

# **A Constitution for Aotearoa New Zealand**

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## **Introduction**

1. We are a group of law academics and students in the area of human rights law at the University of Canterbury School of Law.
2. We would like to begin by welcoming the authors' proposal for a written Constitution for Aotearoa New Zealand ('Constitution Aotearoa'). We endorse the majority of proposals in Constitution Aotearoa although this submission is focussed on the human rights provisions and so is not intended to be exhaustive. However, important provisions we specifically acknowledge include the entrenched status of the Constitution, the power of the judiciary to strike down inconsistent legislation, the protections of fundamental human rights, the removal of the Monarchy as Head of State and (flexible) accommodations of Māori rights, biculturalism and the Treaty of Waitangi.
3. In this submission we draw the authors' attention to the following human rights issues in Constitution Aotearoa, which we believe require further consideration and development:
  - a. environmental rights;
  - b. economic, social, cultural rights: non-justiciability; and
  - c. prohibited grounds of discrimination: gender identity, socio-economic circumstances and any other status.

## **Environmental rights**

4. As explained on page 169 of the book, there is a 'rapidly growing international movement to connect strong developments in human rights law with the magnitude of the global environmental crisis'. The protection and advancement of our environment is a considerable issue facing humankind today, as natural resources are increasingly threatened by the impacts of agriculture, urbanisation, industry, population growth and climate change.
5. Unlike constitutions in many parts of the world, there is currently no specific protection of environmental rights in New Zealand law. The New Zealand Bill of Rights Act 1990 does not protect a human right to a clean environment, for example, although there are certain environmental protections in other New Zealand laws such as the Resource Management Act 1991.

6. Constitution Aotearoa includes proposed protection of environmental rights, in clause 105, as follows:

Everyone has the right—

- (a) to an environment that is not harmful to his or her health or wellbeing; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
  - (i) reduce pollution and ecological degradation;
  - (ii) promote conservation;
  - (iii) pursue ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

7. Constitution Aotearoa also includes, in clause 112, the continuation of the office of the Parliamentary Commissioner for the Environment.

#### *International law context*

8. There now exists a wide array of international law protections for environmental and natural resources.<sup>1</sup> These human rights instruments, beginning with the Declaration of the United Nations Conference on the Human Environment 1972 (Stockholm Declaration), recognise that without a clean environment there can be no human rights:<sup>2</sup>

Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. . . . Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights.

9. Accordingly, humans have a fundamental right to adequate conditions of a 'good life', in an environment that allows for their dignity and well-being, and life and human dignity are only possible where people have access to an environment with certain basic qualities. In many parts of the world, environmental degradation and the deteriorated state of air, water and land seriously undermine the realisation of human rights.<sup>3</sup>
10. Further, humans owe obligations to protect and improve the environment for the benefit of present and future generations. States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the environment for the benefit of their population.<sup>4</sup>
11. More recently, in a proliferation of international conferences and related documents concerning natural resources and the environment, the United Nations (UN) has expanded certain areas of international environmental law. Recent work includes the right to biodiversity and the right to water, both rights that are absent from clause 105.

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<sup>1</sup> See Elisa Morgera and Kati Kulovesi *Research Handbook on International Law and Natural Resources* (Edward Elgar Publishing, 2016).

<sup>2</sup> "Declaration of the United Nations Conference on the Human Environment" *Report of the United Nations Conference on the Human Environment, Stockholm, 5-17 June 1972* A/CONF.48/14/Rev.1 (1972) Ch. 1:1.

<sup>3</sup> *Analytical study on the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights* A/HRC/19/34 (2011) at [76].

<sup>4</sup> "As Developing Countries Strive to Enhance Economic Performance, Developed Partners Should Honour or Surpass Aid Pledges, Addis Conference Hears" (14 July 2015) United Nations Meetings Coverage and Press Releases <<https://www.un.org/press/en/2015/dev3187.doc.htm>>.

12. Water is now typically referred to as the ‘oil of the future’ and global demand for fresh water is set to exceed supply by 2050.<sup>5</sup> As well as being necessary for economic development, water is essential to human health. We cannot live without water, yet, almost 900 million people worldwide do not have access to clean drinking water and 2.6 billion people lack access to basic sanitation services. According to the UN 1.5 million children under the age of five die each year because of water and sanitation related diseases.

