

***Monitoring Mechanisms for the Implementation
of International Human Rights Treaties in
the United Kingdom, New Zealand and Canada***

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Executive Summary

1. In the United Kingdom (UK), New Zealand and Canada, they have set up various mechanisms to involve the public and non-governmental organizations (NGOs) in the preparation of reports to the United Nations (UN) treaty-monitoring bodies. They have also established a practice of seeking comments on draft reports prepared by the government. In the UK, advisory committees have been set up to help the government organize the report consultation process and monitor progress in following up the recommendations of treaty monitoring bodies. The NGO community in the UK also has the opportunity to comment on the draft periodic reports when they are released for public consultation.
2. In New Zealand, the government endeavours to release its treaty reports in draft form to allow for public comment. In Canada, the federal government consults NGOs in the preparation of its own section of most major UN reports. The Canadian Human Rights Commission is also invited to review and contribute to the reports.
3. The HKSAR Government, before drafting the reports, publishes outlines of the reports for public consultation. The Government does not have a practice to publish reports in draft form for public comment. The Government has recently agreed to provide reports to the Legislative Council (LegCo) on annual overviews of developments relating to the various human rights treaties applicable to HKSAR.
4. In the UK, the establishment of the parliamentary Joint Committee on Human Rights (JCHR) is intended to enhance the role of human rights in the work of Parliament. JCHR has been actively involved in assessing the government's practice and legislation in accordance with the UK's international human rights obligations. In Canada, the establishment of the Standing Senate Committee on Human Rights is also aiming at strengthening parliamentary scrutiny in international human rights issues.
5. In New Zealand and HKSAR, the legislatures do not have any committees to deal exclusively with human rights. However, one remit of the LegCo Panel on Home Affairs is to monitor and examine government policies and issues of public concern relating to human rights.
6. While the three places studied as well as HKSAR adopt the common law, the extent to which the international human rights treaties have been incorporated into the domestic legal systems is quite different. In recent years, the governments in the three places studied have one after another launched major reviews on their legal system regarding the protection of human rights, with one of the emphases on bridging the growing discrepancy between international human rights obligations and local implementation measures.
7. In the three places studied, only the UK does not have a national human rights commission. The UK government has recently announced its intention of setting up a Commission for Equality and Human Rights.

8. Both New Zealand and Canada have set up human rights commissions since 1977. There are many reasons behind the formation of such organizations in these two places, including pressure from local groups and parliamentary institutions, a desire to be in line with international human rights law and a distrust of the court system to handle human rights issues.
9. In recent years, both Human Rights Commissions in New Zealand and Canada have been subject to major reviews. The Commissions are expected to be more focused on education and advocacy, instead of expending its energy on individual complaints.

Monitoring Mechanisms for the Implementation of International Human Rights Treaties in the United Kingdom, New Zealand and Canada

Chapter 1 - Introduction

1.1 Background

1.1.1 One remit of the Panel on Home Affairs of the Legislative Council (LegCo) is to monitor and examine government policies and issues of public concern relating to human rights. The Panel monitors the submission of reports to the United Nations (UN) under various international human rights treaties¹ by the Hong Kong Special Administrative Region (HKSAR) Government and its progress in following up the recommendations made by the corresponding UN treaty-monitoring bodies. In the past, the Panel discussed at various meetings the issue of establishing effective monitoring mechanisms, including the establishment of a human rights commission, for the implementation of these treaties in HKSAR.²

1.1.2 The Panel on Home Affairs, at its meeting on 9 May 2003, requested the Research and Library Services Division to conduct a research on monitoring mechanisms for the implementation of international human rights treaties in selected places.

1.2 Scope of research

1.2.1 The scope of research includes the following:

- (a) relevant international and domestic human rights legislation;
- (b) monitoring mechanisms of parliamentary and judicial institutions, and non-governmental organizations (NGOs); and
- (c) monitoring mechanisms of specialized institutions, such as an independent human rights commission.

¹ The six major treaties are *the International Covenant on Civil and Political Rights (ICCPR)*; *the International Covenant on Economic, Social and Cultural Rights (ICESCR)*; *the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*; *the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*; *the Convention on the Rights of the Child (CRC)*; and *the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*.

² For details, see a background brief prepared by the Legislative Council Secretariat, "Monitoring Mechanism for the Implementation of United Nations Human Rights Treaties in the Hong Kong Special Administrative Region," LegCo paper No. CB(2)1999/02-03(02).

1.2.2 The implementation of international human rights treaties can be monitored through international and domestic arrangements. Internationally, the treaties can be monitored through the UN reporting process in which governments are required to submit periodic reports to the UN treaty-monitoring bodies. At the domestic level, parliamentary institutions can play a role in monitoring the implementation of these treaties by requiring governments to account for their performance relating to human rights protection. If international human rights obligations are incorporated into the domestic legal system, the courts can be drawn in to act as the guardian of human rights protection. The establishment of specialized bodies such as human rights commissions is also considered a way of ensuring that international human rights obligations are effectively implemented.

1.2.3 This paper first looks at how selected places organize government agencies, NGOs and civil society in the preparation and submission of reports required under the UN international human rights treaties. The system of periodic reporting established within the context of the six major international human rights instruments is the central element in monitoring the national implementation of international human rights obligations.

1.2.4 This paper then examines the role of parliaments in monitoring the implementation of international human rights treaties.

1.2.5 Next, the paper studies the extent to which these international human rights treaties are incorporated into the legal system of the selected places so that the courts of the selected places can help monitor the implementation of the treaties. In some places, international treaties do not automatically become part of their domestic laws. Therefore, for an international treaty to have domestic effect, it has to be incorporated into their legal systems. For the purpose of this research, only the major human rights legislation in the selected places will be discussed.

1.2.6 Finally, this paper investigates the existence of various specialized bodies and other mechanisms that have been set up for monitoring the implementation of the treaties. Specifically, the paper will look at how a human rights commission is used to investigate and monitor human rights violations and the implementation of the protection of human rights specified in the treaties.

1.3 Selected places

1.3.1 This research studies the monitoring mechanisms for the implementation of international human rights treaties in the United Kingdom (UK), New Zealand, and Canada. All three places accede to the six international human rights treaties that are applicable to HKSAR.

1.3.2 The three places are selected because they all adopt the common law. In the UK, since the enactment of the *Human Rights Act* in 1998, there have been major developments in human rights protection, including discussions on the establishment of an independent human rights commission. Both New Zealand and Canada have a human rights commission, and it is worth studying how these commissions are organized and operated.

1.4 Methodology

1.4.1 Information for preparing this report was obtained from the Internet, parliamentary documents and relevant materials. Enquiries were also sent to the relevant authorities in the selected places.

Chapter 2 - United Kingdom

2.1 Background

2.1.1 The UK is a unitary state with a parliamentary system of government. It has a bicameral legislature — the House of Commons and the House of Lords.

2.1.2 The UK does not have a constitution set out in any single document. Instead, its constitution is made up of statute law, common law and conventions.

2.1.3 The court system in England and Wales includes the House of Lords, the Supreme Court (comprising the Court of Appeal, High Court and Crown Court), the County Courts, the magistrates' courts and some tribunals. The House of Lords is the Supreme Court of Appeal.³

2.1.4 In the UK, the power to make treaties is a prerogative power vested in the Crown and exercised on the advice of the Secretary of State for Foreign and Commonwealth Affairs in consultation with other Ministers. There is no constitutional requirement for treaties to be laid before or approved by Parliament, although a constitutional convention (the "Ponsonby Rule") requires the government to lay treaties before Parliament before rectification.⁴

³ In July 2003, a consultation paper was published in the UK to seek views on creating a new Supreme Court to replace the existing system of Law Lords operating as a committee of the House of Lords. The proposed new court will be a UK body legally separated from the England and Wales Courts since it will also be the Supreme Court of both Scotland and Northern Ireland.

⁴ For details, see House of Commons Select Committee on Procedure, Second Report of Session 1999-2000, *Parliamentary Scrutiny of Treaties*, HC 210, available at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmproced/210/21003.htm>.

2.2 Status of the six human rights treaties

2.2.1 The UK is a party to all of the six core international human rights treaties. Their status of ratification is shown in the following table.

Treaty	Ratification or Accession Date
<i>International Covenant on Civil and Political Rights (ICCPR)</i>	20/05/76
<i>International Covenant on Economic, Social and Cultural Rights (ICESCR)</i>	20/05/76
<i>International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)</i>	07/03/69
<i>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</i>	08/12/88
<i>Convention on the Rights of the Child (CRC)</i>	16/12/91
<i>Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)</i>	07/04/86

2.2.2 The UK is also a party to other major multilateral treaties relating to the protection of human rights, including the *European Convention on Human Rights (ECHR)* and the *European Social Charter*.

