary means by which rights-based approaches to policy are taken into account in the legislative process is through the requirement, by section 7 of the Bill of Rights Act, for the Attorney-General to draw the attention of the House of Representatives to provisions in Bills that appear to be inconsistent with that Act. A number of "negative reports" are issued from time to time. Advice given to the Attorney-General by the Ministry of Justice and Crown Law Office that supports her fulfilment of this function with respect to every Bill is now published on the Ministry of Justice's website on referral of the relevant Bill to select committee.

159. We do not consider that it would be desirable to attempt to replicate the section 7 legislative mechanism with respect to ESCRs at this stage of the development of ESCR jurisprudence in New Zealand or internationally. However, if may be desirable to bring these issues to legislators' attention by some other means. It would, for example, be possible for the Explanatory Notes to government Bills that are introduced to the House to include a statement about the implications of the Bill for ESCRs, in much the same way as Explanatory Notes currently include a Regulatory Impact Statement.

160. We are aware that the Standing Orders Committee is currently considering issues concerning how select committees should best arrange to receive advice on the implications of the Bill of Rights Act for legislation. Once that Committee's report is published, it would be possible to examine whether advice on ESCRs could be treated in a similar manner.

161. We note, though, that mechanisms of this kind would, again, primarily focus on the negative rather than the positive obligations of the State regarding rights.

C The Wider State Sector

162. Part of the Long Title of the Human Rights Act 1993 is "to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights." The Act establishes the Human Rights Commission, an independent crown entity that has, as one of its two primary statutory functions, "to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society."

163. As exemplified by its commissioning this paper, it is within the core functions of the Human Rights Commission to have a capacity to analyse social policy using a rights-based approach, including by drawing on ESCR jurisprudence. Education and information programmes aimed at the public and at government officials are clearly possible activities that the Commission could decide, on the basis of its priorities and limited resources, to engage in.

164. There are other administrative "watchdogs" within the wider State Sector that already play a similar information and education role, most particularly, the Health and Disabilities Commissioner and the Commissioner for Children.

D The Courts

165. When it comes to the role of the third branch of government, the courts, regarding protection of rights within the New Zealand system, it is important not to present an overly simplistic picture. Rights are protected and enforced by the New Zealand courts through a multitude of different mechanisms: through the criminal law and the law of tort, for example. They are also enforced through administrative mechanisms such as the complaints agencies mentioned above and through tribunals.

166. The New Zealand statute books contain countless examples of the courts and/or quasi-judicial bodies being expressly empowered to protect and enforce aspects of ESCRs. By way of example only, the Education Act 1989 contains numerous detailed and enforceable rights that contribute to the State's fulfilment of the international right to education (on this, see the Court of Appeal in *Attorney-General v Daniels* [2003] 2 NZLR 742); the Tenancy Tribunal contributes to the State's fulfilment of its responsibility to protect the right to housing (for example, to protect tenants against unfair evictions); and the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the Health and Disability Commissioner Act 1994 set out a range of enforceable patients' rights.

167. It is not possible within the scope of this discussion paper (although it might well be a valuable exercise) to attempt to identify the principal gaps in this patchwork of specific judicial powers. What we do note, though, is that the New Zealand courts clearly lack, where ESCRs are concerned, the ability to test in an independent legal forum, State and/or private action against broad human rights protections. Thus, the Residential Tenancies Act 1986 might create certain specific justiciable rights for tenants but it does not create a general "right to housing".

168. On those occasions in which such broadly phrased language is to be found in New Zealand legislation, a further hurdle to be faced is the tendency of the courts currently to treat such language as non-justiciable. This approach is exemplified in the *Daniels* case (above) in which the Court of Appeal, overruling the High Court on the point, refused to treat the entitlement in section 3 of the Education Act 1989 to "free education" as directly justiciable, preferring to assess the content of the right to free education solely by reference to the detailed entitlements contained elsewhere in the Act. New Zealand courts have also expressed a more general reluctance to bring their judicial review powers to bear in the area of socio-economic entitlement because of the "political" nature of social policy questions (on this, see *Lawson v Housing New Zealand* (1996) 3 HRNZ 285).

