



NEW ZEALAND

Submission to the Committee on the Rights of the Child

93rd Pre-Sessional Working Group, September 2022

NGO Report

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INTRODUCTION

The WORLD Policy Analysis Center, based at the University of California, Los Angeles, captures quantitative policy data on more than 2,000 indicators that matter to equality, health, and well-being. We strive to improve the quantity and quality of globally comparative data available to policymakers, citizens, national governments, intergovernmental organizations, civil society, and researchers for all 193 UN member states. We submit the following brief in advance of the 93rd Pre-Sessional Working Group of the Committee on the Rights of the Child.

This brief will focus on the following three areas:

- General Principles: **Equality and Non-Discrimination**
- Special Protection Measures: **Education, Leisure and Cultural Activities**
- Special Protection Measures: **Children in Situations of Emergency (Detention based on Immigration Status)**

We have collected and analyzed information on rights, laws, and policies in these areas for all 193 UN member states (150 in the case of detention based on immigration status) using a variety of sources, including primary national legal sources (e.g., original legislation and constitutions), national reports on policies and laws to the United Nations and official global and regional bodies, and secondary sources where clarification or corroboration of primary data is needed. Using a rigorous double-coding process, we create original databases which distill thousands of pages of text to highlight the essential features of each right, law, or policy. These original databases are the reference for the following brief. When drafting each brief, we perform a series of additional verifications to ensure the data provided reflects the current constitutional and legal landscape of a country.

In this report we first provide a summary of our constitutional and legislative findings, as well as suggested questions for the Committee to ask New Zealand, and topics we hope the Committee will address in its concluding observations. This summary is followed by detailed constitutional and legislative excerpts documenting our findings. We hope the Committee will recommend that New Zealand address any gaps in consultation and collaboration with relevant stakeholders, including civil society organizations. We also recognize that while having strong laws and policies in place are necessary first steps, implementation is also of paramount importance. In areas where we have commended New Zealand for having provisions in place, we hope the Committee will recommend that New Zealand work with stakeholders to overcome any obstacles in implementing these provisions.



SUMMARY OF FINDINGS AND RECOMMENDATIONS

1. General Principles: Equality and Non-Discrimination (Article 2)

Although New Zealand does not have a codified constitution, based on our review of generally accepted sources of constitutional law, New Zealand’s constitutional order prohibits discrimination on the basis of race, sex, religion, political affiliation, national or ethnic origin, and disability. However, some groups guaranteed equality in the Convention are not explicitly covered by this provision, including children facing discrimination based on language, social origin, property status, or birth status.

RECOMMENDED CONCLUDING OBSERVATION

We hope the Committee will:

- Recommend in its concluding observations that New Zealand amend its Human Rights Act to add explicit guarantees of equality and non-discrimination regardless of language, social origin, property status and birth status, consistent with CRC commitments. These guarantees could be added to Section 21 of the act, which already guarantees non-discrimination based on other personal characteristics and statuses.

2. Special Protection Measures: Education, Leisure and Cultural Activities (Articles 23, 28)

New Zealand’s education legislation guarantees free education at the primary and secondary levels; it further guarantees students with disabilities access to the public education system at the primary and secondary levels, integrating these students into mainstream schools and, together with the Human Rights Act, prohibits discrimination against students with disabilities.

However, our review also finds that New Zealand’s provisions on supports and accommodation for students with disabilities are ambiguous, committing schools to providing them only if they can “reasonably be made available”.



RECOMMENDED QUESTION FOR THE LIST OF ISSUES AND CONCLUDING OBSERVATION

We hope the Committee will:

- In its list of issues, ask New Zealand: Can New Zealand outline any concrete, near-term plans to pass legislation that explicitly and unambiguously guarantees individualized accommodation and supports for students with disabilities at the primary and secondary levels?
 - If New Zealand does not have concrete, near-term plans to guarantee individualized accommodation and supports for students with disabilities at the primary and secondary levels, recommend in its concluding observations that New Zealand pass and implement legislation to do so.

3. [Special Protection Measures: Children in Situations of Emergency \(Detention based on Immigration Status\) \(Articles 9, 24, 28, 37\)](#)

Based on our review of legislation, regulations, and decrees, we find that New Zealand's Immigration Act prohibits the imprisonment of detained minor migrants, but still generally allows the detention of migrants regardless of age; the law does specify that alternatives to detention exist. Moreover, while in detention, New Zealand does not guarantee that minors will be detained separately from adult strangers.