13. The human right to water and sanitation is now recognised internationally, as follows:<sup>6</sup>

*The General Assembly,*

1. Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights;
14. Although just a General Assembly resolution and not a binding treaty, the resolution on the right to water is a powerful statement of what the UN thinks is important and other documents and meetings at the UN continue to build on the human right to water. In the resolution, the UN calls upon States and international organisations to provide financial resources, assist with capacity-building, and supply technology to help countries, particularly developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all. In these documents, the UN has developed some key principles around the human right to water.<sup>7</sup> They are that water supply must be sufficient, safe, [socially and culturally] acceptable, physically accessible, and affordable.
15. More recently, much international attention has been drawn to the rights and protection of biodiversity, the genesis of which was the 1992 UN Convention on Biological Diversity, which sought conservation of biological diversity, sustainable use of its components and fair and equitable sharing of benefits arising from genetic resources.<sup>8</sup> The variability of flora, fauna, animal and insect life is vital to the healthy functioning of our environment, our health, and therefore our society and our economy.<sup>9</sup> Yet, around the world, biodiversity is rapidly being degraded and destroyed, with grave, far-reaching, irreversible and even unknown implications for human well-being. The Special Rapporteur this year submitted a report on *Human Rights and Biodiversity*, which examines the human rights obligations relating to the conservation and sustainable use of biological diversity and recommends a human rights based approach to biodiversity protection. In his report, the Rapporteur describes the importance of ecosystem services and biodiversity for the full enjoyment of human rights, and outlines the application of human rights obligations to biodiversity-related actions.<sup>10</sup>

The full enjoyment of human rights, including the rights to life, health, food and water, depends on the services provided by ecosystems. The provision of ecosystem services depends on the health and sustainability of ecosystems, which in turn depend on biodiversity. The full enjoyment of human

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<sup>5</sup> United Nations Department of Economic and Social Affairs “Human Right to Water” (29 May 2014) United Nations <[http://www.un.org/waterforlifedecade/human\\_right\\_to\\_water.shtml](http://www.un.org/waterforlifedecade/human_right_to_water.shtml)>.

<sup>6</sup> *The Human Right to Water and Sanitation* GA Res 64/292 (2010) at [1].

<sup>7</sup> UNDESA, above n 5.

<sup>8</sup> Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993).

<sup>9</sup> Elisa Morgera and Jona Razzaque *Biodiversity and Nature Protection Law*. [Electronic Resource] (Edward Elgar, 2017).

<sup>10</sup> *Report of the Special Rapporteur on the issue of human rights, obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* A/HRC/34/49 (2017) at [5].

rights thus depends on biodiversity, and the degradation and loss of biodiversity undermine the ability of human beings to enjoy their human rights.

16. In order to protect human rights, States have a general obligation to protect ecosystems and biodiversity.

#### *Comparative context*

17. As mentioned in the book, around 80 jurisdictions worldwide include the protection of environmental rights in their constitutions.<sup>11</sup> The environmental rights clause in Constitution Aotearoa is identical to article 24 in the Constitution of the Republic of South Africa 1996. However, there are other relevant constitutions, in particular Latin American constitutions, which protect environmental rights. The Political Constitution of the Republic of Chile 1980 (Chilean Constitution), for example (enacted, incidentally, during a military dictatorship) provides:

Art 19(8) incision 1 – The Right to live in an environment free of contamination.

It is the obligation of the State to ensure that this right is not affected and to guard the preservation of nature.

18. The Constitución Política de Colombia 1991 (Colombian Constitution) includes a broader protection of environmental rights as part of its ‘Constitucion Ecologica’ (‘Ecological Constitution’);<sup>12</sup> a series of provisions intended to protect environmental interests including both rights and obligations.<sup>13</sup> In particular, articles 79 and 80 recognise the collective right of all people to a healthy environment and the responsibility of the State to protect the diversity and integrity of the environment, conserve areas of special ecological importance, plan the management and use of natural resources to guarantee their sustainable development, conservation, restoration or substitution, and prevent and control environmental deterioration, as follows:<sup>14</sup>

#### Art 79

All persons have the right to enjoy a clean environment. The law guarantees community participation in decisions that may affect it.