169. The position of ESCRs differs in this respect from that pertaining to CPRs. Of course, no court in New Zealand has the power to strike down legislation for failure to comply with human rights standards of any kind. Although it is now possible that courts may declare Acts of Parliament to be inconsistent with the Bill of Rights Act, such declarations do not affect the legality of the legislation at issue. In that sense, no human rights standards impose more than a partial constraint on legislative policy-making in New Zealand. In the absence of a clearly contrary statutory enactment, however, the broad language of the Bill of Rights Act is directly enforceable against the State through the Courts (and, where freedom from discrimination is concerned, through the Human Rights Tribunal). We also note that under the Optional Protocol to the CPR Covenant, individuals are entitled to complain to the UN Human Rights Committee of breaches of that Covenant. While the Committee's recommendations do not bind the New Zealand government at domestic law, awareness of this potential remedy is likely to rise with the first successful complaint

against the New Zealand government being upheld in November 2003 (*Rameka v New Zealand*, Human Rights Committee Communication No 1090/2002, 12 November 2003)**.**

170. Again, we reiterate that CPRs and ESCRs are not watertight categories. Notably, the judicial and quasi-judicial protection given to freedom from discrimination through the Human Rights Tribunal and the Courts applies to economic and social, as well as civil and political entitlements. Further, that protection now includes an express power for the Human Rights Review Tribunal to declare that legislation is, itself, inconsistent with the right to freedom from discrimination under the Bill of Rights Act. That said it is clear that, particularly in the Bill of Rights Act era, the New Zealand courts draw a fundamental distinction in their approach to CPRs versus ESCRs.

171. We have not been asked to focus on justiciability in this paper and we do not do so. However, it needs to be borne in mind that one of the elements of the international literature associated with human rights is the principle that effective remedies need to be provided to enforce rights. In terms of article 2(1) of the ESCR Covenant, such remedies must be progressively realised but can be limited to what is "appropriate" and what is affordable. We have suggested that the obligation under article 2(1) is for States parties to investigate mechanisms for State accountability, including mechanisms for provision of effective remedies, and to institute them to the fullest extent appropriate (and subject to resource constraints).

172. The question of the "appropriateness" of particular remedies clearly puts the issue justiciability of ESCRs centre stage and we commend the Human Rights Commission's decision to prepare a separate discussion paper on that question. While there are a number of difficulties and certainly much controversy about the justiciability of ESCRs, we suggest, further, that over the next three years, the government should undertake a broad based review of the possibilities for greater administrative or judicial enforcement of ESCRs. This suggestion is consistent with the call from the ESCR Committee in its concluding comments on New Zealand's most recent periodic report that New Zealand reconsider its position on justiciability of ESCRs (para 21).

173. In our view, though, judicial enforcement is by no means the be all and end all of the protection of human rights. First, we tend to think that integration of a rights-based approach into the toolkit of policy advisers and policy-makers is of higher priority. Second, we note that judicial challenges are much better suited to examining what the Crown *is doing* rather than to what the Crown *should be doing*. Accordingly, they tend to skew the focus towards the Crown's negative obligation *not to interfere* with rights.

174. Finally, we emphasise, again, that the long-term effectiveness of New Zealand's engagement with ESCRs, and of a rights-based approach to social policy more generally, is dependent on dialogue with and within the wider community.

VIII WHERE NEXT?