RECOMMENDED QUESTIONS FOR THE LIST OF ISSUES AND CONCLUDING OBSERVATION

We hope the Committee will:

- In its list of issues, ask New Zealand: can New Zealand describe any specific steps it is taking to prohibit the detention of minor migrants and minor asylum-seekers?
 - If New Zealand is not taking any specific steps to explicitly prohibit the detention of minor migrants and minor asylum-seekers, recommend that New Zealand pass and implement legislation against minor detention.

- In its list of issues, ask New Zealand: given the legal alternatives to detention, can New Zealand provide:
 - details on the current rates of detention among minor migrants
 - details on the current rates of detention among minor asylum-seekers
 - current statistics on how often alternatives to detention are utilized in place of detention of minors
 - current statistics on how often minors are placed in detention with adult strangers

DETAIL OF CONSTITUTIONAL AND LEGISLATIVE FINDINGS

While the following review is systematic and rigorous, we recognize that there may be laws or policies governing these areas that we have not captured, including new legislation or policies that have not yet been published globally.

1. General Principles: Equality and Non-Discrimination (Article 2)

Article 2.1 of the Convention states that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Constitutions state the values of a country, outlining the rights of people living within the country and profoundly influencing norms and practices. In nearly all countries, constitutions take precedence over other sources of law—making them critical tools for delineating and implementing equal rights. New



constitutions and new rights guaranteed in constitutions can be used to overturn discriminatory laws, as well as to legislate non-discrimination guarantees. Moreover, constitutions can offer protection against policy and legal changes during periods of social and political shifts that may seek to undermine equal rights. For these reasons and others, as the foundational document setting out the rights of all human beings in a country, a constitution and the rights contained therein are essential to realizing equal rights.

We reviewed full text constitutions for all 193 UN member states available from official government sources to determine whether the constitution took any approach to equality across the grounds listed in article 2.1 of the CRC by prohibiting discrimination based on each specific status, guaranteeing equal rights, guaranteeing equality before the law, or guaranteeing overall equality or equal opportunities.

NEW ZEALAND'S CONSTITUTIONAL PROVISIONS: MISSING SOME PROTECTIONS

New Zealand has no single constitutional document, but rather a series of documents and laws that are considered to be constitutional either by the country itself or by the legal community. We nevertheless reviewed all written sources of law that are generally considered to be part of the country's uncodified constitution. Based on this review, section 19 of New Zealand's Bill of Rights, which does have constitutional status, prohibits discrimination on the basis of statuses enumerated in the Human Rights Act. These include race or color, sex, religion or ethical belief, political opinion, ethnic or national origin, and disability.

Bill of Rights Act 1990, amended to 2013

19. Freedom from discrimination

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

(...).

Human Rights Act 1993, amended to 2022

21. Prohibited grounds of discrimination

(1) For the purposes of this Act, the prohibited grounds of discrimination are—

(a) sex, which includes pregnancy and childbirth:

(b) marital status, (...)

(c) religious belief:

(d) ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions:

(e) colour:



(f) race:

(g) ethnic or national origins, which includes nationality or citizenship:

(h) disability, which means—

(i) physical disability or impairment:

(ii) physical illness:

(iii) psychiatric illness:

(iv) intellectual or psychological disability or impairment:

(v) any other loss or abnormality of psychological, physiological, or anatomical structure or function:

(vi) reliance on a disability assist dog, wheelchair, or other remedial means:

(vii) the presence in the body of organisms capable of causing illness:

(i) age, (...)

(j) political opinion, which includes the lack of a particular political opinion or any political opinion:

(k) employment status, (...)

(l) family status (...)

(m) sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.

However, **some groups guaranteed equality in the Convention are not explicitly covered by this provision, including children facing discrimination based on language, social origin, property status, or birth status.**

2. Special Protection Measures: Education, Leisure and Cultural Activities (Articles 23, 28)

Article 28.1 of the CRC recognizes a child's right to education, and specifically orders States Parties to "make primary education compulsory and available free to all". In addition, Article 23.3 of the CRC recognizes the rights and special needs of children with disabilities, and in particular, encourages States Parties to design assistance policies which "ensure that the disabled child has effective access to and receives education".

For all 193 UN member states, we systematically reviewed education acts, child protection laws, and anti-discrimination legislation available online through UNESCO's Observatory on the Right to Education Library and International Labour Organization's NATLEX database. Through the review, we determined whether national legislation or supplementary policy documents guaranteed free and compulsory



primary education. Our review also determined whether national legislation guaranteed non-discrimination in education based on disability, and whether legislative provisions guaranteed individualized accommodations and supports to enable students with disabilities to succeed in school alongside their peers and advance inclusion.

