

# THE RELEVANCE OF INTERNATIONAL STANDARDS TO DOMESTIC LITIGATION: THE CASE OF NEW ZEALAND



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## **Introduction**

During the course of this paper, I will examine some aspects of the way in which New Zealand, a small developed country with a strong record of adherence to human rights principles in general and support for women's human rights in particular, has responded to the challenge of compliance with international standards. New Zealand has no written constitution, and international treaties ratified by it are not self-executing. It is proud of its record in women's issues: in 1893, it was the first nation in the world to give women the vote, and later this year will celebrate the 100th anniversary of the legislation which enabled women to practice law. It now has three women High Court judges, has had a woman Governor-General and some of its most senior politicians, short of Prime Minister, have been women. There remain nonetheless serious issues surrounding the status of women which from time to time require the formal resolution normally provided by a court system. I will touch on the manner in which some disputes have been approached, and comment on areas where I consider that New Zealand has failed to achieve full compliance with its international obligations.

I begin with the proposition that as human rights issues have real application and relevance for every citizen, they are the responsibility of domestic courts and authorities. The affirmation and implementation of human rights principles form the foundation of a just society. Such issues cannot be dismissed as of concern only to the international community and, as such, of academic interest only; they are vital to the peace and prosperity of every society. It has become increasingly apparent that the human rights issues which affect women in particular play a critical part in the quest to achieve a just and fair society. Women's place in every community is vital to the well-being of that society; without their work, both in the formal sector and in the family, most communities would not survive. It is now well recognised that enhancing women's status and enforcing their rights on an equal basis with men will do much to achieve the objectives of equality, development and peace adopted at the United Nations Fourth World Conference on Women held in Beijing in September 1995.<sup>1</sup>

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<sup>1</sup> *Report of the Fourth World Conference on Women, Beijing, September 1995*, UN Doc A/CONF.177/20 (17 October 1995).

In 1993 the World Conference on Human Rights concluded that:

“The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.... The World Conference on Human Rights urges governments, institutions, inter-government and non-governmental organisations to intensify their efforts for the protection and promotion of human rights of women and the girl-child.”<sup>2</sup>

During the World Conference on Human Rights two significant issues were stressed: firstly, the universality of human rights, described as “the common language of all humanity”<sup>3</sup> and secondly, the importance of including and emphasising the particular nature of women’s human rights. It is worth emphasising that these concepts are of great importance to this colloquium. Not only must we speak a common language across our different cultures, languages and jurisdictions, but it is important that we focus on the issue of human rights for women.

Successive United Nations conferences and regional meetings have concluded that issues critical to the future well-being of the world’s people, such as resource development coupled with protection of the environment, the pursuit of peace and the improvement of basic human rights such as health and education are all heavily dependent on an improvement in the status of women. This improvement is needed urgently in all nations, not just the developing nations and not just nations which are torn by years of war and civil disruption. For it is now well-known that although most nations promise equality of opportunity for women, few come close to delivering it and that failure has a huge impact on the ability of half the world’s population to contribute fully to the economic and social, civil and political spheres of the community’s activities. In all nations women earn less from paid employment than men; they have less likelihood of inheriting land and other assets than their brothers; they are more likely to be physically assaulted regularly by members of their own families; they are less likely to serve in governments in senior positions and they are likely to be the sole bread-winner for something approaching one third of the world’s families. And now they are increasingly likely to be infected with the HIV or AIDS virus simply because they lack the information with which to protect

<sup>2</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, June 1993, UN Doc A/CONF.157/24 (1993), at 33, para 18.

<sup>3</sup> Boutros Boutros-Ghali, Secretary-General of the United Nations, Opening Statement to the World Conference on Human Rights.

themselves, or the right to refuse intimate relationships whether with their own husbands or with the rapist.

These barriers to attainment of equality apply as much in New Zealand as they do in the poorest African, Asian or South American community. The barriers which women must overcome, if they are not to remain disproportionately represented amongst the world's poorest with all the resulting health problems and lack of community and political participation, are not to be found so much in a reform of the law as in a reform of attitudes, traditions and beliefs which nations have developed into an ethic which, upon examination, nonetheless has no ethical basis.