It is the obligation of the State to protect the diversity and integrity of the environment, conserve areas of special ecological importance and develop education to achieve those objectives.

#### Art 80

The State must plan the management and use of natural resources, to guarantee their sustainable development, conservation, restoration or substitution.

Further, [the State] must prevent and control environmental deterioration, and impose legal sanctions and require reparation for damage caused

Equally, [the State] must cooperate with other nations in the protection of ecosystems situated in border zones.

19. The Colombian Constitution places a positive obligation on the state to guarantee environmental protection. This positive obligation has provided fertile ground for the

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<sup>11</sup> David R. Boyd “The Constitutional Right to a Healthy Environment” (2012) *Environment: Science and Policy for Sustainable Development* <<http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html>>.

<sup>12</sup> The ‘Ecological Constitution’ is integrated in more than 30 provisions (from the preamble to article 366) in a double dimension: (i) integral protection of the environment, and (ii) guarantee of a sustainable development.

<sup>13</sup> See Oscar Darío Amaya Navas, *La Constitución Ecológica de Colombia: Análisis Comparativo Con El Sistema Constitucional Latinoamericano* (Universidad Externado de Colombia, 2002).

<sup>14</sup> See also arts 1, 2, 8, 49, 79, 86, 88, 95, 333 and 366.

reconceptualisation of natural resources such as rivers as legitimate rights-bearing entities in Colombia,<sup>15</sup> and the recognition of the particular relationships Indigenous communities hold with the natural world.<sup>16</sup> The Ecological Constitution includes other environmental protections, including article 81, which prohibits the manufacturing or possession and use of chemical, biological or nuclear weapons and toxic wastes, and article 82, requiring the state to protect common public spaces.

20. The *Constitucion Politico del Estado de Bolivia* (Bolivian Constitution) goes even further to protect environmental rights. The word ‘environment’ is mentioned over 50 times within the Bolivian Constitution including:

Art 33 - Protection of environment

Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be guaranteed to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way.

Art 34 - Protection of environment

Any person, individually or collectively, may take legal action in defence of environmental rights, without prejudice to the obligation of public institutions to act in response to threats to the environment.

21. The environmental rights in the Bolivian Constitution are supported by various related provisions. Article 30 specifically protects the right of Indigenous peoples ‘[t]o live in a healthy environment, with appropriate management and exploitation of the ecosystems.’
22. Article 80 requires that public education includes ‘the development of the competencies, attitudes, and physical and intellectual skills that link theory to productive practice; the conservation and protection of the environment, biodiversity and the land to assure well-being.’ The Bolivian Constitution also frames environmental protection as a responsibility of all Bolivian people, not just the State.
23. The *Constitucion de la Republica de Ecuador 2008* (Ecuadorian Constitution) includes similarly broad protections of environmental rights, as follows:

Article 14

The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (*sumak kawsay*), is recognized.

Environmental conservation, the protection of ecosystems, biodiversity and the integrity of the country’s genetic assets, the prevention of environmental damage, and the recovery of degraded natural spaces are declared matters of public interest.

Article 15

The State shall promote, in the public and private sectors, the use of environmentally clean technologies and nonpolluting and low-impact alternative sources of energy. Energy sovereignty shall not be achieved to the detriment of food sovereignty nor shall it affect the right to water.

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<sup>15</sup> *Centro de Estudios para la Justicia Social ‘Tierra Digna’ and others v the President of the Republic and others*, No T-622 of 2016, Corte Constitucional [Constitutional Court], Sala Sexta de Revision [Sixth Chamber] (Colombia) (10 November 2016).

<sup>16</sup> Article 330 of the Colombian Constitution creates the Indigenous territories (*resguardos indigenas*) based on customary and ancestral Indigenous law.

The development, production, ownership, marketing, import, transport, storage and use of chemical, biological and nuclear weapons, highly toxic persistent organic pollutants, internationally prohibited agrochemicals, and experimental biological technologies and agents and genetically modified organisms that are harmful to human health or that jeopardize food sovereignty or ecosystems, as well as the introduction of nuclear residues and toxic waste into the country's territory, are forbidden.