2.3 Status of human rights treaties in domestic law

2.3.1 In the UK, a treaty signed by the government can only have legal effect if it is incorporated into the laws of the UK by an act of Parliament.⁵

2.3.2 There is no rule of interpretation which determines that domestic law must be interpreted in courts in conformity with treaty obligations. Courts in the UK have used treaties for interpretative guidance.⁶

⁵ Unlike treaties made by the UK government, treaties concluded by the European Communities may have direct domestic effect without legislative implementation.

⁶ See Richard Clayton & Hugh Tomlinson, *The Law of Human Rights*, Vol. 1, Oxford: Oxford University Press, 2000, chapter 2.

2.4 Monitoring mechanisms

United Nations reporting mechanisms

2.4.1 Lead responsibilities for individual treaties are held by a number of government departments. The Department for Constitutional Affairs⁷ has lead responsibility for *ICCPR* and *CAT*, the Home Office on *ICERD*, the Foreign and Commonwealth Office on *ICESCR*, the Women and Equality Unit in the Department of Trade and Industry (see paragraph 2.4.21) on *CEDAW*, and the Children and Young People's Unit (see paragraph 2.4.22) on *CRC*.

2.4.2 The extent to which NGOs are involved in the reporting process depends on the particular government department. For instance, the Foreign and Commonwealth Office and the Department for Constitutional Affairs have established links with human rights NGOs in relation to reporting.⁸ A sub-committee of the Ministerial NGO Forum on Human Rights (see paragraph 2.4.25) was established to monitor progress on recommendations of the UN treaty-monitoring bodies.

2.4.3 The NGO community also has the opportunity to comment on the government's draft periodic reports to the UN when they are released for public comment. For example, a draft of the UK's forthcoming report under *CAT* was circulated for public comment in early 2003.

2.4.4 For periodic reports to the *CEDAW* Committee under the UN, the consultation process is organized by the Women's National Commission (WNC)⁹. WNC is an official independent advisory body, and its job is to consult women's organizations and present their views to the government. WNC also produces shadow reports of their own to the *CEDAW* Committee, aiming to put together the views of NGOs and other community groups.¹⁰

⁷ The Department for Constitutional Affairs was set up in June 2003 to take up most of the responsibilities of the former Lord Chancellor's Department. A consultation paper was published in September 2003 to abolish the Office of Lord Chancellor.

⁸ See uncorrected transcript of Bill Rammell MP, Parliamentary Under-secretary for the Foreign and Commonwealth Office, evidence to the Joint Committee on Human Rights on 15 September 2003, which is available at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/uc1099/uc109901.htm>.

⁹ WNC is an advisory non-departmental public body, which is, similar to the Women and Equality Unit, based in the Department of Trade and Industry. Although WNC is fully funded by the government, it is able to comment freely on government policies.

¹⁰ For detailed information on how *CEDAW* has been implemented and the role of NGOs in the UK, see Carole J. Petersen and Harriet Samuels, "The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organisations in the United Kingdom and Hong Kong," *Hastings International and Comparative Law Review*, Fall 2002.

2.4.5 In the UK, some NGOs are actively involved in the reporting process, particularly by making their own submissions to the relevant UN committees.¹¹ Some of these NGOs have successfully brought various UN committees' attention to specific human rights issues in the UK.¹²

Parliamentary mechanisms

2.4.6 In the UK, Parliament has no formal procedure and mechanism for systematically reviewing compliance with human rights treaty obligations after the treaties have been entered into.

2.4.7 Nevertheless, Parliament established a Joint Committee on Human Rights (JCHR) in January 2001. The terms of reference include considering and reporting on matters relating to human rights in the UK, excluding individual cases. Although the passage of the *Human Rights Act 1998* was the stimulus to the establishment of JCHR, its remit extends well beyond those rights as defined by the Act, as it includes the UK's obligations under international human rights treaties. For instance, JCHR considered aspects of the implementation of *CRC* in the UK and published its report in Session 2002-03.¹³ JCHR also examines all bills that have a bearing on human rights issues, taking advice from its Legal Adviser.¹⁴

¹¹ For example, an UK human rights NGO called JUSTICE often makes submissions, either by itself or together with other NGOs, to the UN Committees.

¹² See Martin O'Brien, "Non-governmental Organisations and the United Nations," in Angela Hegarty & Siobhan Leonard eds., *Human Rights: An Agenda for the 21st Century*, London: Cavendish Publishing Ltd., 1999.

¹³ Joint Committee on Human Rights, Tenth Report of Session 2002-03, *The UN Convention on the Rights of the Child*, HC 81, available at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/117/117.pdf>.

¹⁴ See David Feldman, "Parliamentary Scrutiny of Legislation and Human Rights," *Public Law*, Summer, 2002, pp. 323-48.

Legal mechanisms

2.4.8 Other than *ECHR*, the vast majority of the UK's international human rights treaty obligations have not been incorporated directly into domestic law.¹⁵ The most important piece of human rights legislation in the UK is the *Human Rights Act 1998*, which gives further effect in the UK law to the rights and freedoms contained in *ECHR*.¹⁶

2.4.9 Although many of the articles in *ECHR* are similar to those rights specified in the UN human rights treaties, the UN human rights treaties are more substantive and comprehensive.¹⁷

Human Rights Act

2.4.10 The *Human Rights Act 1998* came into force in October 2000. The 16 basic rights¹⁸ provided in the Act, all taken from *ECHR*, are known as the Convention rights.

2.4.11 Briefly, the *Human Rights Act 1998* works in three main ways. First, it requires all legislation to be interpreted and given effect compatibly with the Convention rights as far as possible. Where it is not possible to do so, a court may quash or disapply subordinate legislation or, if it is a higher court, make a declaration of incompatibility in relation to primary legislation. This allows a Minister to make a remedial order to amend the legislation to bring it in line with the Convention rights.

¹⁵ Up to 1997, the UK's approach to international human rights treaties was based on a view that its own constitutional arrangements had already provided for most of the substantive rights specified in these treaties. It was argued that the possession of individual rights and freedoms was inherent, and that Parliament's role was not to confer rights, but to consider whether they needed to be restricted as part of an exercise to balance the needs of individuals against those of the society. See "Core Document Forming Part of the Reports of States Parties: United Kingdom of Great Britain and Northern Ireland," HR/CORE/1/ADD 5/Rev 2, paragraph 118.

¹⁶ *ECHR* is an international agreement made by the member states of the Council of Europe in November 1950. The Council of Europe, a separate entity from the European Union and European Community, is an association of over 40 nations. The UK ratified *ECHR* in 1951, and the agreement entered into force in September 1953. *ECHR* consists of 66 Articles arranged in five sections. A series of protocols have been added, making further provision and adding new rights. The European Court of Human Rights (ECtHR) is the enforcement machinery of *ECHR*. ECtHR hears complaints from individuals and states about alleged breaches of *ECHR* rights and freedoms under the Council of Europe.

¹⁷ See Deirdre Fottrell, "Reinforcing the Human Rights Act—the Role of the International Covenant on Civil and Political Rights," *Public Law*, Autumn, 2002, pp. 485-500.

¹⁸ Under the *Human Rights Act 1998*, the Convention rights mean the rights and freedoms set out in Articles 2 to 12 and 14 of the Convention, Articles 1 to 3 of the First Protocol, and Articles 1 and 2 of the Sixth Protocol. They include: the right to life; freedom from torture or inhuman or degrading treatment; freedom from slavery or forced labour; personal freedom; right to a fair trial; no punishment without law; private life and family; freedom of belief; free expression; free assembly and association; right to marry; prohibition of discrimination; protection of property; right to education; right to free elections; and abolition of the death penalty.

2.4.12 Second, the *Human Rights Act 1998* makes it unlawful for a public authority to act incompatibly with the Convention rights and allows for a case to be brought in a UK court or tribunal against the authority if it acts incompatibly with the Convention rights.

2.4.13 Third, the UK courts and tribunals must take account of the Convention rights in all cases that come before them. This means, for example, that they must develop the common law compatibly with the Convention rights.

Specialized bodies

Human rights commission

2.4.14 In the UK, there is a human rights commission on Northern Ireland, and a decision has been taken to establish a Scottish Human Rights Commission.¹⁹ In a 2001 review of the UK's human rights record, the UN Human Rights Committee recommended that the UK should establish a national human rights commission.²⁰

2.4.15 In March 2003, JCHR published a report, entitled *The Case for a Human Rights Commission*²¹. The report was the culmination of a two-year long inquiry.²² The main conclusion of the report was that there was a compelling case for establishing an independent body to promote and protect human rights in England and Wales.

2.4.16 In the report, JCHR considered why the "culture of respect for human rights", which was supposed to have developed after the passing of the *Human Rights Act 1998*, did not materialize. JCHR argued that there were unmet needs in terms of the promotion and protection of human rights so that such culture could not be developed either through the courts alone or solely by an agency within the government. It was believed that an independent commission would be the most effective way of bringing about the "culture of respect for human rights".