While judges and the courts have an important role to play in the protection of women's rights, in reality the opportunity does not arise frequently. It is in the making of policy, or in the work of tribunals and government agencies such as the police and the social welfare department that women's human rights will be implemented or frustrated. Few women would think first of the courts as a means of changing the structural factors which are the real barriers to achieving equality with men.

Like other countries without a written constitution to focus attention on these issues, New Zealand has not been accustomed to developing a jurisprudence based on rights. But at least since the 1960s there have been significant legislative developments directed towards an improvement of human rights, and some Acts have held out the glittering promise of equality for all.

### **The application of international human rights norms to women in New Zealand**

New Zealand has ratified the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention)<sup>4</sup> and takes its reporting functions under the Convention seriously. But whereas the International Covenant on Civil and Political Rights (ICCPR)<sup>5</sup> has in part been incorporated in the New Zealand Bill of Rights Act 1990, there is no legislative parallel for the Women's Convention. The Minister of Women's Affairs, relying on the advice of her officials, monitors legislative and policy initiatives for their impact on women. As a result, the Convention is generally well known amongst women and on the whole New Zealand's obligations under the Convention are discharged.

<sup>4</sup> 1249 UNTS 13. New Zealand signed the Convention on 17 July 1980 and ratified it on 10 January 1985.

<sup>5</sup> 999 UNTS 171. New Zealand signed the Covenant on 12 November 1968 and ratified it on 28 December 1978.

It should be noted, however, that where in the opinion of individuals or groups of women, principles of the Convention have been breached, or not adequately implemented by the New Zealand, or indeed any other ratifying government, there is no direct means by which the courts can redress grievances. Unlike the complaints mechanism which enables direct communication with the Human Rights Committee under the ICCPR, as yet there is no optional protocol under the Women's Convention. Women in New Zealand must instead rely on a wide variety of agencies, tribunals and courts with no one body having overall responsibility and accountability for advocating women's equality.

### **Legislative measures**

The New Zealand Bill of Rights 1990 has since its enactment had a significant and much publicised influence on the affirmation of rights generally in New Zealand. Originally intended to be entrenched legislation, following often heated public debate, it emerged from Parliament in a much weakened form. There is no power for judges to strike down legislation and no remedies clause. The Court of Appeal has, however, emphasised the importance of the Act for the general body of New Zealand law, describing it as being "intended to be woven into the fabric of New Zealand"<sup>6</sup> and to be "construed generously and in a manner... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."<sup>7</sup>

To date much of the jurisprudence which has developed under the Bill of Rights Act is in the area of the right to legal advice and restraints on illegal search and seizure. It was in this latter field that a woman whose house was mistakenly, and therefore illegally, searched by the police was granted damages by the Court of Appeal, notwithstanding the absence of a remedy clause.<sup>8</sup> The Court found that compliance with the ICCPR must have been contemplated by Parliament when the bill was introduced and relied on article 2(3) of the Covenant which calls for nations to "ensure an effective remedy... for violation and to develop the possibilities of judicial remedy."

In its development of this part of New Zealand jurisprudence it is true that the courts may have been more assertive in their interpretation and application of the Act than Parliament intended. But the Act's application to issues of particular significance for women has thus far been limited.

Over the last two decades however the advancement of women or their protection from discrimination has been a focal point of many enactments, notably the Human Rights Act 1993 which was designed to

<sup>6</sup> *R v Goodwin* [1992-93] 3 NZBORR 214 at 242 per Cooke P, [1993] 2 NZLR 153.

<sup>7</sup> *Flickinger v Crown Colony of Hong Kong* [1990-92] 1 NZBORR 1 at 4, [1991] 1 NZLR 439 at 440.

<sup>8</sup> *Simpson v Attorney-General [Baigent's Case]* [1994] 2 NZLR 667.

“provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights.”<sup>9</sup>

Among the prohibited grounds of discrimination sex (including pregnancy), child-birth and marital status have particular significance for women.