24. The constitutions of both Bolivia and Ecuador are also renowned internationally for the recognition of the rights of mother earth (*pachamama*) as legitimate rights bearing entities.<sup>17</sup> In reliance on this protection a number of human rights activists, NGOs and Indigenous communities have commenced litigation for the environmental protection of natural resources like rivers and animals. The Ecuadorian Constitution provides:

Article 71

Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

Article 72

Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems.

In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.

Article 73

The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles.

The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden.

Article 74

Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living.

Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State.

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<sup>17</sup> Constitución de la República del Ecuador 2008 (Ecuador); Constitución Política del Estado 2009 (Bolivia); Ley de Derechos de la Madre Tierra (Ley 071) 2010 (Bolivia). See generally Tom Perreault, "Tendencies in Tension: Resource Governance and Social Contradictions in Contemporary Bolivia" in Lori Leonard (ed) *Governing Extraction* (Routledge, London, 2017); Craig M Kauffman and Pamela L Martin "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail" (2017) 92 World Development 130.

25. Many other countries also now recognise an explicit human right to water in their constitutions,<sup>18</sup> including Bolivia, the Democratic Republic of the Congo, Ecuador, South Africa, Uganda and Uruguay. The right to sanitation has also been recognized in constitutions and national legislation, including in Algeria, Bolivia, Maldives, South Africa, Sri Lanka and Uruguay. Other constitutions suggest a general responsibility on the part of the State to ensure access to safe drinking water and sanitation.<sup>19</sup> As an example, the Ecuadorian Constitution provides part of the concept of '*buen vivir*' under the Constitution; the rights necessary to live a 'good life':

Article 12

The human right to water is essential and cannot be waived. Water constitutes a national strategic asset for use by the public and it is unalienable, not subject to a statute of limitations, immune from seizure and essential for life.

26. Finally, a number of comparative constitutions and laws protect rights to biodiversity. Costa Rica's Ley de Biodiversidad N° 7788 (1998) implements obligations under the UN Convention on Biological Diversity the objective of which is to 'conserve biodiversity and the sustainable use of resources, and to justly distribute derived costs and benefits'. Article 7 defines biodiversity as the:

variability of living organisms from any source, whether found in terrestrial, air or marine or aquatic ecosystems or in other ecological complexes. This includes the diversity within each species, as well as between species and between the ecosystems that they form part of.

27. The Law recognises in article 9 that 'all living things have the right to life, independent of their actual or potential economic value' and that 'the components of biodiversity are valuable. They have decisive and strategic importance for the development of the country and are indispensable for the domestic, economic, social, cultural and aesthetic use of its inhabitants'.
28. A similar concept of biodiversity is protected in article 73 of the Ecuadorian Constitution, set out above.

*Discussion*

29. Clause 105 is a necessary protection of the right to live in an environment that is not harmful to health or wellbeing. However, the clause does not go far enough to secure environmental rights as a necessary condition for the fulfilment of the human rights of current and future generations. As a starting point, environmental rights should be referred to in the preamble of Constitution Aotearoa, alongside other matters of national significance like the Treaty.
30. The first limitation of clause 105 is its predominantly deficit frame, focusing on the right to be free from contamination rather than imposing positive responsibilities on people and the State. Clause 105(a) frames the right to a clean environment in a negative sense, meaning the right to an environment that is 'not harmful'. In contrast, international law protections like the Stockholm Declaration, protect in a positive sense the 'fundamental right' of all people to an environment of quality that promotes wellbeing and bears the responsibility to improve that environment.<sup>20</sup> The Stockholm Declaration emphasises the legal implication of the recognition

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<sup>18</sup> WASHwatch (2017) <<https://washwatch.org/en/>>.

<sup>19</sup> See for instance, the constitutions of Cambodia, Colombia, Eritrea, Ethiopia, Gambia, Iran (Islamic Republic of), Mexico, Nigeria, Panama, Philippines, Portugal and Zambia.