NEW ZEALAND'S LEGISLATIVE PROVISIONS: LACKING GUARANTEES OF SUPPORT FOR CHILDREN WITH DISABILITIES

New Zealand passed a new education law in 2020. We commend New Zealand for making an explicit commitment in this law to protecting students with disabilities from discrimination in the education system, and for mandating their integration in public schools.

Education and Training Act 2020, amended to 2022

34. Students with special educational needs have same rights to education at State schools as others

(1) Except as provided in this Part, students who have special educational needs (whether because of disability or otherwise) have the same rights to enrol, attend, and receive education at State schools as students who do not.

(...)

37 Special education

(1)

If satisfied that a student under the age of 21 years should have special education, the Secretary must—

(a) agree with the student's parent that the student should be enrolled, or direct the parent to enrol the student, at a particular State school or specialist school; or

(b) agree with the student's parent that the student should have, or direct the parent to ensure that the student has, education or help from a special service.

(2) If an agreement is reached or a direction is given under subsection (1), the student concerned must be allowed to enrol at the State school or specialist school concerned or to have education or help from the special service concerned.

A student may not be or continue to be enrolled at a specialist school, or have or continue to have education or help from a special service, except under an agreement or direction given under subsection (1).

However, based on our systematic review of New Zealand's legislation, **it is unclear if these same students with disabilities are guaranteed accommodation and supports**; the Education and Training Act only cites inclusion and accommodation as an "objective" of school boards, and the Human Rights Act exempts schools from providing accommodation if it requires services or facilities that cannot "reasonably" be provided.



Education and Training Act 2020, amended to 2022

127. Objectives of boards in governing schools

(1) A board's primary objectives in governing a school are to ensure that—

(...)

(b) the school—

(i) gives effect to relevant student rights set out in this Act, the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993; and

(...)

(c) the school is inclusive of, and caters for, students with differing needs; (...)

Human Rights Act 1993, amended to 2022

57. Educational establishments

(1) It shall be unlawful for an educational establishment, or the authority responsible for the control of an educational establishment, or any person concerned in the management of an educational establishment or in teaching at an educational establishment,—

(a) to refuse or fail to admit a person as a pupil or student; or

(b) to admit a person as a pupil or a student on less favourable terms and conditions than would otherwise be made available; or

(c) to deny or restrict access to any benefits or services provided by the establishment; or

(d) to exclude a person as a pupil or a student or subject him or her to any other detriment,— by reason of any of the prohibited grounds of discrimination.

60. Further exceptions in relation to disability

(1) Nothing in section 57 applies to a person whose disability is such that that person requires special services or facilities that in the circumstances cannot reasonably be made available (being services or facilities that are required to enable the person to participate in the educational programme of an establishment referred to in that section or to enable the person to derive substantial benefits from that programme).

(2) Subject to subsection (3), nothing in section 57 shall apply where the person's disability is such that there would be a risk of harm to that person or to others, including the risk of infecting others with an illness, if that person were to be admitted to an educational establishment and it is not reasonable to take that risk.

(...)

3. Special Protection Measures: Children in Situations of Emergency (Detention based on Immigration Status) (Articles 9, 24, 28, 37)

The detention of children based on immigration status violates the principle of the best interests of the child and infringes on core values outlined in the Convention, including the right to liberty (Article 37).

Moreover, as noted in the Committee's 2002 Report on the Rights of All Children in the Context of International Migration, migrant and asylum-seeking children may experience heightened



vulnerabilities. For example, migrant children held in detention may face barriers to accessing fundamental services such as education (Article 28) and health services (Article 24).

Article 37.b. specifically state:

37 States Parties shall ensure that:

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

In General Comment No. 6, the Committee has specifically ruled that detention of minor migrants is not in accordance with the Convention.

61. In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.

For 150 UN member states, we systematically reviewed national-level immigration laws, regulations, ministerial decrees, and executive decrees related to asylum-seekers, refugees, and migrants. We identified and located relevant laws through the United Nations High Commissioner for Refugees (UNHCR) RefWorld catalog, the International Labour Organization's (ILO) NATLEX legislation database, and the Global Detention Project. For each country, we reviewed all identified legislation to determine whether countries prohibited or allowed the detention of accompanied and unaccompanied minors, and under what circumstances.