Where women's rights are in conflict with other rights, such as the right to a fair trial, freedom of expression, freedom of religion and the rights of minorities, there has however been limited opportunity to examine competing rights claims in a measured and progressive manner. Few if any disputes which are primarily concerned with gender issues reach the Court of Appeal, and those which are considered by the Complaints Review Tribunal, established under the Human Rights Act, are not subjected to rigorous analysis. For example, in proceedings before the Tribunal a woman was awarded damages for her dismissal by an employer who had considered, based it appears on religious beliefs, that a married woman ought not to work, citing women's work outside the home as a major reason for the decline of moral standards since the Second World War. The Tribunal did not explore the rationality of this belief, or even its religious basis, both of which, it must be said, are dubious, but instead found that the dismissal occurred “by reason of the sex and marital status”<sup>10</sup> of the applicant.

In another instance where there were clearly competing issues of rights and freedoms between the accused and the complainant,<sup>11</sup> delays in assigning a date of hearing to a rape trial resulted in the Court of Appeal directing a stay of the indictment against the accused. While the accused undoubtedly felt that his rights to a timely trial had been vindicated, the complainant was left isolated without any real means of achieving justice and security for herself, unless the government's apology to her could be considered as such. Women's groups which have protested at the unfairness of the outcome for the woman have been partly mollified by the Court's stated intention that only in extreme cases will indictments be quashed for delay in the court process.

### **Development of courtroom procedures which protect and promote women's rights**

Measures in New Zealand introduced to make it easier for women to give evidence in rape and indecency trials have had a largely positive outcome. Under amendments to the Evidence Act 1908 there is a prohibition on the disclosure of identifying details of the complainant in trials involving offences of a sexual nature. The complainant may not be

<sup>9</sup> Human Rights Act 1993 (No 82 of 1993), Preamble.

<sup>10</sup> *Proceedings Commissioner v Boakes* CRT 1/94 13 April 1994 (unreported), [1994] NZCLD at H576.

<sup>11</sup> *Martin v Tauranga District Court* [1995] 2 NZLR 419.

cross-examined on her sexual experience with any person other than the accused, nor on her reputation in sexual matters except with leave of the judge and leave will not be granted, unless the evidence has such direct relevance to facts in issue in the proceedings, or to the issue of the appropriate sentence that to exclude it would be contrary to the interests of justice. There is no longer any need for corroboration of the complainant's evidence and where there has been a delay in making a complaint the judge may tell the jury that there "may be good reasons why the victim of such an offence may refrain from or delay in making such a complaint."<sup>12</sup>

There are a variety of rules in cases involving child complainants which enable their evidence to be given by video tape, screened from the accused or by closed circuit television. There are restraints placed on cross-examination by the accused in person or by counsel if the judge considers that, having regard to the age of the complainant, the questions are intimidating or overbearing. Medical practitioners or psychologists with training and experience in the treatment of sexually abused children may be called as experts to comment on their assessment of the complainant's behaviour and whether it is consistent with that of sexually abused children of the same age group. In considering what mode of trial shall be adopted, the judge must have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the accused.

In a joint Practice Note issued in 1992, the Chief Justice and the Chief Judge of the District Court directed that cases involving alleged sexual offences are to be disposed of promptly. The Practice Note has been widely interpreted as requiring that cases of a sexual nature must be given a degree of priority over civil and other criminal cases in the interests of the women and child complainants.<sup>13</sup>

While these general provisions have been welcomed by those who must give evidence in cases of a sexual nature, there remain a large number of suggestions for further reform of the rules of evidence, directed towards improving courtroom procedures and thereby lessening the stress on complainants and witnesses in trials. But concerns are beginning to be voiced:

"Keeping the pendulum of the fair trial exactly in the middle is a delicate process. I have little doubt that before the reforms of the last decade it was inclined in favour of the defence. It has received a strong push, and I know some Judges are uneasy that it has swung too far."<sup>14</sup>

<sup>12</sup> Evidence Act 1908, s 23AC.

<sup>13</sup> See [1992] NZLJ 78.

<sup>14</sup> The Chief Justice, The Rt Hon Sir Thomas Eichelbaum, "Rape: 10 Years' Progress?", Address to Inter-Disciplinary Conference, Wellington, March 1996.