¹⁹ In February 2003, a consultation paper was published to solicit views on establishing a human rights commission in Scotland. The paper is available at <http://www.scotland.gov.uk/consultations/justice/shrs-01.asp>. The Scottish Executive has expressed the view that the Scottish Human Rights Commission should be directly accountable to the Scottish Parliament with its funding overseen by the Scottish Parliament Corporate Body.

²⁰ See United Nations Human Rights Committee, "Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland," CCPR/CO/72/United Kingdom.

²¹ Joint Committee on Human Rights, Sixth Report of Session 2002-03, *The Case For A Human Rights Commission*, HC 487-I, available at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/67/67.pdf>.

²² In its 1997 White Paper, *Rights Brought Home: The Human Rights Bill*, the UK government suggested that any parliamentary committee on human rights, established after the *Human Rights Act 1998* was passed, might examine whether a human rights commission was needed and how it should operate.

2.4.17 In relation to the international human rights obligations, the report suggested that the proposed human rights commission should be involved in the reporting processes under the various international human rights instruments and should help raise the general awareness of the obligations under these instruments.²³

2.4.18 JCHR's report also looked at the issue of whether a separate human rights commission should be established in view of the UK government's decision to establish a new equality commission.²⁴ The report argued that there was a considerable degree of congruence between the work required for the promotion of equality and that required for the promotion and protection of human rights. However, there were also divergences. Therefore, the report concluded that "[t]here are strong arguments for moving, over the proposed timescale for the establishment of a single equality body, to the establishment of an integrated human rights and equality commission."²⁵

2.4.19 In the report, JCHR recommended that the proposed human rights commission should include the following powers and functions:

- "(a) to promote understanding and awareness of human rights (including not only the Convention rights but also rights embodied in international human rights instruments binding on the UK);*
- (b) to conduct and commission research and provide financial or other assistance for educational activities in connection with promoting understanding and awareness of human rights;*
- (c) to conduct inquiries into matters of public policy and practice relating to human rights (with the power to have access to information needed for an effective inquiry);*
- (d) to give guidance to, and promote best practice in, public authorities in relation to human rights;*
- (e) to offer guidance and advice to Ministers and to Parliament in connection with human rights;*
- (f) to be able to publish reports on any of the above matters;*

²³ Joint Committee on Human Rights, Sixth Report of Session 2002-03, *The Case For A Human Rights Commission*, HC 487-I, paragraphs 114 to 118.

²⁴ There are three equality agencies in the UK, which are the Equal Opportunities Commission, the Disability Rights Commission and the Commission for Racial Equality. They focus on rights under domestic discrimination legislation and European law, but also take into account international human rights instruments relating to the elimination of discrimination. There is a plan to establish a single equality body in the UK.

²⁵ Joint Committee on Human Rights, Sixth Report of Session 2002-03, *The Case For A Human Rights Commission*, HC 487-I, p. 9.

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- (g) *to be able to support and promote access to alternatives to litigation in disputes relating to the protection of human rights;*
 - (h) *to be able to apply to the courts for permission to appear as amicus curiae²⁶ in proceedings that involve or are concerned with human rights; and*
 - (i) *to be able to intervene as a third party in legal proceedings relating to questions of principle involving human rights."²⁷*

2.4.20 The UK government announced its intention of setting up a Commission for Equality and Human Rights on 30 October 2003.²⁸ A white paper will be published in early 2004, providing detailed proposals for the Commission and seeking comments. A task force to provide advice on the new Commission will be established, with its members reflecting different interests in the related areas. It is estimated that the earliest time to establish the new Commission will be by late 2006.

The Women and Equality Unit

2.4.21 The Women and Equality Unit (WEU), within the Department of Trade and Industry, has lead responsibility within the government for policies on women, gender equality, sexual orientation and co-ordination of equality. In 2003, WEU led across the government in producing the UK's fifth periodic report on the implementation of *CEDAW*.

Children and Young People's Unit

2.4.22 The Children and Young People's Unit was established in November 2000 as a cross-cutting unit (across different departments and Ministers) which would help co-ordinate government policies relating to children. The Unit is responsible for ensuring that *CRC* is fully implemented across the UK.²⁹

²⁶ A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.

²⁷ Joint Committee on Human Rights, Sixth Report of Session 2002-03, *The Case For A Human Rights Commission*, HC 487-I, pp. 88-9.

²⁸ For details, see <http://www.humanrights.gov.uk/sosannouc.htm>.

²⁹ For details, see <http://www.cypu.gov.uk/youth/index.cfm>.

Commissioner for Children

2.4.23 Independent commissioners for children and young people have either existed, or on the way of being introduced, in Wales, Northern Ireland and Scotland. JCHR published a report in April 2003, recommending that the protection and promotion of children's rights throughout the UK would be best advanced by the establishment of a children's commissioner for England as well.³⁰

Other mechanisms*Interdepartmental Review of International Human Rights Instruments*

2.4.24 On 7 March 2002, the government announced a review of the UK's position under various international human rights instruments. The review is still in progress and is co-ordinated by the Department for Constitutional Affairs. The terms of reference of the review are to study the UK's position on international human rights instruments in the light of the experience of the operation of the *Human Rights Act 1998*, the availability of existing remedies within the UK, and the laws and practices in other EU member states. A similar review was completed in 1999.

Ministerial NGO Forum on Human Rights

2.4.25 In 2002, the then Lord Chancellor's Department established a Ministerial NGO Forum on Human Rights for ongoing discussion about how to implement and develop human rights policies. The Forum discusses the progress on the Review of International Human Rights Instruments; follow-up recommendations by international monitoring bodies such as the UN Human Rights Committee; and general policy issues arising from the *Human Rights Act 1998*.

2.4.26 The core membership of the Forum consists of both public bodies and NGOs concerned with the promotion of human rights within the UK, including Amnesty International, the Bar Human Rights Committee, the British Institute of Human Rights, Charter 88, the Committee on the Administration of Justice, the Institute for Public Policy Research, JUSTICE, the Law Society, Liberty, the Northern Ireland Human Rights Commission, and the Scottish Human Rights Centre.

³⁰ Joint Committee on Human Rights, Ninth Report of Session 2002-03, *The Case for A Children's Commissioner for England*, HC 666, available at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/96/96.pdf>.

Chapter 3 - New Zealand

3.1 Background

3.1.1 New Zealand is a unitary state with a parliamentary system of government. It has a unicameral legislature — the House of Representatives. New Zealand's head of the state is the Queen of England, who is represented by the Governor-General.

3.1.2 New Zealand does not have a single written constitution. New Zealand's constitutional arrangements can be found in a number of key documents. They include the *Constitution Act 1986*, the *New Zealand Bill Of Rights Act 1990*, the *Electoral Act 1993*, the *Treaty of Waitangi*³¹ and the *Standing Orders of the House of Representatives*. These documents, together with New Zealand's constitutional conventions, form the nation's constitution.

3.1.3 There are four tiers in the New Zealand court system. The Privy Council of the UK remains the highest court in New Zealand, but there are proposals to replace the final right of appeal with the creation of a New Zealand Supreme Court. The next two tiers are the Court of Appeal and the High Court. The bottom tier is the District Court.

3.1.4 In recent years, a new system has been established in the New Zealand House of Representatives for the government to present international treaties, together with an accompanying national interest analysis³², to the House for examination prior to taking any binding treaty action by the government. The procedure is formally written into the *Standing Orders of the House of Representatives*.³³

³¹ The Treaty of Waitangi was signed in 1840 as an agreement between the British Crown and a large number of Maori of New Zealand. The Treaty is widely accepted to be a constitutional document, which establishes and guides relationships between the Crown in New Zealand (as embodied by the New Zealand government) and Maori.

³² A national interest analysis must address the following matters —
(a) the reasons for New Zealand becoming a party to the treaty; (b) the advantages and disadvantages of the treaty entering into force for New Zealand; (c) the obligations which would be imposed on New Zealand by the treaty, and the position in respect of reservations to the treaty; (d) the economic, social, cultural and environmental effects of the treaty entering into force for New Zealand, and of the treaty not entering into force for New Zealand; (e) the costs to New Zealand of compliance with the treaty; (f) the possibility of any subsequent protocols (or other amendments) to the treaty, and of their likely effects; (g) the measures which could or should be adopted to implement the treaty, and the intentions of the government in relation to such measures, including legislation; (h) a statement setting out the consultations which have been undertaken or are proposed with the community and interested parties in respect of the treaty; and (i) whether the treaty provides for withdrawal or denunciation.

³³ *Standing Orders of the House of Representatives* 384-387. For details, see Allan Bracegirdle, "Domestic Procedures for International Treaty Actions: Description of New Zealand Procedures," *Public Law Review*, Vol. 14, 2003, pp. 28-40.