175. As noted at the beginning, this paper aims to facilitate debate over the role of a rights-based approach to social policy. It has been commissioned from us, through the New Zealand Centre for Public Law, by the Human Rights Commission. It is aimed at government officials rather than the general public. In order to focus and provoke discussion this final section of the paper suggests particular steps that the Human Rights Commission could pursue, in discussion with government, to make more effective New Zealand's engagement with its international human rights obligations, in particular, in relation to ESCRs

176. In making these suggestions we concentrate on the practical rather than the theoretical. We also concentrate on the generation of information and dialogue about ESCRs rather than on making these rights justiciable in the short term. We are convinced that in the long term, the government's willingness to engage with ESCRs will depend on the existence of public dialogue and support for that engagement. This is so for two reasons. First, in a democracy, government needs to be responsive to public opinion and public opinion that neither understands nor values these rights will ultimately lead a government to adopt the same view. Second, as demonstrated in the body of the paper, participation and community engagement are an inherent feature of engagement with rights.

177. In New Zealand, at present, we consider that there is little understanding of, or debate about, ESCRs, and less about the relevance of a rights-based approach to social policy. We therefore urge that the first necessary condition for engagement with these rights in New Zealand is to focus on the importance of education and information, rather than on the erection of punitive legal instruments.

178. We suggest that the Human Rights Commission discuss with the New Zealand government the following steps to make more effective New Zealand's engagement with its international obligations in observing ESCRs.

Impact of a rights-based approach on social policy-making

(a) The Commission should lead a discussion with officials from relevant departments, utilising the questions in paragraph 135 of this paper (reproduced in the attached Annex) as to what a rights-based approach to social policy-making would seem to require, the extent to which a rights-based approach is currently being taken to social policy-making and the capacity implications of adopting a rights-based approach.

(b) Self-selected government departments, in cooperation with the Commission, should undertake a small number of specific case study comparisons of current New Zealand social policy approaches by government departments to particular issues of social policy with the application of a rights-based approach to those same issues.

(c) The Commission, pursuant to its statutory obligation to promote human rights, should lead the development of a resource that clarifies the nature of ESCRs in general and the international and New Zealand jurisprudence relating to specific rights.

(d) The Commission, pursuant to its statutory obligation to promote human rights, together with relevant officials, should lead a review which results in agreement on indicators of the realisation of ESCRs and establishes a process of regular monitoring of progress towards realisation of ESCRs.

(e) The Commission, in cooperation with relevant government departments, should ensure that the resource in (c) and (d) is regularly updated, at least annually, is made publicly accessible through the world wide web, and is made available to inform the development of the New Zealand Action Plan for Human Rights.

(f) The Commission, in cooperation with relevant government departments, should organise regular public events and targeted briefings for officials and Parliamentary

select committees on developments revealed through the maintenance of the resource in (c) and (d).

Procedural and structural implications of a rights-based approach to social policy-making

(g) Officials should prepare a Cabinet paper on the basis of which Ministers can decide:
- i which core government departments should be responsible for maintaining expertise in ESCRs;
- ii whether Cabinet decision-making procedures should make explicit that advice on the consistency of policy proposals with ESCRs should be noted in every Cabinet paper, as with human rights implications more generally; and
- iii how the creation of the required expertise for i and ii above should be funded.

(h) On the basis of the resource in (c) and (d) above, the Commission should make submissions to select committees from time to time, in their consideration of draft legislation and the conduct of inquiries, regarding the implications of ESCRs for such legislation and inquiries.

(i) By the end of 2006, on the basis of experience with the measures taken in response to the above suggestions, the Human Rights Commission, together with relevant officials, should undertake a broad based review of the possibilities for greater administrative or judicial enforcement of ESCRs.