It is difficult to assess whether in the balancing of women's rights against the rights of the accused there has been "... greater justice for rape complainants or greater injustice for the accused..."<sup>15</sup>

Although in New Zealand rape convictions have increased 150% since 1986, on the actual numbers of complainants this translates to a 42% conviction rate in 1986 and 48% in 1995. In fact, it is estimated that fewer than 1 in 10 rapes are reported, suggesting that the whole process of police investigation and court trial presents an insuperable barrier to the vast majority of women, women who are therefore denied the opportunity to seek a just resolution of crimes perpetrated against them. "Common [woman] sense would suggest that for every false allegation there are countless others that are never made. For though the public trial is useful to set boundaries,... the cost to the individual players may be unjustifiably high."<sup>16</sup>

### **Policy initiatives**

There have also been general social policy initiatives introduced in an effort to improve attitudes to women. Concerns about the portrayal of women in the media have for example led to the consolidation of censorship legislation into the Films, Videos and Publications Classification Act 1993. Administered by a chief censor and classification officers, rather than by a tribunal, it is subject to the courts' overriding control and monitoring only through proceedings brought by way of judicial review.

In recent years too, the acknowledgement that violence against women is a violation of their human rights has steadily gained attention and importance. Reflecting the concerns about the impact on individual women, on their families and on the community which must bear the social and economic costs of the high incidence of violence against women in the community, there are many legislative and policy measures in place in an attempt to stem the tide.

The New Zealand Police are the first line of defence for women who complain of violence perpetrated upon them by members of their own families. For some years now official police policy has been to arrest when there is independent evidence of an assault upon a woman, lessening the reliance on her evidence to obtain a conviction. This policy has enormous advantages: it enables the police to arrest and remove the assailant from the home and makes it less likely that the man's influence over his female partner or family member can be brought to bear to force her to refuse to give evidence.

Nonetheless, women's perception of the manner in which the police enforce complaints of family or sexual violence remains poor, with only

<sup>15</sup> Report from 19 *The Capital Letter II* at 859.

<sup>16</sup> *Ibid.*

50% in a recent survey being satisfied with police treatment of rape complaints. In the end, as with the judiciary, much may depend on education of the police force to help its members appreciate that violence against women is not only a physical assault, but also a violation of their human rights rendering them less able to operate on a basis of equality with men in their families or in the community, diminishing their opportunity to participate fully in education and employment, and affecting their health and well-being.

Recent legislation enacted with the intention of reducing and preventing violence in domestic relationships specifies that any court which or any person who exercises power conferred under the Act must be guided in the exercise of that power by, *inter alia* "recognising that domestic violence, in all its forms, is unacceptable behaviour..."<sup>17</sup>

The Family Court which will largely administer the Domestic Violence Act 1995 will be placed under enormous pressure, as the result of the expected greatly increased number of applications due to the extension of the definition of domestic relationship to spouses, partners, family members, persons who share the household or have a close personal relationship. Moreover, strict provisions concerning the possession of any weapons by a person against whom a protection order is made under the Act will undoubtedly result in many more defended hearings directed at avoiding the operation of those sections.

But on the whole it is agencies such as the police, the professional disciplinary tribunals, volunteer and community agencies such as women's refuges and rape crisis centres, Maori community organisations and the department of social welfare, which are the enforcers of women's rights in New Zealand. While those agencies will all have criteria to work to, there is no overarching principle as found in the Women's Convention by which they must apply their policies and against which the delivery of services can be measured. Moreover, legislation which is inherently biased against women cannot be struck down by the courts under the Bill of Rights Act, or because it conflicts or does not comply with the Women's Convention.

New Zealand has been enduring a period of structural adjustment over the last decade. Legislation designed to free the economy from restrictive economic and trade practices and encourage market-driven reforms has seen an improvement in economic conditions. But arguably women have been obliged as a consequence to bear a disproportionate share of the burdens of market reform. In its first legislative action in 1991, the incoming right of centre government repealed legislation designed to provide equality of opportunity and pay equity for women in the workplace.<sup>18</sup> Reform of the no-fault scheme of compensation for

<sup>17</sup> Domestic Violence Act 1995 (No 86 of 1995), s 5(1)(a).

<sup>18</sup> The Labour Relations Amendment Act was passed on 19 December 1991, only three weeks after Parliament convened.

accidental injury<sup>19</sup> has abolished lump sum compensation, the only monetary compensation available to women who are injured accidentally and who work outside the paid work force.