<sup>20</sup> "Declaration of the United Nations Conference on the Human Environment" above n 2, at Principle 1.

of a right to live in a healthy environment. It declares that along with right-holders there are duty bearers.<sup>21</sup> The Latin American Constitutions are also framed positively, as the right to live in a healthy, protected, balanced environment, which the State and all citizens must uphold and enforce.<sup>22</sup>

31. Clause 105(b) does refer to a right to have the environment protected, but refers first to a need to reduce pollution and environmental degradation. The Stockholm Declaration specifically protects against the depletion of resources for the benefit of future generations and gives humans a positive responsibility to safeguard and manage the culture, wildlife and habitat.<sup>23</sup> The Ecuadorian Constitution frames environmental conservation, the protection of ecosystems, biodiversity and the integrity of the country's genetic assets, the prevention of environmental damage, and the recovery of degraded natural spaces as matters of public interest.
32. In line with international and comparative tendencies, environmental rights must necessarily encompass both the right to biodiversity and the right to water. Such rights are explicitly protected in Latin American constitutions. It might be argued that there is no need for a human right to water in a well-watered country like New Zealand. However, water quantity in New Zealand is variable and some catchments are already over-allocated, leading to fierce trade-offs between competing users. In August 2016 there was an outbreak of gastroenteritis in Havelock North,<sup>24</sup> in which 5,500 of the town's 14,000 residents were estimated to have become ill with campylobacteriosis, 45 were subsequently hospitalised, and the illness contributed to three deaths. The outbreak was characteristic of declining water quality in New Zealand, and increasing threats to human health and associated human rights implications, prompting a Government Inquiry.
33. The right to water is a hot topic in New Zealand currently, highlighted in debate surrounding the 2017 General Election, and the Government is currently considering freshwater management reform.<sup>25</sup> The Human Rights Commission reported on the human right to water in 2012<sup>26</sup> in which it called for recognition of the human right to water in New Zealand, necessary for living a life in dignity and upholding human rights. It also emphasised the need for rights-based water allocation, as opposed to a strictly economic approach which has dominated public debate in the past, and represents international tendencies towards property rights in water and allocation through market mechanisms.
34. The Waitangi Tribunal found in 2013 that Māori interests in water are proprietary in nature, and is currently hearing stage two of its *National Freshwater and Geothermal Resources Inquiry*,

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<sup>21</sup> At Principle 4.

<sup>22</sup> See for example, Article 83 of the Ecuadorian Constitution which sets out the duties of all citizens.

<sup>23</sup> "Declaration of the United Nations Conference on the Human Environment" above n 2, at Principle 65.

<sup>24</sup> Te Tari Taiwhenua, Department of Internal Affairs "Governmental Inquiry into Havelock North Drinking Water Report, Section One, Part 1" New Zealand Government <<https://www.dia.govt.nz/Government-Inquiry-into-Havelock-North-Drinking-Water-Report---Part-1---Overview>>.

<sup>25</sup> Manatū Mō Te Taiao, Ministry for Environment "Next Steps for Freshwater: Consultation Document" New Zealand Government <<http://www.mfe.govt.nz/publications/fresh-water/next-steps-fresh-water-consultation-document>>.

<sup>26</sup> Human Rights Commission "Human Rights and Water, Tika Tangata me te Wai" (2012) <<https://www.hrc.co.nz/your-rights/human-rights/our-work/human-rights-and-water/>> at 17-19.



something that must also be addressed in recognising a human right to water.<sup>27</sup> The UN has noted the New Zealand Government's failure to resolve the issue of Māori water rights:<sup>28</sup>

The Committee notes the recent decision of the New Zealand Supreme Court (27 February 2013) affirming that the Finance (Mixed Ownership Model) Amendment Act of 2012 does not materially impair the Crown's ability or obligation to ensure the rights of Māori communities to freshwater and geothermal resources, as protected by the Treaty of Waitangi.

The Committee urges the State party to ensure that any privatization of energy companies is pursued in a manner that fully respects the rights of Māori communities to freshwater and geothermal resources, as protected by the Treaty of Waitangi.