ALPHABETICAL LIST OF SOURCES REFERRED TO

Committee on Economic, Social and Cultural Rights, "Poverty and the International Covenant On Economic, Social and Cultural Rights: Statement of the Committee on Economic, Social and Cultural Rights to the Third United Nations Conference on the Least Developed Countries", May 2001, Annex VII to the Report on the Twenty-fifth, Twenty-sixth and Twenty-seventh Sessions (E/2002/22; E/C.12/2001/17)

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Hunt, P., *Reclaiming Social Rights: International and Comparative Perspectives* (Dartmouth Publishing Co Ltd, Aldershot, 1996)

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International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997)

Ministry of Education, *Guide to Excellent Policy Advice* (last updated February 2003)

Ministry of Social Development, *The Social Development Approach* (June 2001)

Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights and Poverty Reduction Strategies* (September 2002)

Report by Mr Hatem Kotrane, independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights (E/CN.4/2003/53, 13 January 2003)

Report of the Special Rapporteur, Paul Hunt, submitted in accordance with Commission resolution 2002/31 (E/CN.4/2003/58, 13 February 2003)

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Waldron, J., "Rights in Conflict" in J Waldron, *Collected Papers 1981-1991* (Cambridge University Press, Cambridge, 1993)

Waldron, J., "Rights and Needs: The Myth of Disjunction" in Austin Sarat and Thomas R Kearns (ed) *Legal Rights: Historical and Philosophical Perspectives* (University of Michigan Press, Ann Arbor, 1996)

ANNEX

QUESTIONS TO FRAME DISCUSSION OF IMPLICATIONS OF RIGHTS-BASED APPROACH FOR SOCIAL POLICY-MAKING

i. To what extent do social policy-makers engage explicitly, as part of an ongoing and dynamic process, with the scope of relevant human rights, including relevant ESCRs, as determined by the international framework? How much capacity currently exists within relevant government agencies to support such an engagement? How much if any additional capacity would be required?

ii. To what extent do social policy-makers engage in effective and regular monitoring of the level of realisation of human rights? How much if any additional capacity would be required to support such an engagement? What indicators are employed to measure progress in the fulfilment of human rights and how effective are they? What changes to existing indicators would be necessary to support rights-based analysis?

iii. Do social policy-makers regularly re-evaluate the State's economic capacity to realise relevant rights? If so, how? If not, how costly would be it be to do so? How much if any additional capacity would be required?

iv. Do social policy-makers regularly re-evaluate existing strategies for realising human rights, in light of their changing understandings of (i) – (iii)? If so, how? If not, why not? What additional capacity would be required?

v. How can we tell that the strategies employed to realise human rights are "reasonable", in the sense of involving coherent and coordinated programmes designed to realise human rights and a sensible prioritisation of resources?

vi. Do social policy-makers actively avoid <u>retrogressive</u> measures that lessen the extent of realisation of human rights? Is this a reasonable expectation?

vii. Do social policy-makers ensure that the State and its agents "respect" (ie, do not interfere with) human rights, including ESCRs? What assurances are there that any such positive interferences are restricted to those that are determined by law, compatible with the nature of the rights, and for the purpose of promoting the general welfare?

viii. Do social policy-makers ensure that the State provides certain minimum essential levels of each protected right? If so, what are the minimum levels of relevant rights that are regarded as essential? What would be the implications of recognising, in the process of policy-formation, such a minimum entitlement?

ix. To what extent and how do policy-makers involve civil society (and in particular, affected groups) in the process of social policy formation? What level of participation is viable and at what stage or stages of the policy process?

x. What mechanisms of accountability are social policy-makers currently subject to where human rights, including ESCRs, are concerned? Are social policy-makers investigating mechanisms for further State accountability? What are policy makers' views as to "appropriate" methods of enhanced accountability?

xi. To the extent full realisation of particular rights is not yet able to be achieved, how do social policy-makers ensure that social policy strategies offer special protection for the most needy?

xii. To what extent and in what ways do social policy-makers ensure that to the extent human rights, including ESCRs, are capable of being realised, they are realised on an equal basis? How actively do social policy-makers address the structural causes of inequality?

xiii. Are any of the, above, proposed facets of a rights-based approach unworkable in the New Zealand context? If so, why? Are there any additional facets that should form part of a rights-based approach?