The Health and Safety in Employment Act 1992, which dismantles a complex series of health and safety regulations and places primary responsibility on employers, arguably does not apply to voluntary workers and those engaged in doing housework in private homes, workers who are overwhelmingly women. Much needed reforms of mental health legislation have returned the majority of patients to the community where they are cared for often with little or no financial support, predominantly by women. None of these measures can be challenged except electorally, and arguably none comply with the provisions of the Women's Convention.

### **Developing the common law and providing guidance to tribunals and other bodies**

As with other common law systems the path to implementation of their rights leaves women in New Zealand facing a bewildering array of statutes, tribunals and administrative criteria to negotiate. The courts' significance in the enforcement of human rights for women is much diluted by the absence of a clearly defined path to their doors. But when the courts demonstrate that it is open to a rights-centred approach to the resolution of disputes as the Court of Appeal emphasised in proceedings brought under the Bill of Rights Act, then their influence will be more significant than at first sight appears.

The Court of Appeal in New Zealand has led the way in noting the relevance of international law norms and instruments to the law. In the first case to be argued under the Bill of Rights Act, the judge at first instance, rightly identifying the weaknesses of the legislation, said "in the absence of constitutional entrenchment and the omission of any remedies clause, it would be inappropriate for this Court to provide a prosthesis for a statute that is more crippled than debilitated."<sup>20</sup>

Clearly viewing this as too readily conceding defeat, by 1994 the Court of Appeal had already determined a number of important Bill of Rights cases and in a matter involving the rights of an immigrant from the Pacific Islands, the Court commented that the ratification of international instruments must be taken seriously by the courts, otherwise New Zealand's "adherence to the international instruments has been at least partly window dressing."<sup>21</sup> The fundamental rights contained in the New Zealand Bill of Rights Act highlight the obligations New Zealand assumed when it acceded the Optional Protocol to the

<sup>19</sup> Accident Rehabilitation and Compensation Insurance Act 1992.

<sup>20</sup> *Ministry of Transport v Noort*, District Court Wellington, 7 May 1991, Hobbs DCJ.

<sup>21</sup> *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266, [1994] 1 LRC 421 at 431h (per Cooke P).

ICCPR.<sup>22</sup> The Court of Appeal suggested that the United Nations Human Rights Committee is “in a sense part of this country’s judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it.”<sup>23</sup>

Those remarks made obiter have had a dramatic impact on the development of the law and policy in this field and have provided valuable guidance to the lower courts and tribunals.

### **Developing judges’ understanding of obstacles to women’s access to justice**

It is critical that the judiciary also focus its attention on this aspect of the promotion of women’s human rights. In a number of jurisdictions including Australia, Canada and the United States of America, studies demonstrate that there are elements of the court system that deter women from using the courts, make women’s experiences of court proceedings unduly traumatic or hinder the ability of courts to deal justly with women. New Zealand’s experience in attempts to reduce the stress for women and children who must give evidence in cases of a sexual nature have undoubtedly achieved a great deal, but the reforms appear to have had little impact on the number of rape complaints or convictions. Efforts to make the courts more accessible to women and therefore equality of justice available to all citizens, must then be of an ongoing nature.

While some of the obstacles to women’s full access to the court system stem from matters which are strictly outside the judiciary’s responsibility (such as the physical environment of the courts), others (including education which helps to improve the manner in which women are treated in courts) could prove beneficial. In a number of studies in Australia and North America women involved in court proceedings as parties, witnesses, lawyers and judges have given examples of the ways in which the court process, or the attitudes of those involved in it left them feeling that they had been treated unfairly because they were women. In New Zealand, a study conducted by the Law Commission on women’s access to justice recounts similar experiences.<sup>24</sup> Since the fundamental obligation of the justice system is to deliver justice to all its citizens, it is disturbing to consider that there may be elements of our court processes that knowingly or otherwise discriminate against women.

While each jurisdiction will confront the problem in a different way, in New Zealand we have established a Judicial Working Group on Gender Equity which, as well as commissioning research on judicial

<sup>22</sup> 999 UNTS 11. New Zealand acceded to the Optional Protocol on 28 May 1989.

<sup>23</sup> [1994] 2 NZLR at 266, [1994] 1 LRC at 431h.