3.2 Status of the six human rights treaties

3.2.1 New Zealand is a party to all of the six core international human rights treaties. Their status of ratification is shown in the following table.

Treaty	Ratification or Accession Date
<i>International Covenant on Civil and Political Rights (ICCPR)</i>	28/12/78
<i>International Covenant on Economic, Social and Cultural Rights (ICESCR)</i>	28/12/78
<i>International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)</i>	22/11/72
<i>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</i>	10/12/89
<i>Convention on the Rights of the Child (CRC)</i>	6/04/93
<i>Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)</i>	10/01/85

3.2.2 New Zealand is also a party to the *Optional Protocol to ICCPR* and the *Optional Protocol to CEDAW*. Both protocols enable individuals who consider that their rights under these international treaties have been breached and who have exhausted domestic remedies to submit communications to the specific UN bodies for their consideration. In 2001, New Zealand ratified the *Optional Protocol to CRC on the Involvement of Children in Armed Conflicts*.

3.3 Status of human rights treaties in domestic law

3.3.1 International treaties do not automatically become part of the law of New Zealand simply by the process of ratification, accession or acceptance of a treaty. For an international treaty to have domestic effect, either its provisions must have already been reflected in New Zealand's existing law or new legislation must be enacted.

3.3.2 In New Zealand, there is no rule of interpretation which determines that domestic law must be interpreted in courts in conformity with treaty obligations. New Zealand courts have used treaties for interpretative guidance.³⁴

3.4 Monitoring mechanisms

United Nations reporting mechanisms

3.4.1 In New Zealand, the Ministry of Foreign Affairs and Trade is responsible for co-ordinating the preparation of all periodic reports to the UN human rights treaty bodies, except for reports under *CEDAW* and *CRC* which are prepared by the Ministry of Women's Affairs and the Ministry of Youth Affairs respectively. The Ministry of Foreign Affairs and Trade consults with government agencies, independent Crown entities, NGOs and civil society when compiling periodic reports.

3.4.2 The New Zealand government endeavours to release its treaty reports in draft form for public comment.³⁵ A recent example was the fifth *CEDAW* report described below.

3.4.3 New Zealand submitted its fifth *CEDAW* report in September 2002. In preparing this report, the Ministry of Women's Affairs used a consultation process which differed significantly from that used for previous reports.³⁶ The female population was widely consulted through a series of workshops and through the dissemination of a draft report for public comment. The consultation process included the following steps:

- (a) the Ministry of Women's Affairs, as a precursor to public consultation on the draft *CEDAW* report, held 22 regional workshops throughout New Zealand;
- (b) information packs about *CEDAW* and the reporting process were given out to interested members of the public at the workshops;
- (c) a draft report, approved by the Cabinet, was circulated for public comment;
- (d) a detailed summary of the public comments on the draft report was prepared and circulated to officials for response and to fill information gaps; and
- (e) a revised draft report containing public submissions and officials' comments was approved by the Cabinet before being submitted to the UN.

³⁴ For details, see Mark Gobbi, "Making Sense of Ambiguity: Some Reflections on the Use of Treaties to Interpret Legislation in New Zealand," *Statute Law Review*, Vol. 23, 2002.

³⁵ Information provided by the Ministry of Foreign Affairs and Trade.

³⁶ *New Zealand's 5th CEDAW Report: The Status of Women in New Zealand 2002*, which is available at <http://www.mwa.govt.nz/pub/CEDAW-RPT-NZ%27s-5th-Report-2002.pdf>.

Parliamentary mechanisms

3.4.4 There is no formal mechanism for the New Zealand House of Representatives to monitor the implementation of international human rights treaties.

3.4.5 Parliamentary select committees have no formal role in monitoring the implementation of international human rights treaties. However, issues relating to the implementation of such treaties could come before select committees in various other ways, for example, in the context of a subsequent international treaty examination (such as a new international human rights treaty or a protocol to amend an existing treaty), relevant draft implementing legislation that comes before the House, consideration of the work of departments and other agencies when undertaking financial reviews or examination of estimates of expenditure, or consideration of particular petitions or inquiries.

Legal mechanisms

New Zealand Bill of Rights Act

3.4.6 Although the *New Zealand Bill of Rights Act 1990 (NZBRA)* remains an ordinary statute, it is developing into a potent constitutional document. *NZBRA* provides safeguards for the civil and political rights in New Zealand³⁷ and affirms New Zealand's commitment to *ICCPR*³⁸. *NZBRA* applies to acts by the government and public actors³⁹.

3.4.7 *NZBRA* does not "override" other laws, but it does provide protection for the rights specified in it. The courts must interpret other laws consistently with *NZBRA* if at all possible. Further, all bills are assessed for consistency with *NZBRA* before they are introduced into the House of Representatives. Where there is an inconsistency in a bill, the Attorney-General must inform the House of Representatives. While this does not prevent the House of Representatives passing inconsistent laws, it does ensure that any issues are fully debated.

³⁷ *NZBRA* protects the following categories of rights and freedoms: life and security of the person; democratic and civil rights; non-discrimination and minority rights; search, arrest and detention; criminal procedure; and right to justice.

³⁸ The long title of *NZBRA* states that it is an Act to affirm New Zealand's commitment to *ICCPR*.

³⁹ A public actor refers to any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

The Human Rights Act

3.4.8 The *Human Rights Act 1993* came into force on 1 February 1994. The Act is intended to provide protection of human rights in New Zealand in general accordance with *ICCPR* and *ICESCR*. The Act is primarily an anti-discrimination statute and sets out 13 prohibited grounds of discrimination against sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origin, disability, age, political opinion, employment status, family status and sexual orientation. The Act applies to both public and private sectors.

3.4.9 In 2000, the government decided to conduct a Ministerial re-evaluation of the *Human Rights Act 1993* and the roles, interrelationships, operation and structures of human rights agencies in New Zealand.⁴⁰

3.4.10 The *Human Rights Amendment Act 2001* made significant changes to the *Human Rights Act 1993*, including amendments relating to the anti-discrimination standard for government activities and the associated publicly funded complaints process.

3.4.11 Under sections 131 and 134 of the *Human Rights Act 1993*, the District Court has jurisdiction over the offences of inciting racial disharmony and of refusing access on discriminatory grounds to a public place, vehicle or facility. Such prosecutions may be instituted only with the consent of the Attorney-General.

Specialized bodies

Human Rights Commission

3.4.12 The Human Rights Commission was established by the *Human Rights Commission Act 1977*. It is empowered under the *Human Rights Act 1993* to protect human rights in general accordance with the UN Covenants or Conventions on Human Rights.⁴¹

3.4.13 An important reason for the establishment of the Human Rights Commission was a governmental desire to bring New Zealand in line with the developing international human rights law. New Zealand had wanted to ratify various international human rights instruments since the mid-1960s. The *Human Rights Commission Act* passed into law in late 1977 amid great hopes, enabling New Zealand to ratify both *ICCPR* and *ICESCR* in December 1978. The work of a parliamentary committee on women's rights also contributed to the establishment of the Human Rights Commission at that time.⁴²

⁴⁰ For details, see Ministry of Justice, *Re-evaluation of the Human Rights Protections in New Zealand*, October 2000.

⁴¹ Stated in the preamble of the *Human Rights Act 1993*.

⁴² For details, see Mariam Bell, "The Establishment of the Human Rights Commission," available at <http://www.hrc.co.nz/index.php?p=390>.

3.4.14 The *Human Rights Amendment Act 2001* makes several significant changes to the functions and powers of the Commission. The Commission is expected to be more focused on education and advocacy, instead of expending its energy on individual complaints.

3.4.15 Under the *Human Rights Act 1993*, functions of the Human Rights Commission include:

- "(1) to be an advocate for human rights and to promote and protect, by education and publicity, respect for, and observance of, human rights;*
- (2) to make public statements in relation to any matter affecting human rights, including statements promoting an understanding of, and compliance with, this Act or the New Zealand Bill of Rights Act 1990;*
- (3) to promote by research, education, and discussion a better understanding of the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international human rights law;*
- (4) to prepare and publish, as the Commission considers appropriate, guidelines and voluntary codes of practice for the avoidance of acts or practices that may be inconsistent with, or contrary to, this Act;*
- (5) to inquire generally into any matter, including any enactment or law, or any practice, or any procedure, whether governmental or non-governmental, if it appears to the Commission that the matter involves, or may involve, the infringement of human rights; and*
- (6) to apply to a court or tribunal, under rules of court or regulations specifying the tribunal's procedure, to be appointed as intervener or as counsel assisting the court or tribunal, or to take part in proceedings before the court or tribunal in another way permitted by those rules or regulations."⁴³*

3.4.16 The Commission consists of the following Human Rights Commissioners:

- (1) a Chief Commissioner;
- (2) a Race Relations Commissioner;
- (3) an Equal Opportunities Commissioner; and
- (4) five other part-time Human Rights Commissioners.

