

Aotearoa New Zealand's Periodic Review 2024

Report to United Nations Committee

Michael Gibson
Southland Beneficiaries and Community Rights Centre Inc
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Introduction

1. Southland Beneficiaries and Community Rights Centre Inc (“SBCRC”) is a non-government, community-funded, organisation that exists for the purpose of advocating for the economic, social and cultural rights of people living within the Southland/Murihiku region of Aotearoa New Zealand.

Context

2. By the time the Committee conducts its review, New Zealand's government is likely to have changed to one that respects and protects human rights even less than its predecessor. A general election, due on 14 October 2023, seems likely to usher in the most rightwing government in our history, comprised of a coalition of political parties who each campaigned on platforms that promised to restrict or curtail the human rights of many New Zealanders.¹

3. However, this Report will not address the probable actions of that government. Instead, it will focus on the actions of the governments that held office between the time of the last UPR, in 2019, and today.

4. There were two governments in that period. The first, elected in 2017, was a coalition between the Labour and New Zealand First Parties, together with a support agreement with the New Zealand Greens; collectively these three parties commanded a majority of votes in New Zealand's House of Representatives, the country's legislative chamber.

5. The next general election, held in late 2022, resulted in a single-party majority of votes for the Labour Party, a first since the advent of the Mixed Member Proportional (“MMP”) electoral system in 1996. Nevertheless, the Labour Party continued its support agreement with the Greens, some of whose members also became members of the Executive branch of government.

6. Since 1984, when the fourth Labour Party government was elected, New Zealand governments have all governed under neoliberal regimes. The following definition serves:²

“At a very base level we can say that when we make reference to ‘neoliberalism’, we are generally referring to the new political, economic, and social arrangements within society that emphasize market relations, re-tasking the role of the state, and individual responsibility. Most scholars tend to agree that neoliberalism is broadly defined as the extension of competitive markets into all areas of life, including the economy, politics, and society.”

7. Under neoliberalism, respect and protection for fundamental human rights and, in particular, economic, social and cultural rights, can be characterised as hollow; at best, lip service; at worst, disdain and contempt.³

8. New Zealand's record in that respect remains consistent.

9. Because of time constraints this report will mention only a few of the human rights that concern SBCRC.

Right to Adequate Standard of Living, including Housing Rights

10. We note the contents of the 2019 UPR Recommendations 90-92.

Welfare reform

11. On forming government in 2017, the Labour party-New Zealand First coalition had no ideas about the social policies it wished to implement. Accordingly, and to show a semblance of action, it commissioned a number of lengthy, and expensive, “reviews” by individuals it selected.
12. One of these exercises was labelled the *Welfare Expert Advisory Group* (“WEAG”), which reported to government in February 2019.⁴ The WEAG Report is comprehensive and contains an impressive and extensive list of recommendations to government, including increased benefit rates and the removal of punitive and harmful sanctions against people receiving welfare benefits.
13. Naturally, the Government has not fully implemented a single one of WEAG’s recommendations. Instead, it merely tinkered with the existing welfare regime that it inherited from the previous government, including the Social Security Act 2018, itself merely a reworded version of its antediluvian predecessor, the Social Security Act 1964.
14. Although the government increased the rates of main benefit entitlements, and made annual indexing more generous, it clawed back much of those increases by abating, or reducing, entitlements to supplementary entitlements, such as Accommodation Supplement or Temporary Additional Support. Thus, people receiving welfare benefits only benefited to a small extent.
15. In addition, increases in welfare benefits were more than offset when rentier capitalists⁵ promptly increased their charges for various essential goods and services: rental accommodation, utilities such as electricity, and food, thus leaving beneficiaries no better off. The New Zealand government has done little or nothing to restrain capitalist profiteering; anything it has done is largely cosmetic and ineffectual.
16. We are particularly concerned that the social welfare regime in New Zealand deliberately excludes access to justice in cases where it makes decisions affecting people with disabilities. Section 396 of the Social Security Act 2018 expressly excludes rights of appeal to Courts or tribunals. Instead a *Medical Appeal Board* (“MAB”) is provided, a creature of the executive branch of government, populated by people with no legal training or experience whatsoever.
17. The MAB’s exclusive jurisdiction to adjudicate disputes was significantly expanded in 2013, by amendment to the 1964 Act, which was then replicated in s396 of the 2018 Act, and applies to more than 20 discrete decisions concerning welfare rights affirmed by the Covenants to which New Zealand is a state party.⁶
18. Section 396 operates as an “*ouster clause*”, which are meant to be constitutionally improper.⁷ In addition section 27(1) of the New Zealand Bill of Rights Act 1990 (“NZBORA”) is meant to provide the right to natural justice to people whose rights, obligations, or interests protected or recognised by law are determined by any tribunal or public authority.⁸ MSD’s tight control of MAB membership and functions breaches that right because the decision-maker effectively acts as judge in its own case and creates at least an appearance of bias, if not actual bias itself.
19. We raised our concerns about MABs with MSD in 2022 but have not received any response. Recently the New Zealand High Court determined that MAB decisions are within its judicial review jurisdiction;⁹ although the Court found that the MAB had committed errors of law, it remitted the matter back to it for reconsideration, thus raising the very real risk that