<sup>24</sup> For references, see New Zealand Law Commission, “Women’s Access to Justice: Information about Lawyers Fees: Consultation Paper”, MP3, and “Women’s Access to Justice: Women’s Access to Legal Information: Consultation Paper, MP4.

responses to issues of equality between women and men, will embark upon a study programme designed to assist the judges to understand more fully the nature of the difficulties faced by women in the court system so that they, in compliance with the judicial oath, can work progressively towards eliminating any bias in the system. As leaders in the court system, the judges bear a particularly serious responsibility to examine our own beliefs and prejudices and to lead the way in the attempt to eliminate bias.

There are other good reasons for ensuring that the judiciary understands the systemic nature of the bias against women in society in general and in the court system. In New Zealand, in accordance with the modern trend towards incorporating principles upon which a statute is based, the legislature has often included in the body of the Act a significant area within which a judge's discretion must be exercised. A discretion can only be validly exercised if it is based on accurate information, and not upon values and traditions which, while honestly held, may well be mistaken or outmoded. For this reason programmes designed to inform judges of the subtle but widespread bias against women who participate in any way in the court system will assist judges to comply with their judicial oath, which in New Zealand is to do justice to all people without fear or favour, affection or ill-will.

So too there are a number of reasons for emphasising the importance of greatly increased numbers of women in the judiciary. Firstly, the composition of the judiciary should reflect the population that it serves. Secondly, a significant number of women in the judiciary normalises the institution and demonstrates to women lawyers in particular that the power and status attaching to judicial office is open to both women and men. Thirdly, it is only when a critical mass, of at least one third of the judiciary, comprises women that the institution itself will begin to change to reflect the values and experiences of women.

While the total numbers of women in the judiciary in New Zealand may be higher than in some comparable jurisdictions (approximately 10 to 12 per cent), nonetheless, there are no women judges in the Court of Appeal, or in the Maori Land Court. Nor are there any female judges in the Employment Court, which deals daily with issues of employment law which have a significant impact on women.

The delivery of justice is not a scientific process; the law is developed by interpretation of statutes and application of precedent. At its foundation development of the law depends on the ethos, views and experiences of those who apply it. Where women are excluded or are underrepresented, their contribution to the nation's jurisprudence will be minimal. I do not argue that when they do serve equally with male judges at all levels of the domestic jurisdiction, the development of the law will be better, but I do argue that it will be different and that women's life experiences should be included. Without the dimension provided by half of the world's population, the law's focus will lack the breadth of vision which application of human rights norms demands.

## Conclusion

Enforcement of human rights remains essentially male-focused. The cases brought thus far under the New Zealand Bill of Rights Act are concerned with matters which mostly affect men: arrest and detention following commission of criminal offences, the right to consult a lawyer in private following arrest for alcohol-affected driving. Women still feature mainly as the complainants in crimes of violence and sexual assault. But few if any landmark judgments have been delivered concerning violence against women as a human rights issue. Moreover women are rarely to be seen as expert witnesses in commercial causes or seeking review of administrative action. They remain largely confined to the private sphere of human activity and for that reason, if not invisible, remain marginalised in the court system.

The challenge for those in New Zealand who wish to see a coherent development of the law by reference to the Women's Convention is to find the right case, with a willing litigant and bring proceedings for relief before the court. If that is achieved, then I have no doubt of the far reaching influence of the Convention in the interpretation of New Zealand legislation, or application of policy. *New Zealand Van Lines v Proceedings Commissioner*<sup>25</sup> was a case concerning sexual harassment in the work place which was so serious that the woman concerned felt obliged to leave her employment. On appeal, the court after considering the Women's Convention and the United Nations Declaration on the Elimination of Violence against Women,<sup>26</sup> said that human rights legislation "is to be accorded a liberal and enabling interpretation." And in *Coburn v Human Rights Commission*, the court said "the proper construction of [the Human Rights Act] requires an appropriate regard for the substantial body of authority both in New Zealand and abroad, as to the special character of human rights legislation and the need to accord it a fair, large and liberal interpretation, rather than a literal or technical one."<sup>27</sup>

The courts are poised to give real and practical effect to international instruments ratified by New Zealand, but the paucity of proceedings involving interpretation or application of norms guaranteeing the human rights of women demonstrates the inaccessibility of the courts to women, rather than a general commitment to the achievement of equality.