⁴³ *Human Rights Act 1993*, s 5(2).

3.4.17 Commissioners are appointed by the Governor-General on the recommendation of the Minister of Justice for terms of up to five years. The Commission is funded through the Ministry of Justice. The Commission reports to the Minister of Justice and, through the Minister, tables an annual report to the House of Representatives each year.

3.4.18 The Human Rights Commission has the power to report to the Prime Minister on:

- "(i) any matter affecting human rights, including the desirability of legislative, administrative, or other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights;
- (ii) the desirability of New Zealand becoming bound by any international instrument on human rights; and
- (iii) the implications of any proposed legislation (including subordinate legislation) or proposed policy of the Government that the Commission considers may affect human rights."⁴⁴

3.4.19 The Commission also has the power to resolve disputes relating to unlawful discrimination under the *Human Rights Act 1993*. The Commission attempts to assist in resolving complaints by using a flexible and speedy approach to dispute resolution, which includes mediation and other low-level dispute resolution mechanisms.⁴⁵

3.4.20 If the low-level dispute resolution fails or is inappropriate, complainants may take their cases to the Human Rights Review Tribunal. The Director of Human Rights Proceedings (an autonomous office situated within the Commission) may represent a complainant. He may also represent complainants free of charge in the litigation if they meet certain criteria. Alternatively, complainants may take their cases to the Tribunal themselves or engage their own legal counsel.

3.4.21 The Human Rights Review Tribunal is independent of the Commission and is administered by the Department for Courts. Decisions of the Human Rights Review Tribunal may be appealed to the High Court whose decision is final, or to the Court of Appeal in a point of law.

⁴⁴ *Human Rights Act 1993*, s 5(2)(k).

⁴⁵ For detailed information on the dispute resolution process, see <http://www.hrc.co.nz/index.php?p=342>.

The Ministry of Women's Affairs

3.4.22 The Ministry of Women's Affairs was set up in 1986. One of its functions is to manage on behalf of the government New Zealand's international obligations in relation to women. The Ministry of Women's Affairs prepares the reports to the UN under *CEDAW*.

The Office of the Commissioner for Children

3.4.23 The Office of the Commissioner for Children was established under the *Children, Young Persons and Their Families Act 1989*. The Commissioner has broad-ranging functions, which are aimed at promoting and ensuring the welfare of children and young people. *CRC* is used as a basis for the Commissioner's work.

Other mechanisms*National Plan of Action*

3.4.24 The *Human Rights Amendment Act 2001* has given the Human Rights Commission responsibility for the development of a national plan of action for human rights.⁴⁶ The development of the New Zealand Action Plan for Human Rights (NZAP) is a two-year project which requires nation-wide participation by interested parties and is expected to be completed by the end of 2004.

3.4.25 The NZAP project is to construct a set of strategies which are intended to develop and strengthen the promotion and protection of human rights in New Zealand. One of the considerations of NZAP is to improve the implementation of international human rights treaties in New Zealand.⁴⁷

3.4.26 The Commission, with advice from the National Advisory Council (NAC)⁴⁸, will review the action plans developed after public consultation and develop a draft New Zealand action plan for human rights. The draft plan will be made public for comment before being finalized.

3.4.27 NZAP will need to be adopted by the Cabinet. One objective is to have NZAP eventually endorsed by the House of Representatives. The implementation of NZAP will require a mobilization of resources and an allocation of responsibilities and duties among the parties involved.

⁴⁶ The proposal to develop national plans of action was adopted at the Vienna World Conference on Human Rights in 1993. Since then, a number of countries - including Australia, Canada, Norway, and South Africa - have developed national plans of action for human rights and human rights education.

⁴⁷ For details, see <http://www.hrc.co.nz/index.php?p=23950>.

⁴⁸ NAC is broadly representative of the private sector and the community.

Chapter 4 - Canada

4.1. Background

4.1.1 Canada is a federal state with a parliamentary system of government. It has a bicameral legislature — the Senate and the House of Commons. The monarch is the Queen of England, who is represented by the Governor General in Canada.

4.1.2 The *British North America Act, 1867*, passed by the UK Parliament to create the Canadian federation, was renamed the *Constitution Act, 1867* in 1982. The *Constitution Act, 1982* declares that the constitution of Canada includes:

- (a) the *Canada Act 1982* and the *Constitution Act, 1982*;
- (b) 24 other Acts and Orders noted in Schedule 1, mostly comprising the *Constitution Acts 1867-1975*; and
- (c) amendments to any Act or Order referred to in paragraph (a) or (b).

4.1.3 There are basically four levels of courts in Canada. The first level is provincial courts. The second level is the provincial and territorial superior courts. On the same level but responsible for different issues is the Federal Court, Trial Division. At the next level are the provincial courts of appeal and the Federal Court of Appeal, while the highest level is the Supreme Court of Canada.

4.1.4 In Canada, treaty-making is an executive act. Parliamentary approval is not required for Canada to enter into international treaties. Although only the federal executive is empowered to enter into international treaties, the federal government cannot legislate to implement treaties in areas that would fall in provincial jurisdiction. As human rights is a matter of shared federal-provincial jurisdiction, the general practice adopted by the federal government is to ratify a human rights treaty only after obtaining the support of Canadian provinces and territories.

4.2 Status of the six human rights treaties

4.2.1 Canada is a party to all of the six core international human rights treaties. Their status of ratification is shown in the following table:

Treaty	Ratification or Accession Date
<i>International Covenant on Civil and Political Rights (ICCPR)</i>	19/05/76
<i>International Covenant on Economic, Social and Cultural Rights (ICESCR)</i>	19/05/76
<i>International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)</i>	14/10/70
<i>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</i>	23/06/87
<i>Convention on the Rights of the Child (CRC)</i>	13/12/91
<i>Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)</i>	10/12/81

4.2.2 Canada is also a party to the *Optional Protocol to ICCPR*, the *Optional Protocol to CEDAW* and the *Optional Protocol to CRC on the Involvement of Children in Armed Conflicts*.

4.3 Status of human rights treaties in domestic law

4.3.1 International human rights treaties that Canada has ratified apply throughout Canada federally and in all provincial and territorial jurisdictions. International treaties will only be part of Canadian law if they are directly implemented by local legislation.

4.3.2 In Canada, there is no rule of interpretation which determines that domestic law must be interpreted in courts in conformity with treaty obligations. Canadian courts have used treaties for interpretative guidance.

4.4 Monitoring mechanisms

Inter-governmental arrangement

4.4.1 According to the constitution of Canada, the federal government has the exclusive power to ratify international treaties. However, the federal government does not have the power to legislate in matters of provincial jurisdiction in order to fulfill any international obligations that it may have undertaken.

4.4.2 To co-ordinate federal and provincial implementation of the international human rights treaties, the Federal-Provincial-Territorial Continuing Committee of Officials on Human Rights was created in 1975.

4.4.3 There are also many other federal-provincial-territorial committees with a mandate relating to human rights matters. The Canadian Association of Statutory Human Rights Agencies brings together human rights commissions in the country and facilitates consultation and collaboration among them.

4.4.4 For instance, Ministers responsible for the Status of Women Canada⁴⁹ meet each year to discuss matters of common interest to them, and the Federal-Provincial-Territorial Senior Status of Women Officials Forum usually meets three times a year. There is also a Family Law Committee of federal-provincial-territorial officials that meets regularly to develop and co-ordinate family-law policies of national interest and to advise Deputy Ministers.

United Nations reporting mechanisms

4.4.5 Canada's reports to the UN under international human rights treaties are prepared by the federal government in collaboration with the provincial and territorial governments. Under the Federal-Provincial Agreement of 1975, the provincial and territorial governments have the right to prepare reports on their own activities, and they usually exercise this right. Their reports become part of the report submitted by the federal government for Canada.

4.4.6 The federal Department of Canadian Heritage assumes the general responsibility for the preparation of the reports to the UN, including consultations with the provincial and territorial governments. The Canadian Human Rights Commission is invited to provide input for all reports and to comment on the drafts.

⁴⁹ The Status of Women Canada (SWC) is the federal government department which promotes gender equality, and the full participation of women in the economic, social, cultural and political life of the country.

4.4.7 The federal government also consults NGOs in the preparation of its own section of most major reports. The federal government has occasionally sought formal inputs of NGOs in the preparation of reports.⁵⁰ In recent years, some NGOs submitted alternate or shadow reports to the relevant UN committees.⁵¹

Parliamentary mechanisms

4.4.8 At the federal parliamentary level, the Standing Committee of the House of Commons on Human Rights and the Status of Disabled Persons, the Standing Committee on Foreign Affairs and International Trade as well as the Subcommittee on Sustainable Human Development occasionally consider international human rights issues.