NEW ZEALAND'S LEGISLATIVE PROVISIONS: NO PROVISIONS PROHIBITING THE DETENTION OF CHILDREN

Based on our review of legislation, regulations, and decrees, we find that **New Zealand has inadequate provisions protecting minor asylum seekers and minor migrants from detention.** While sections 330-332 of the Immigration Act generally prohibit the imprisonment of detained minor migrants, **section 309 still permits any migrant or asylum-seeker, including those under 18, to be arrested and detained.** In most cases, the law does prohibit detention of those who have already obtained refugee or protected person status.

Immigration Act, 2009, amended to 2022

309. Persons liable to arrest and detention

(1) The following persons are liable to arrest and detention under this Part:

(a) persons who are liable for turnaround:

(b) persons who are liable for deportation (including persons recognised as refugees or protected persons but whose deportation is not prohibited under section 164(3) or (4)):



(c) persons who are suspected by an immigration officer or a constable to be liable for deportation or turnaround and who fail to supply satisfactory evidence of their identity when requested under section 280:

(d) persons who are, on reasonable grounds, suspected by an immigration officer or a constable of constituting a threat or risk to security.

(2) The following persons are not liable to arrest and detention under this Part:

(a) persons who are recognised as refugees, except those whose deportation is not prohibited under section 164(3):

(b) persons who are recognised as protected persons, except those whose deportation is not prohibited under section 164(4).

330. Approval of premises for purpose of immigration detention

The chief executive may approve any premises for the purpose of detention under this Act.

331. Form of custody of persons detained without warrant overnight

Every person who is placed in custody under section 313 and is to be detained overnight must be detained,—

(a) in the case of a person under 18 years of age who is not married or in a civil union, in—

(i) a residence (within the meaning of section 2(1) of the Oranga Tamariki Act 1989) or other premises under the control of, or approved by, the chief executive of the department for the time being responsible for the administration of the Oranga Tamariki Act 1989; or

(ii) any other premises agreed to by an immigration officer and the person's parent, guardian, or responsible adult; or

(b) in any other case, in—

(i) premises approved by the chief executive under section 330; or

(ii) a police station.

332. Form of custody of persons detained under warrant of commitment

Every person who is to be detained in custody under a warrant of commitment must be detained,—

(a) in the case of a person under 18 years of age who is not married or in a civil union, in a place approved for the purpose by the District Court Judge before whom the person is brought, being—

(i) a residence (within the meaning of section 2(1) of the Oranga Tamariki Act 1989) or other premises under the control of, or approved by, the chief executive of the department for the time being responsible for the administration of the Oranga Tamariki Act 1989; or

(ii) any other premises agreed to by an immigration officer and the person's parent, guardian, or responsible adult; or

(iii) premises approved by the chief executive under section 330; or

(b)

in any other case,—

(i) in a prison; or

(ii) in other premises approved for the purpose by the Judge, being premises approved by the chief executive under section 330.

Section 315 of the Immigration Act allows immigration officers, at their sole discretion, to determine whether alternatives to detention for migrants or asylum-seekers are offered.



Immigration Act, 2009, amended to 2022

315. Person may instead agree to residence and reporting requirements

(1) Rather than causing a person who is liable for arrest and detention to be arrested under section 313, or making an application for a warrant of commitment under section 316, an immigration officer and the person liable for arrest and detention may agree that the person will do all or any of the following things:

(a) reside at a specified place:

(b) report to a specified place at specified periods or times in a specified manner:

(c) provide a guarantor who is responsible for—

(i) ensuring the person complies with any requirements agreed under this section; and

(ii) reporting any failure by the person to comply with those requirements:

(d) if the person is a claimant, attend any required interview with a refugee and protection officer or hearing with the Tribunal:

(e) undertake any other action for the purpose of facilitating the person's deportation or departure from New Zealand.

(2) A decision as to whether to offer or agree residence and reporting requirements under subsection (1) is a matter for the absolute discretion of an immigration officer.

We commend New Zealand for its expansion of community-based alternatives to child detention, as described in paragraphs 26.a and 174 of the State Party Report. However, the fact remains that if children are detained, our review of legislation, regulations and decrees shows that New Zealand **does not guarantee that minors will be detained separately from adult strangers** (as acknowledged in paragraphs 295 and 296 of the State Party Report).

BRIEFING PREPARED BY THE WORLD POLICY ANALYSIS CENTER, UNIVERSITY OF CALIFORNIA, LOS ANGELES