35. Environmental rights in Constitution Aotearoa should also protect the rights of nature itself. There is a growing international tendency towards recognising the rights of nature, with the exemplary cases of Ecuador and Bolivia, and other cases where natural resources (like rivers, forests and animals) have been recognised and protected as 'legal persons' in New Zealand, India and Colombia. It is particularly interesting that both clause 79 of Constitution Aotearoa and section 29 of the current New Zealand Bill of Rights Act 1990 allow for legal persons to enjoy human rights protections. It is therefore possible that natural resources recognised as legal persons in New Zealand, namely the Whanganui River and Te Urewera Forest, could similarly enjoy constitutional protection. However, in the interests of certainty, the constitutional rights of natural resources as legal persons should be specifically provided for in Constitution Aotearoa.
36. As a final submission, we wish to express concern about the reference to 'justifiable economic and social development' in clause 105. Environmental impacts are routinely pursued and justified by governments, industry and business interests in the name of economic and social development. The result is typically that environmental rights become subservient to these other interests, and it is no coincidence that the most developed countries internationally do not include constitutional environmental protections.<sup>29</sup> Given the existing 'justifiable limitations' placed on all human rights, the additional reference to 'justifiable economic and social development' in clause 105 unduly and disproportionately waters down the extent of environmental protection and should be removed.

#### *Recommendations*

37. In summary, we recommend that the environmental rights protected in clause 105 be strengthened by:
- a. including a specific reference to environmental rights in the Preamble;
  - b. including specific protection of a right to biodiversity;
  - c. including specific protection of a right to water;
  - d. specifically recognising that nature and natural resources have rights to protection, restoration and maintenance;

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<sup>27</sup> Tāhū o te Ture, Ministry of Justice "National Freshwater and Geothermal Resources Inquiry" (2017) New Zealand Government <<https://www.waitangitribunal.govt.nz/inquiries/urgent-inquiries/national-fresh-water-and-geothermal-resources-inquiry/>>.

<sup>28</sup> United Nations Committee on the Elimination of Racial Discrimination *Concluding observations on the eighteenth to the twentieth periodic reports of New Zealand, adopted by the Committee at its eighty-second session (11 February – 1 March 2013)* CERD/C/NZL/18-20 at 5-6.

<sup>29</sup> Boyd "The Constitutional Right to a Healthy Environment", above n 11.

- e. removing the reference to balancing environmental protection with economic development; and
- f. maintaining the office of the Parliamentary Commissioner for the Environment in clause 112.

### **Economic, social and cultural rights: non-justiciability**

38. Clause 106 of Constitution Aotearoa, titled 'social and economic rights provides that Parliament and the government shall be guided by certain 'non-justiciable principles.' These are the right to an adequate standard of living, the right to social security, the right to health, and the right to work. These rights are commonly regarded as economic, social and cultural rights (ESC rights). Three other clauses in Constitution Aotearoa provide protection for other ESC rights, and provide that those rights are justiciable, ie right to education (clause 94), cultural rights of minorities (clause 97) and the economic right to property (clause 104).
39. The current New Zealand Bill of Rights Act 1990 provides only limited protection for ESC rights, with s 20 (replicated in clause 97 of Constitution Aotearoa) protecting the justiciable right to culture of ethnic, religious and linguistic minorities.

#### *International law context*

40. The International Convent on Economic, Social and Cultural Rights 1966 (ICESCR) provides protection for a wide range of ESC rights including the right to an adequate standard of living, the right to health and the right to education. ICESCR is now widely ratified, with 166 states parties. New Zealand ratified ICESCR in December 1978.
41. Article 2 of ICESCR sets out the nature of states parties' obligations. It provides on the one hand that a state party is 'to take steps ... to the maximum of its available resources' but on the other 'with a view to achieving progressively' the full realisation of the rights in the Covenant. The tension between these two phrases has given states considerable amounts of 'wiggle room' in terms of how they meet their obligations. The Committee on Economic, Social and Cultural Rights (CESCR), in an effort to impress upon states that this language is not an excuse for no action has developed the notion of a 'minimum core obligation' to suggest a minimum essential level of each right. In addition, CESCR has also issued various general comments prescribing the parameters of each right and the state action required.
42. In 2009, an Optional Protocol to ICESCR was adopted to provide for an individual complaints mechanism.<sup>30</sup> This came into force in 2013, but in 2014, New Zealand rejected recommendations to ratify this protocol, stating that: 'While New Zealand is not considering ratification of the OP-ICESCR at this stage, this may be reviewed later.'<sup>31</sup>
43. Various other international human rights treaties ratified by New Zealand also touch on ESC rights in particular contexts including CERD (arts 1-2, 5), CEDAW (arts 10-16), UNCROC (arts 9, 16, 19, 24-36) and the Refugee Convention (arts 17-24, 30).