the Appellant, who is significantly disabled, will be defeated again by a quasi-judicial body that has no real understanding of legal matters.¹⁰

20. New Zealand's social welfare regime is the subject of considerable and informed criticism.¹¹ We believe that the design and administration of the regime amounts to "*structural injustice*", as conceptualised by Iris Marion Young¹² and applied to neoliberal welfare regimes by Virginia Mantouvalou.¹³ Structural injustice in New Zealand's welfare system amounts to a derogation of the state party's obligations under ICESCR and CRPD, respectively.

Housing

21. New Zealand's housing crisis continued, largely unabated by any action the government took during the review period. During the 2017 election campaign, the Labour Party promised to build a large number of state or community owned houses, to be rented to tenants at income-related rates fixed at no more than 25 percent of household incomes.
22. Instead, the government spent considerable time and money building homes for first-home buyers to purchase from it. This scheme, labelled *Kiwibuild*, was an expensive failure: the homes constructed were unappealing to middle class home buyers and were largely rejected, although some were purchased and added to the property portfolios, and untaxed capital gains, of wealthy investors.
23. *Kiwibuild* did not add a single home to the state, or social, housing stock.
24. After the Minister for Housing was, eventually, sacked and replaced by a competent successor, the state housing agency was directed to start building homes for poorer people. This process was assisted by ending the practice of previous governments, that required the agency to pay it virtually the entire rental income it received, in the form of dividends that vanished into the governments' general accounts and were not expended on new construction, or even maintenance of existing stock, much of which is decades old and decrepit.
25. Since those changes were made, the government has managed to complete, roughly, 15,000 new state-owned dwellings, although it sold or demolished approximately half that number of its existing stock. There has been considerable resistance to state housing construction from other elements of the population, including arson of at least one development, which may have been incited by private sector interests.
26. An article in the *New Zealand Medical Journal* affirmed the relationship between homelessness and poor health status.¹⁴ The authors reported that the numbers of homeless people within Aotearoa increased by nearly a quarter between 2006 and 2013, a rate and number that has only continued to grow since the 2013 census.¹⁵
27. The article also reported a "*dramatic rate of amenable mortality*" among homeless people, a finding that remains relevant in 2023.
28. In its edition of 9 September 2023, *The Economist* reported that nearly one-quarter of New Zealanders who paid rent for their accommodation paid more than 40 percent of their disposable income to their landlords, the highest aggregation among the comparator group of OECD members.¹⁶