4.4.9 The Senate established in 2001 a standing committee to deal exclusively with human rights. In May 2001, the Standing Senate Committee on Human Rights was authorized to review the machinery of government dealing with Canada's international and national human rights. The committee subsequently released a review report, entitled "Promises to Keep: Implementing Canada's Human Rights Obligations."⁵²

Legal mechanisms

4.4.10 The six international human rights treaties have not been directly integrated into Canadian law.⁵³ The *Canadian Charter of Rights and Freedoms (CCRF)* and the *Canadian Human Rights Act (CHRA)* are the two major legal instruments through which human rights are protected in Canada.

⁵⁰ See Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, The Hague: Kluwer Law International, 2002, pp. 135-40.

⁵¹ A prominent example is the Canadian Coalition for the Rights of Children, which has a mandate to ensure a collective voice for Canadian organizations and youth groups concerned with the rights of children as described in *CRC*. The Coalition, with over 50 national and provincial NGOs, has published reports to accompany the Canadian government's progress reports submitted to the UN. See Canadian Coalition for the Rights of Children, *The UN Convention on the Rights of the Child: How Does Canada Measure Up?* November 1999. In May 2003, an update of the report was published.

⁵² Available at <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/huma-e/rep-e/rep02dec01-e.htm>.

⁵³ See Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, The Hague: Kluwer Law International, 2002, pp. 124-5 and Standing Senate Committee on Human Rights, *Promises to Keep: Implementing Canada's Human Rights Obligations*, December 2001.

Canadian Charter of Rights and Freedoms

4.4.11 In 1982, *CCRF* was proclaimed to come in force. It was added to the Canadian constitution as schedule B, part I of the *Constitution Act, 1982*. *CCRF* applies to governments only.

4.4.12 Certain rights are protected under *CCRF*, including fundamental freedoms; democratic rights; mobility rights; legal rights; equality rights; language rights; and minority language education rights. *CCRF* was drafted with Canada's international obligations in mind, including *ICERD*, *ICCPR*, *ICESCR*, and *CEDAW*.⁵⁴ Many sections of *CCRF* were modelled after the provisions in *ICCPR*.

4.4.13 *CCRF* protects Canadians' rights and freedoms by limiting the ability of governments to pass laws or take actions that discriminate against or infringe on human rights. If a challenge based on *CCRF* is successful, the courts may declare a law of "no force and effect".

4.4.14 Certain legal remedies are provided under *CCRF*. Section 24 of *CCRF* permits anyone whose Charter rights have been infringed or denied to apply to a court of competent jurisdiction for an appropriate and just remedy.

Canadian Human Rights Act

4.4.15 At the federal level, the most important piece of human rights legislation is *CHRA*, which came into force in 1978. It outlaws discrimination in employment and in the delivery of goods and services on 11 grounds: race, national or ethnic origin, colour, religion, age, sex, marital status, family status, pardoned conviction, disability and sexual orientation.

4.4.16 *CHRA* applies to people working for either the federal government or private companies regulated by the federal government. In 1997, *CHRA* was amended to require employers and service providers to accommodate all persons with disabilities and to ensure greater independence for the Human Rights Commission (see paragraphs 4.4.20 to 4.4.28 for details).

⁵⁴ See Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, The Hague: Kluwer Law International, 2002, p. 123.

4.4.17 In 1999, a panel was set up by the Minister of Justice to review *CHRA*. The panel submitted its report in 2000, with 165 recommendations addressing a number of issues ranging from the human rights protection process to additional safeguards.⁵⁵ Some of the recommendations are in relation to the powers and procedures of the Canadian Human Rights Commission and to the government's compliance with international human rights treaties.⁵⁶

Other domestic human rights legislation

4.4.18 Each province has its own human rights law, usually called a Code or an Act (or in Quebec, a Charter), that covers other types of organizations not included under federal legislation. Provincial governments, schools, retail stores, restaurants, and most factories are covered by provincial human rights laws. Provincial human rights laws also prohibit discrimination in housing⁵⁷.

Specialized body

4.4.19 In Canada, the major specialized body that plays a role in monitoring the implementation of international human rights treaties is the human rights commission at both the federal and local levels.

Human rights commission

4.4.20 Canada's first human rights commission is the Ontario Human Rights Commission, which was established to administer the new *Ontario Human Rights Code* of 1962. By the late 1970s, human rights commissions had been established in all provinces and at the federal level as well.

4.4.21 During the 1960s and the 1970s, there was a growing interest in using specialized administrative agencies for human rights protection. One of the reasons was that the traditional court system was under increasing attack regarding its ability to engage in human rights law reform. It was believed that a commission type of organization staffed by officials who were experts in the fields of human rights policies would be capable of implementing the policies in the most economical, efficient, effective and socially responsive manner possible.⁵⁸

⁵⁵ The Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision*, 2000, available at <http://canada.justice.gc.ca/chra/en/index.html>.

⁵⁶ The panel recommended that (i) the preamble to *CHRA* should mention the international human rights agreements that Canada has entered into, and (ii) the Canadian Human Rights Commission should have a duty to monitor and report to Parliament and the UN Human Rights Committee on the Federal Government's compliance with international human rights treaties.

⁵⁷ An example is the refusal to rent an apartment to someone because of that person's race or religion.

⁵⁸ For details, see R. Brian Howe and David Johnson, *Restraining Equality: Human Rights Commissions in Canada*, Toronto: University of Toronto Press, 2000.

4.4.22 The Canadian Human Rights Commission (CHRC) was established in 1977. CHRC administers *CHRA*, and ensures that the principles of equal opportunity and non-discrimination are followed in all areas of the federal jurisdiction.

4.4.23 The mandate of CHRC includes:

- (a) helping parties resolve complaints of discrimination in employment and in the provision of services based on the grounds enumerated in *CHRA*;
- (b) investigating complaints of discrimination, including complaints alleging inequities in pay between men and women who are performing work of equal value;
- (c) auditing and, when necessary, taking action to ensure employers' compliance with the *Employment Equity Act*;
- (d) monitoring programmes, policies and legislation affecting designated groups (women, aboriginal peoples, minorities and persons with disabilities) to ensure that their human rights are protected; and
- (c) developing and conducting information programmes to promote public understanding of *CHRA*, and the role and activities of CHRC.

4.4.24 CHRC is composed of up to two full-time and up to six part-time Commissioners. The Commissioners are appointed by the Governor General on the advice of the Prime Minister/Cabinet. CHRC reports directly to Parliament rather than to a Minister. It tables annual reports and can issue special reports to Parliament, as it deems appropriate.

4.4.25 CHRC meets regularly to decide on individual complaints and to approve Commission policies. Some complaints are settled through mediation or through other procedures.⁵⁹ Alternatively, the Commission may appoint an investigator to study a particular complaint.

4.4.26 When the investigator's report is presented at a Commission meeting, the Commissioners may consider submissions from either side. They will dismiss a complaint if they find it not being supported by evidence. If the Commissioners find that there is evidence to support the complaint, they will refer it to the Canadian Human Rights Tribunal.

⁵⁹ For detailed information concerning the complaint handling process, see http://www.chrc-ccdp.ca/publications/Complaint_Plaintes_index.asp?l=e.

4.4.27 The Canadian Human Rights Tribunal is independent of the Commission. It holds public hearings at which both sides can present their arguments and call witnesses. The Tribunal determines whether or not there has been discrimination on a prohibited ground. If appropriate, it orders a remedy.

4.4.28 Both the complainant and the respondent can ask the Federal Court of Canada to review decisions made by the Commissioners or by the Canadian Human Rights Tribunal. In some cases, complaints can be appealed all the way to the Supreme Court of Canada.

Chapter 5 - Analysis

5.1.1 Tables 1 to 5 (on pages 34-38) summarize various attributes of the monitoring mechanisms for the implementation of international human rights treaties in the three places studied and HKSAR⁶⁰. The following analysis will look at some of the important issues with reference to HKSAR.

United Nations reporting process

5.1.2 The places studied have set up various mechanisms to involve the public and NGOs in the preparation of reports and have all established a practice of seeking comments on draft reports prepared by the government.

5.1.3 In the UK, advisory committees have been set up to help the government organize the report consultation process and monitor progress in following up the recommendations of treaty monitoring bodies. The NGO community in the UK also has the opportunity to comment on the draft periodic reports when they are released for public consultation. In New Zealand, the government endeavours to release its treaty reports in draft form to allow for public comment.

5.1.4 In Canada, the federal government consults NGOs in the preparation of its own section of most major UN reports. The Canadian Human Rights Commission is also invited to review and contribute to the reports.