<sup>30</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (opened for signature 24 September 2009, entered into force 5 May 2013).

<sup>31</sup> A/HRC/26/3/Add.1 (2014) at [5].

### *Comparative context*

44. Around the world, there has been a noticeable shift towards increasing constitutional recognition of ESC rights. A 2009 study notes, without specific detail, that ‘most’ national constitutions now refer to ESC rights.<sup>32</sup> In a more recent search of 189 constitutions, around 60 were found to refer to some sort of ‘economic, social and cultural’ protection.<sup>33</sup> There are three key ways in which ESC rights have been constitutionalised in these constitutions.
45. First, and as is proposed in clause 106 of Constitution Aotearoa, ESC rights have been included in some constitutions as non-justiciable principles. Examples of this type of constitutional model can be found in the constitutions of India, Ireland and Sweden. While this approach is preferable to no constitutional recognition at all, it perpetuates the distinction between civil and political rights and ESC rights and maintains the second-class status of ESC rights.
46. The second way in which ESC rights have effectively received constitutional protection has been as a result of development by the judiciary of a broad interpretative analysis of other human rights protections. So, for example, in Canada the equality provisions have been used to provide protection for ESC rights, and in India a dynamic interpretation of civil and political rights such as the right to life have provided protection for some ESC rights. While this option is arguably currently open to the New Zealand courts, a 2015 review of the case law suggested that until there is a clear statutory commitment to incorporate ICESCR into NZBORA, ‘it will be very difficult to pursue economic and social rights through the courts in New Zealand.’<sup>34</sup> Even with the proposed clause 106 of Constitution Aotearoa, the designation as ‘non-justiciable’ would make it more difficult for New Zealand courts to take this approach.
47. The third, and preferred, way in which ESC rights have been constitutionalised is where they can be directly enforced in the courts. Countries which have adopted a model such as this include Argentina, Brazil, Colombia, Denmark, Finland, Kenya, Mexico, Mongolia, Norway, Peru and South Africa.
48. The most well-known provisions enabling direct enforceability of ESC rights are those found in the 1996 South African Constitution. A number of sections in the Constitution provide for substantive recognition of ESC rights, including the rights to adequate housing, health care, food, water and social security.<sup>35</sup> Each of these provisions further provides that:
- The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
49. Essentially, this requires South Africa to act reasonably when creating policies that will progressively lead to the right in question being realised. The focus is on the process followed by the Government rather than the substantive way in which the right is realised. For example, in *Government of the Republic of South Africa v Grootboom*, a case concerning the right to adequate

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<sup>32</sup> See Joss Opie “A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990” (2012) 43 VUWLR 471 at 510, citing Zachary Elkins, Tom Ginsburg and James Melton *The Endurance of National Constitutions* (Cambridge University Press, New York, 2009) at 28.

<sup>33</sup> Katie Boyle “Economic, Social and Cultural Rights in Scotland” (Scottish Human Rights Commission, 2015), at 41, n 60.

<sup>34</sup> Margaret Wilson, Judy McGregor and Sylvia Bell “The impact of economic and social human rights in New Zealand case law” (2015) 21(1) Australian Journal of Human Rights 143, at 159.

<sup>35</sup> Constitution of South Africa, sections 26-27.

housing, the Court considered how the right to adequate housing in s 26 of the Constitution applied to a community of squatters living in shelters lacking basic sanitation or electricity.<sup>36</sup> The Court held that the Government was ‘obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.’<sup>37</sup> This did require measures to be taken to ‘establish a coherent public housing programme directed towards the progressive realisation of the right to adequate housing within the state’s available means’ but the precise details of the measure were primarily a matter for the legislature and the executive to decide.<sup>38</sup> Similarly, in *Minister of Health and others v Treatment Action Campaign and others (No 2)*, concerning the right to health, although the Constitutional Court ordered the South African government to remove unreasonable restrictions on the availability of an anti-HIV treatment to expectant mothers, the details as to how the programme would operate were left for other branches of government to determine.<sup>39</sup> In the more recent case of *Mazibuko v City of Johannesburg*, concerning the right to water, the Court overturned a lower court decision which had prescribed the number of free litres of water to which each household was entitled, and instead held that the City had met its obligations in relation to the right to water. This was because the obligation in s 27(2) of the Constitution to take ‘reasonable’ legislative and other measures was met – even as the case was going through the courts, the policy was being updated, which showed that the City was working towards progressive realisation of the right.<sup>40</sup>