Disability Rights

29. We note the contents of the 2019 UPR Recommendations 30, 89, 156-162

Bureaucratic engineering

30. The government's principal "*achievement*" during the review period was the creation of another bureaucratic department, the Ministry of [sic] Disabled People¹⁷ – Whaikaha, in 2022, when it appropriated just under \$108million, over four years, to establish the new Ministry.
31. Since then, the Ministry has devoted itself largely to internal matters: hiring staff, including senior executives, at "*market*" salaries; occupying newly-refurbished offices; designing corporate logos and fonts for stationery; and attending conference and events overseas. It has not managed to improve the lives of people with disabilities by an iota.
32. A typical government media statement is that dated 8 September 2023, announcing the "*allocation*" of \$73.7million, over four years, "*to continue to transform the disability support system*".¹⁸ This statement, like most from government, is sophistry: the money will be spent on office bureaucracy and bureaucrats¹⁹, located in the bureaucratic heart of the country, central Wellington; it will not be spent on purchasing goods or services for people with disabilities themselves.
33. We note the Concluding observations on the combined second and third periodic reports of New Zealand by the UN Committee on the Rights of People with Disabilities in August 2022,²⁰ following its consideration of those reports.²¹
34. With one significant exception, by Dr Esther Woodbury, the performance of New Zealand's official delegation at the UN Review of New Zealand's compliance with CRPD in August 2022 was shameful.²²
35. We endorse the contents of Dr Woodbury's submission to the Committee, together with those of the shadow reports that were also submitted.
36. We note that the government's response to the Committee's recommendations consists, for the most part, of an intention to hold a meeting of bureaucrats by December 2027.²³ We see this as further evidence of the government's lack of good faith in complying with its international human rights obligations.

Mental health

37. The mental health of New Zealanders, overall but particularly among the poorest, continued to deteriorate during the review period, while government action, although appearing to involve the appropriation of large sums of public money, had little or no effect.²⁴
38. As it did with the welfare system, the Labour-led government of 2017-2022 commissioned an extensive, and expensive, "*Inquiry*" of the mental health system, which reported to it in November 2018.²⁵ This report, too, contained a slew of recommendations, most of which the government failed to fully implement.
39. Because of widespread scepticism towards the good faith of this Inquiry, an alternative was conducted, completely independent of government.²⁶ Among its findings was that mistreatment of people by government agencies, notably the Ministry of Social Development and the Accident Compensation Corporation ("ACC"), was a leading cause of mental health problems, either fresh or aggravated, among New Zealanders. We endorse that finding, based on the work we do for people dealing with both agencies.

Accident Compensation scheme

40. Like the Social Security Act 2018, the statute empowering New Zealand's personal injury scheme, the Accident Compensation Act 2001 ("the ACA"), embodies neoliberal ideology throughout. The ACA is, similarly, replicated from an earlier statute, the Accident Rehabilitation Compensation and Insurance Act 1992, widely loathed and extensively criticised for its adverse effects on people who suffer personal injury.²⁷

41. ACC continues to breach the right to privacy of the people it is paid to serve. There have been many instances over the years, some resulting in reviews and reports, with recommendations that are never acted upon or, at best, selectively implemented.²⁸ We believe ACC's failure to respect and protect individual rights to privacy is an outcome of the organisation's design, which is to function as an insurer with a mandate to shift the costs of personal injury from itself and the state to victims and their immediate families.
42. The government actively discriminates against ACC claimants by excluding them from entitlement to Winter Energy Payment, for no apparent reason and in spite of the fact that many claimants, although incapacitated from employment, receive very low rates of weekly compensation from ACC. Attempts to lodge complaints with the government's Human Rights agency are frustrated by the agency itself.
43. The government deliberately enacted section 198 of the Social Security Act 2018, replicating a provision in the Social Security Act 1964 that the latter Act replaced upon repeal of the former. S.198 provides that welfare benefits must be reduced, or abated, on a dollar-for-dollar basis if a receives weekly compensation from ACC because of incapacity for employment. This provision is unfair and unjustified, and has been the subject of comment by the judiciary.²⁹ Nonetheless, the government refuses to amend or repeal it.
44. The government completely ignored the recommendations of a report in 2022³⁰ that provided a blueprint for sustainable, equitable reform of the disability regime, for accident and non-accident victims alike. That blueprint is based on the original vision for people with disabilities in New Zealand that was enunciated in a Royal Commission in 1967 but for which no subsequent government has had the political courage to realise.³¹

Conclusion

45. As Desmond King observed:³²

"The welfare state directly counters market processes by providing citizens with a minimum income, a basic standard of social services (health and education, for example), and respite against economic uncertainty."