5.1.5 In HKSAR, the Home Affairs Bureau drafts reports under all these treaties except for *CEDAW*, responsibility for which belongs to the Health, Welfare and Food Bureau. Reports prepared by HKSAR are submitted to the UN as parts of China's reports (except for reports under *ICCPR*). Before drafting the reports, the HKSAR Government publishes outlines of the reports for public consultation.⁶¹ The HKSAR Government does not have a practice of publishing reports in draft form for public comment.

⁶⁰ The information regarding Hong Kong is extracted from a LegCo paper, "Implementation of International Human Rights Treaties: Monitoring Mechanisms," LegCo paper No. CB(2)1957/02-03(03), see Appendix.

⁶¹ For discussion of how NGOs in HKSAR participated in the UN reporting process, see Andrew Byrnes, "Uses and Abuses of the Treaty Reporting Procedure: Hong Kong Between Two Systems," in Philip Alston & James Crawford, *The Future of UN Human Rights Treaty Monitoring*, Cambridge: Cambridge University Press, 2000 and Carole J. Petersen and Harriet Samuels, "The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organisations in the United Kingdom and Hong Kong," *Hastings International and Comparative Law Review*, Fall 2002.

5.1.6 In HKSAR, the LegCo Panel on Home Affairs monitors the submission of reports to the UN under various international human rights treaties by the HKSAR Government and its progress in following up the recommendations made by the UN treaty-monitoring bodies concerned in respect of the reports. Before and after the related UN hearings of the reports, the Panel on Home Affairs usually convenes special meetings at which representatives of the Government and NGOs exchange views on any issues with LegCo Members.

5.1.7 In order to enhance the role of LegCo in monitoring the implementation of human rights treaties in HKSAR, Members of the Panel on Home Affairs have suggested that the Government should submit annual progress reports to LegCo. The Government has agreed to provide reports on annual overviews of developments relating to the various human rights treaties applicable to HKSAR.⁶²

Parliamentary mechanisms

5.1.8 In the UK, the establishment of a parliamentary Joint Committee on Human Rights (JCHR) is intended to enhance the role of human rights in the work of Parliament. JCHR has been actively involved in assessing the government's practice and legislation in accordance with the UK's international human rights obligations. Similarly, the establishment of the Standing Senate Committee on Human Rights in Canada is believed to have strengthened parliamentary scrutiny in international human rights issues.

5.1.9 In New Zealand and HKSAR, the legislatures do not have any committees to deal exclusively with human rights. However, one remit of the LegCo Panel on Home Affairs is to monitor and examine government policies and issues of public concern relating to human rights.

Legal mechanisms

5.1.10 While the three places studied as well as HKSAR adopt the common law, the extent to which the international human rights treaties have been incorporated into the domestic legal systems is quite different. In recent years, the governments in the three places studied have one after another launched major reviews on their legal system regarding the protection of human rights, with one of the emphases on bridging the growing discrepancy between international human rights obligations and local implementation measures.

⁶² See Report of the Panel on Home Affairs 2002-2003, LegCo paper No. CB(2)2643/02-03.

5.1.11 In the UK, the vast majority of its international human rights treaty obligations have not been the subject of implementing legislation. Only the *Human Rights Act 1998* has incorporated most of the rights under *ECHR* into the UK laws. In any event, the government regularly reviews the UK's position under various international human rights instruments.

5.1.12 In Canada, *CCRF* was drafted in accordance with the spirits of Canada's international obligations, including *ICERD*, *ICCPR*, *ICESCR*, and *CEDAW*. Many sections of *CCRF* are modelled after the provisions in *ICCPR*. In 1999, a major review was conducted on the *Canadian Human Rights Act*.

5.1.13 In New Zealand, various international human rights obligations were legally implemented through the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993*.⁶³ In 2000, the government decided to conduct a Ministerial re-evaluation of the *Human Rights Act 1993* and the roles, interrelationships, operation and structures of human rights agencies in New Zealand.

5.1.14 In HKSAR, the primacy of the two international human rights treaties, namely *ICCPR* and *ICESCR*, is ensured by article 39 of the *Basic Law*. Article 39 stipulates that the provisions of the two treaties "as applied to Hong Kong", "shall remain in force and shall be implemented through the laws of the HKSAR." The *Bill of Rights Ordinance* was enacted in 1991 specifically to give effect in local law to the provisions of *ICCPR* as applied to HKSAR.

5.1.15 In 1993, a government-wide review of all legislation in the light of the *Bill of Rights Ordinance* was conducted in HKSAR. The review led to the amendment of some 40 legal provisions. There has not been any major review on discrepancy between international human rights obligations and local implementation measures since then. In June 2003, the HKSAR Government announced its intention of introducing a racial discrimination law.

Human Rights Commission

5.1.16 In the three places studied, only the UK does not have a national human rights commission. However, with the enactment of the *Human Rights Act* in 1998, discussions on the establishment of an independent human rights commission have gradually been intensified in the UK. The parliamentary Joint Committee on Human Rights has published a detailed report regarding this matter, which concludes that the case for establishing of such an independent commission is compelling. The UK government has recently announced its intention of setting up a Commission for Equality and Human Rights.

⁶³ For details, see Mark Gobbi, "Drafting Techniques for Implementing Treaties in New Zealand," *Statute Law Review*, Vol. 21, No.2, 2000, pp.71-103.

5.1.17 Both New Zealand and Canada have set up human rights commissions since 1977. There are many reasons behind the formation of such organizations in these two places, including pressure from local groups and parliamentary institutions, a desire to be in line with international human rights law and a distrust of the court system in handling human rights issues.

5.1.18 In recent years, both Human Rights Commissions in New Zealand and Canada have been subject to major reviews. The Commissions are expected to be more focused on education and advocacy, instead of expending its energy on individual complaints.

5.1.19 Some members of the Panel on Home Affairs have expressed concerns that the HKSAR Government continues to ignore the recommendations of the relevant UN treaty-monitoring bodies and to refuse to establish a human rights commission.⁶⁴ In paragraph 9 of its concluding observations in 1999, the UN Human Rights Committee "*remains concerned that there is no independent body established by law to investigate and monitor human rights violations in HKSAR and the implementation of Covenant rights.*"

5.1.20 The HKSAR Government reinstates its position that human rights have already been well protected by the relevant legislation, an independent judiciary, the legal aid system, and other institutions such as the Ombudsman, the press, NGOs, and LegCo. The Government does not see any obvious advantage in introducing a new institution such as a human rights commission.⁶⁵

Other mechanisms

5.1.21 In the UK, mechanisms have been set up within the government and in collaboration with NGOs to review the UK's position on international rights instruments and to monitor progress in following up recommendations by international monitoring bodies.

5.1.22 In New Zealand, the Human Rights Commission has been empowered by a recent legislative amendment to develop a national plan of action, in consultation with interested parties, for the promotion and protection of human rights.

⁶⁴ See Report of the Panel on Home Affairs 2002-2003, LegCo paper No. CB(2)2643/02-03. Various UN committees have repeatedly raised a concern that there is no human rights institution with a broad mandate in HKSAR.

⁶⁵ *First Report of the HKSAR of the People's Republic of China in the light of the International Covenant on Civil and Political Rights*, paragraphs 20-22, available at <http://www.info.gov.hk/hab/doc/e-pt2-2.doc>.

5.1.23 In Canada, mechanisms have been set up to co-ordinate federal and provincial implementation of the international human rights treaties.

5.1.24 In HKSAR, there are no similar mechanisms set up within the Government or in collaboration with NGOs to monitor the implementation of international human rights treaties.

Table 1 - United Nations reporting mechanisms

Places	United Nations reporting mechanisms
UK	The Department for Constitutional Affairs has lead responsibility for <i>ICCPR</i> and <i>CAT</i> , the Home Office on <i>CERD</i> , the Foreign and Commonwealth Office on <i>ICESCR</i> , the Women and Equality Unit of the Department of Trade and Industry on <i>CEDAW</i> , and the Children's and Young People's Unit on <i>CRC</i> .
New Zealand	The Ministry of Women's Affairs and the Ministry of Youth Affairs prepare the reports under <i>CEDAW</i> and <i>CRC</i> respectively. All other reports are prepared by the Ministry of Foreign Affairs and Trade. The government endeavours to release its treaty reports in draft form for public comment.
Canada	Reports are prepared by the federal government with the provincial and territorial governments. The federal Department of Canadian Heritage assumes general responsibility for the preparation of the reports.
HKSAR	The Home Affairs Bureau drafts reports under all these treaties except for <i>CEDAW</i> , responsibility for which belongs to the Health, Welfare and Food Bureau. HKSAR reports are submitted to the UN as parts of China's reports ⁶⁶ . Before drafting the reports, the HKSAR Government will publish outlines of the reports for public consultation.

⁶⁶ Except for reports under *ICCPR*.