There is much to be said for the manner in which countries like New Zealand develop the common law. Attentiveness to public opinion or compliance with international human rights principles can result in policy or legislation which the courts can interpret and apply in a wide

<sup>25</sup> [1995] 1 NZLR 100, (1994) EOC ¶92-620 (digest).

<sup>26</sup> GA Res 48/104, UN Doc A/48/49, at 217 (1994), reprinted in 1 IHR 329.

<sup>27</sup> [1994] 3 NZLR 323 at 333, (1994) EOC ¶92-609 (digest).

range of cases. At its foundation however, such a system depends on an unswerving commitment to apply human rights norms developed internationally and ratified locally. Without this grassroots commitment to the achievement of equality the courts' ability to develop the law becomes more constrained. In New Zealand we can point to a tradition of compliance with international human rights instruments. We can say too that, although we have no written constitution or entrenched Bill of Rights, there is the New Zealand Bill of Rights Act which states and reflects the principles of the ICCPR. While Parliament clearly never intended the courts to have much power under the legislation, the courts have in fact seized that power, imposed remedies where none were apparent, and have highlighted the country's commitment, particularly in the civil and political rights areas affecting the accused's right to a fair process of arrest, detention and trial. New Zealand citizens are now more fully aware of our obligations under the ICCPR and the most lowly burglar now claims as a first-defence point that his rights under the Bill of Rights were not observed.

But in the success of the courts' application of this legislation, in heightening public awareness of civil and political rights, may well lie the seeds of political failure for other measures. In order to demonstrate commitment to equality for women, a range of tribunals have been established which determine or mediate disputes which affect women most potently. The Complaints Review Tribunal (which administers the Human Rights Act) and the Social Security Appeal Authority (which examines the grant or refund of welfare benefits) are both examples of tribunals, chaired by those with legal qualifications, which operate outside the central court system. These tribunals and the Family Court examine issues which are personal and private and as a consequence receive little publicity except in cases where women's rights come into conflict with other rights or interests which are strongly held. In proceedings brought for instance by female flight crew to secure promotion equal to their male colleagues of similar service, the Tribunal said:

“There would be few who would openly espouse the view that employers should be free to engage in discriminatory practices which deny women equal opportunity in the work place. Yet, this case illustrates, against a background of complex legal and factual issues, a situation of serious inequality which has existed over a period of many years, and which continues to exist. Years of discussion and debate between the employer, Air New Zealand Limited..., the women whose complaints are the subject of these proceedings, their Union, and the Human Rights Commission...did not produce a remedy because there was a fundamental conflict between the demand for equality made by a small group of senior female air cabin crew and the career expectations of their male colleagues.

Ultimately, [there was] no option but to commence these proceedings under the Act in order to obtain a remedy.”<sup>28</sup>

This decision, unlike most others before the Tribunal, attracted much public comment concerning the tactics employed over the years by the cabin attendants’ male colleagues to discourage the proceedings. But there is seldom a wide-ranging public debate concerning human rights issues concerning women, and perhaps that is a measure of women’s complacency about their status in our society.

Furthermore, only rarely do these issues come on appeal to the High Court or to the Court of Appeal. The resolution of complaints of human rights violations then do not as a rule receive the level of rigorous examination that commercial litigation and criminal issues do. By their nature they are resolved in a semi-private forum. While the tribunal decisions are in writing and accessible, the lack of judicial examination in the higher courts results in an uneven development of jurisprudence and a low level of impact on policymakers and the public in general.

Given Parliament’s failure to keep control of the “toothless tiger”, the Bill of Rights Act, it is unlikely that other tribunals charged with resolving issues that primarily affect women will be accorded greater status or even better resources to expedite their work. It is only when the courts more regularly and publicly consider cases involving women’s human rights and when an optional protocol which will provide a complaints mechanism is established under the Women’s Convention that this area of jurisprudence will begin to develop coherently and thereby benefit all women in New Zealand.

<sup>28</sup> *Proceedings Commissioner v Air NZ Ltd* (1988) EOC ¶¶92-258, at p 77, 532, 7 NZAR 462 at 465.