46. However, *"the ideology of New Right liberals and conservatives implies the retrenchment of these rights, particularly social citizenship rights. For New Right theorists, the welfare state is an undesirable bureaucratic apparatus, which not only reduces the incentive for individuals to work but is also harmful to the economy and social order. The welfare state generates a bureaucratic class responsible for its operation and committed to its perpetuity, if not its expansion, according to New Right critics. A market-based political movement emphasises how state welfare provision interferes with 'natural' economic processes, not its amelioration of hardship. This is why New Right advocates want to destroy social citizenship rights and to return people to the mercy of market processes."*
 47. The record of New Zealand's government during the period under review is, with one significant exception³³, of adherence to neoliberal ideology in its economic and social policies, in which its respect and protection for the human rights contained in the Universal Declaration of Human Rights and the Conventions to which it is a state party, is strictly subordinate and subject to disregard or breach at any time, if the demands of neoliberalism require it.
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(Routledge, 2023); "Authoritarians are on the march (Democracy and human rights)", *The Economist*, 12 August 2023, 12-13 (leader article); "Thinking for themselves (Global Values)" 48-50 (International section).

2 Simon Springer, Kean Birch, Julie MacLeavy (eds), *The Handbook of Neoliberalism* (Routledge International, London, 2016), Springer, Birch, and MacLeavy, "An Introduction to Neoliberalism", 1-14, 2.

3 See, for example: Wendy Brown, *In The Ruins Of Neoliberalism: The Rise Of Antidemocratic Politics In The West (Series: The Wellek Library Lectures)*, (Columbia University Press, 2019); Damian Cahill and Martijn Konings, *Neoliberalism*, (Polity, 2017).

4 WEAG, *Whakamana Tāngata: Restoring Dignity to Social Security in New Zealand* (February 2019) ("the WEAG Report").

5 A feature of neoliberal capitalism. See: [Guy Standing](#), *The Corruption of Capitalism Why rentiers thrive and work does not pay* (Biteback Publishing, 2016); Forrester, Katrina, "[The Corruption of Capitalism by Guy Standing review – work matters less than what you own](#)". *The Guardian* (26 Oct 2016); Brett Christophers, *Rentier Capitalism: Who Owns the Economy and Who Pays For It?* (Verso, 2020).

6 Principally ICECSR but also including CRPD, CRC and CEDAW.

7 See: Philip Joseph, *Constitutional and Administrative Law in New Zealand* (4th ed, 2014, Thomson Reuters), at 22.9; 22.9; GDS Taylor, *Judicial Review: A New Zealand Perspective* (2nd ed, 2010, LexisNexis), "Privative Clauses", 2.50-2.61; Peter Cane, *Administrative Law* (5th ed, 2011, Clarendon), 12.2.1. The exception to the authorities' proscription of ouster clauses seems to where the victim is powerless and vulnerable, such as a welfare beneficiary.

8 See: Joseph, op cit, at 25.2; Taylor, op cit, 13.18; Cane, op cit, 4.1.

9 *J v The Medical Appeals Board and The Chief Executive of the Ministry of Social Development* [2023] NZHC 571.

10 There are other deficiencies within the judicial review process, not least stemming from its formalist and procedural fixations.

11 See, for example: Māmari Stephens, *Social Security and Welfare Law in Aotearoa New Zealand* (Thomson Reuters, 2019); Neville Harris, *Law in a Complex State: Complexity in the Law & Structure of Social Welfare* (Hart Publishing, 2013), 220-223.

12 IM Young, *Responsibility for Justice* (OUP, 2013), Ch1; Young, *Justice and the Politics of Difference* (Princeton UP, 1990), Ch 2.

13 Virginia Mantouvalou, "Welfare-to-Work, Structural Injustice and Human Rights", *Modern Law Review* (2020), 1-26.

14 Sandrine Charvin-Fabre, Otilie Stolte, Ross Lawrenson, "Amenable mortality within the New Zealand homeless population: we can do better!", *NZMJ* 18 December 2020, Vol 133 No 1527,

15 Noting that subsequent census data has become corrupt and unreliable following the failure of the 2018 census. Another census was undertaken in 2023 but results were not available when this report was written.

16 "Giving the thumbs-up: The new zing in zoning", *The Economist*, 9 September 2023 (International section), 53-55. The 40 percent metric is regarded as an indicator of financial stress on tenant households.