Table 2 - Parliamentary mechanisms

Places	Parliamentary mechanisms
UK	The Joint Committee on Human Rights considers and reports on matters relating to human rights. It also examines all bills that have a bearing on human right issues.
New Zealand	No committee specifically deals with human rights issues. In recent years, a new system has been established in the House of Representatives for the government to present international treaties, together with an accompanying national interest analysis, to the House for examination prior to taking any binding treaty action by the government.
Canada	The Standing Senate Committee on Human Rights deals exclusively with human rights issues.
HKSAR	The LegCo Panel on Home Affairs has a remit to monitor and examine government policies and issues of public concern relating to human rights.

Table 3 - Legal mechanisms

Places	Major human rights legislation	Major characteristics
UK	<i>Human Rights Act 1998</i>	<ul style="list-style-type: none"> - incorporates most of the rights specified in the <i>European Convention on Human Rights</i> (Convention rights), - requires all legislation to be interpreted and given effect compatibly with the Convention rights as far as possible, and - makes it unlawful for a public authority to act incompatibly with the Convention rights.
New Zealand	<i>New Zealand Bill of Rights Act (NZBRA)</i> <i>The Human Rights Act (HRA)</i>	<p><i>NZBRA</i> - provides safeguards for the civil and political rights and to affirm a commitment to <i>ICCPR</i>,</p> <ul style="list-style-type: none"> - applies to acts by the government and public actors, - the courts must interpret other laws consistently with <i>NZBRA</i> if all possible, and - the Attorney-General must inform the House of Representatives where there is an inconsistency in a bill with <i>NZBRA</i>. <p><i>HRA</i> - is intended to provide protection of human rights in general accordance with <i>ICCPR</i> and <i>ICESCR</i>,</p> <ul style="list-style-type: none"> - applies to both public and private sectors, and - is administered by the Human Rights Commission and the courts.
Canada	<i>Canadian Charter of Rights and Freedoms (CCRF)</i> <i>Canadian Human Rights Act (CHRA)</i>	<p><i>CCRF</i> - part of the Canadian constitution,</p> <ul style="list-style-type: none"> - applies to governments only, - many sections are modelled after the provisions in <i>ICCPR</i>, and - the courts may strike down a law which is inconsistent with <i>CCRF</i>. <p><i>CHRA</i> - applies to people working for either the federal government or a private company regulated by the federal government,</p> <ul style="list-style-type: none"> - outlaws discrimination in employment and in the delivery of goods and services on 11 grounds, and - is administered by the Canadian Human Rights Commission.
HKSAR	<i>The primacy of ICCPR and ICESCR is ensured under the Basic Law</i> <i>Bill of Rights Ordinance (BORO)</i>	<p><i>BORO</i> - gives effect in local law to the provisions of <i>ICCPR</i> as applied to HKSAR, and</p> <ul style="list-style-type: none"> - applies to the Government and all public authorities.

Table 4 - Human Rights Commission

Places	Human rights commission	Powers and functions
UK	No national human rights commission. ⁶⁷	NA.
New Zealand	The Human Rights Commission was established in 1977.	(a) to advocate for human rights; (b) to educate and co-ordinate programmes regarding human rights; (c) to make public statements; (d) to consult and co-operate with other persons and bodies concerning the protection of human rights; (e) to inquire into any enactment or practice or procedure if it appears to infringe human rights; (f) to take part in Court or Tribunal proceedings regarding human rights; and (g) to report to the Prime Minister on any matter affecting human rights including the implications of proposed legislation and international instruments.
Canada	Human Rights Commissions in every province and at the federal level. The Canadian Human Rights Commission was established in 1977.	(a) to help parties resolve complaints of discrimination; (b) to investigate complaints of discrimination; (c) to audit and, when necessary, to take action to ensure employers' compliance with the <i>Employment Equity Act</i> ; (d) to monitor programmes, policies and legislation affecting designated groups to ensure that their human rights are protected; and (c) to develop and conduct information programmes to promote public understanding of the <i>Canadian Human Rights Act</i> and of the role and activities of the Canadian Human Rights Commission.
HKSAR	No human rights commission.	NA.

⁶⁷ The UK government has recently announced its intention of setting up a Commission for Equality and Human Rights. There is a human rights commission in Northern Ireland and a decision has been taken to establish a Scottish Human Rights Commission.

Table 5 - Other mechanisms

Places	Other mechanisms
UK	<ul style="list-style-type: none"> - Interdepartmental review of international human rights instruments; and - Ministerial NGO Forum on Human Rights.
New Zealand	<ul style="list-style-type: none"> - National Plan of Action.
Canada	<ul style="list-style-type: none"> - The Federal-Provincial-Territorial Continuing Committee of Officials on Human Rights; - The Canadian Association of Statutory Human Rights Agencies; and - The Federal-Provincial-Territorial Senior Status of Women Officials Forum.
HKSAR	<ul style="list-style-type: none"> - Nil.

Appendix

Legislative Council Panel on Home Affairs Implementation of International Human Rights Treaties: Monitoring Mechanisms

Purpose

This paper describes the monitoring mechanisms for the implementation in Hong Kong of the applicable international human rights treaties⁶⁸.

Existing mechanisms

2. Implementation of the treaties is monitored in several ways -
 - (a) **through the United Nations (UN) reporting process:** as the Panel is aware, the UN treaties entail the obligation to submit periodic reports and any additional ones for which the treaty bodies may call. The treaty monitoring bodies themselves are the international community's appointed monitors and carry out their monitoring functions through their assessment of the reports submitted by governments, non-governmental organisations (NGOs), and other bodies, and also through the related hearings process. The process of compiling reports is in itself a monitoring function in that it requires governments to take stock of human rights protections in their jurisdictions as they are at any one time and in the light of comments made by the treaty monitoring bodies and by local and international observers;
 - (b) **through the domestic judicial avenue:** there are numerous legal protections for the individual rights guaranteed in the treaties which are binding on the Government of the Hong Kong Special Administrative Region at the international level. Rights that are implemented in our domestic legal system are interpreted and given effect through the Courts, which do have reference to views and comments of treaty monitoring bodies and international human rights jurisprudence. Hong Kong has a strong and independent judiciary that rules impartially on claims that specific rights have been infringed, whether by the Government or by private individuals or bodies. In this respect, the Courts are the ultimate guardians of rights protection in any jurisdiction, such as Hong Kong, where the rule of law prevails;

⁶⁸ Namely the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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- (c) **by the Legislative Council:** Members of the Legislative Council, in particular members of the Panel, frequently call on the Administration to account for its performance in regard to human rights protections, both in general terms and in respect of issues that impinge on the treaties;
 - (d) **through the specialised bodies:** the Equal Opportunities Commission (EOC), the Office of the Privacy Commissioner for Personal Data (PCO), the Women's Commission, and the Ombudsman exist with the express purpose of monitoring the issues within their respective remits. With the exception of the EOC and the PCO, these bodies do not always entail questions of human rights. But they play a vital role in ensuring good governance and that is one of the pre-conditions for the security of human rights protections in any jurisdiction;
 - (e) **by NGOs:** NGOs play an active role in monitoring implementation of the human rights treaties, in Hong Kong as in other jurisdictions. They play a vital role in the monitoring process by bringing matters of concern to the attention of the public, legislators and the international community; and
 - (f) **through the media:** Hong Kong has a free and active media corps that does not hesitate to report possible breaches of human rights, exposing those involved and the issues themselves to the glare of domestic and international publicity.

3. Thus, there are ample mechanisms, both domestic and international, for ensuring that the Government delivers on its commitments under the international treaties. However, there may be different views as to what such delivery should entail. By way of example, a question that has given rise to disagreement is whether Hong Kong needs an independent institution - usually referred to as a Human Rights Commission - to undertake a central monitoring role. Some local and international commentators have called on us to establish such a body.

4. Our view is that the existing measures - laws, policies, and practices - are consistent with the requirements of the treaties⁶⁹. However, some commentators believe that, by not proceeding on the basis of those recommendations, Hong Kong is in danger of breaching its international obligations. But that is not the case: none of the treaties contain provisions that require governments to establish a central monitoring body for human rights.

⁶⁹ A special exception is the question of our compliance with the International Convention on the Elimination of All Forms of Racial Discrimination. This is an issue that we are actively addressing.

Way forward

5. At the Panel's meeting on 11 April 2003, it was suggested that, to strengthen the existing mechanisms, the Administration should submit annual reports to the Legislative Council on the implementation of the applicable treaties. These would be additional to those submitted to the UN in accordance with our treaty obligations. Members of the Panel asked us to respond to this suggestion.

6. We are not convinced of the need for an additional mechanism but have no objection in principle to providing progress reports as proposed at the meeting on 11 April. However, doing so would place new demands on the Bureau's resources, which are primarily in place to service our reporting obligations under the UN treaties. We will therefore need to examine the implications of accepting these additional tasks. We will advise the Panel of our conclusions shortly.

**Home Affairs Bureau
May 2003**

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