17 The Ministry is not, of course, populated solely by people with disabilities, although it functions as an opportunity for paid employment by many people with disabilities. In this respect, the Ministry provides the government with opportunities, too, to buy and co-opt the allegiance of people who might otherwise criticise it and divide them from people with disabilities that it wishes to marginalise. The Ministry should really be labelled the Ministry for Disabled People if it is truly meant to implement the government's responsibilities under the UN Convention for the Rights of People with Disabilities.

18 <https://www.beehive.govt.nz/release/govt-confirms-additional-support-enabling-good-lives> (8 September 2023).

19 It is no coincidence that many of the bureaucrats are members of the Public Service Association (PSA), neither a trade union nor affiliated to the Labour Party, but which functions as a trade union for bureaucrats and exercises considerable power and control over the Labour Party itself. The PSA hierarchy and, secondly, its members have been the principal beneficiaries of much of the government's spending programs during its term of office; popular resentment and the government's failures to deliver substantial improvements to the lives of people outside its ranks and the PSA, are among the reasons for the government's looming defeat in the October 2023 elections.

20 CRPD/C/NZL/CO/2-3 (26 September 2022).

21 See: CRPD/C/NZL/2-3 (11 October 2019); CRPD/C/SR.596 (7 September 2022).

22 Dr Esther Woodbury, Lead Advisor Disability Rights, HRC Opening Statement 27th Session CRPD – Geneva 24 August 2022

23 New Zealand Government Cabinet Paper, United Nations Convention on the Rights of Persons with Disabilities: Government response and proposed mechanisms to support implementation (29 June 2023).

24 Charvin-Fabre et al, fn(5), for example.

25 *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction* (2018).

26 *People's Mental Health Review* (Action Station, 2017).

27 Not loathed, of course, by employers, managing insurers, ACC bureaucrats, private investigators and contracted assessors, all of whom profit from the design and administration of the scheme. For a sample of criticism of the ARCIA, its successor statutes and ACC itself, see: Dr Rodney Harrison QC, "Matters of Life and Death: The Accident Rehabilitation Compensation and Insurance Act 1992 and Common Law Claims for Personal Injury" Occasional Paper, Legal Research Foundation, Auckland 1993; Ian Campbell, *Compensation for Personal Injury in New Zealand: its rise and fall* (Auckland UP, 1996); Hazel Armstrong, *Blood on the Coals: The origins and future of New Zealand's Accident Compensation scheme* (2008, Trade Union History Project); Acclaim Otago, *From the Perspective of People Injured by Accident: Submissions to the First New Zealand Report on Implementing the United Nations Convention on the Rights of Persons with Disabilities* (2010); Acclaim Otago, *Understanding the Problem: An analysis of ACC appeals processes to identify barriers to access to justice for injured New Zealanders*

(9 July 2015); Miriam R Dean CNZM QC, *Independent Review of the Acclaim Otago (Inc) July 2015 Report Into Accident Compensation Dispute Resolution Processes* (May 2016); Acclaim Otago, *Solving the Problem: Causation, transparency and access to justice in New Zealand's personal injury system* (22 May 2017)

- 28 The most recent of which is that of Linda Clark, a partner in a major law firm: *Independent review of access to and use of client information at ACC* (May 2022).
- 29 See: *Goh v Chief Executive of the Ministry of Social Development* [2010] NZCA 110; *Hennesy v Chief Executive of the Ministry of Social Development* [2012] NZHC 3104; *M v Chief Executive of the Department of Work and Income* (unreported, HC Wellington, AP-335-01, 27 August 2022); [2020] NZSSAA 7 (30 April 2020).
- 30 Warren Forster, *Removing Disabling Experiences: a vision for the future of our people*, (New Zealand Law Foundation, 2022).
- 31 Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (Government Printer, 1967). This document is universally known as "the Woodhouse Report", after the Inquiry's chairperson, the Rt Hon Sir Owen Woodhouse.
- 32 Desmond King, *The New Right: Politics, Markets and Citizenship* (MacMillan 1987), Ch 9, "Social Citizenship in the Welfare State", 164-177, at 165,
- 33 The maintenance and perpetuation of a substantial, and self-serving, bureaucratic cadre of officials.