50. Importantly, developments in South Africa have been achieved without an opening of the floodgates or a blowing of the executive’s budget. The approach of the South African courts has shown that separation of powers, and appropriate deference to the political branches can still be maintained even when the courts have an adjudicatory role in cases concerning ESC rights.
51. In Brazil, art 6 of the 1988 Constitution recognises a number of ‘social rights’ including education, health, nutrition, labour, housing, and social security. As noted by Joss Opie, the right to health has resulted in a large number of court rulings requiring that indigent HIV sufferers be provided with free medication.<sup>41</sup> The constitutional right to free preschool education, has also been used in the courts to ensure such education to children from low-income families.<sup>42</sup> The courts in Brazil appear to take a more generous approach to social rights claims than the South African courts, with the Federal Supreme Tribunal even going so far as to hold that ‘budgetary constraints cannot be permitted to frustrate the implementation of constitutional obligations.’<sup>43</sup> This open-ended approach has admittedly resulted in some criticism that the failure to consider resource limitations of the state or individual circumstances of the applicant has resulted in gross inequalities in health care provision, and the undermining of government healthcare planning.<sup>44</sup> It does nevertheless illustrate that ESC rights can be justiciable.

<sup>36</sup> *Government of the Republic of South Africa v Grootboom* [2000] 11B Const LR 1169 (CC).

<sup>37</sup> At [24].

<sup>38</sup> At [41].

<sup>39</sup> *Minister of Health and others v Treatment Action Campaign and others (No 2)* [2002] 10B Const L R 1033 (CC).

<sup>40</sup> *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

<sup>41</sup> Joss Opie “A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990” (2012) 43 VUWLR 471 at 509.

<sup>42</sup> At 509.

<sup>43</sup> *Estado do Rio Grande do Sul v Rodrigo Skrypszak* (22 February 2000) RE 195.192-3 (RS)(FSC).

<sup>44</sup> Octavio Luiz Motta Feraz “The Right to Health in the Courts of Brazil: Worsening Health Inequities?” (2009) 11(2) Health and Human Rights 33.

52. In Finland, Chapter 2 of the 1999 Constitution lists various ESC rights including the right to property, the right to education, the right to work and the right to social security. Under section 22, public authorities guarantee the observance of 'basic rights and liberties and human rights.' Finland does not have a judicial review mechanism, and so in order to ensure that legislation meets human rights standards, Parliament's Constitutional Law Committee reviews and evaluates the legislation before it is passed. If Parliament either does not enact legislation or enacts legislation that contravenes the Constitution, then the courts are able to intervene and declare this unconstitutional. As noted by Opie, the Finnish courts and the Constitutional Law Committee have applied the social security rights in the Finnish Constitution to prevent the State denying the minimum benefits necessary for a dignified life to groups who could not provide for themselves.<sup>45</sup>

### *Discussion*

53. Currently, New Zealand's framework for the protection of human rights is decidedly lopsided, with greater protection given to civil and political rights, and weaker protection given to ESC rights. Although Constitution Aotearoa improves the protection given to ESC rights, it continues the differential treatment of civil and political rights on the one hand and ESC rights on the other. This differential approach contradicts New Zealand's early stance on the two categories of rights. So, for example, Colin Aikman, New Zealand's speaker at the General Assembly in 1948, noted that New Zealand attached 'equal importance to all the articles [of the UDHR].' Referencing 'the tyranny of privation and want,' and reflecting President Roosevelt's call for an 'Economic Bill of Rights,' Colin Aikman noted that 'there is no dictator more terrible than hunger.'<sup>46</sup>
54. Despite this early promising stance, New Zealand has since given preference to constitutional protection for civil and political rights, most noticeably via the New Zealand Bill of Rights Act 1990. The failure to provide specific constitutional or even statutory protection for ESC rights has been remarked upon at the international level. International human rights monitoring mechanisms regularly recommend that New Zealand provide constitutional protection for ESC rights. In its 2012 concluding observations on New Zealand's third periodic report, the Committee on ESCR urged New Zealand to 'incorporate economic, social and cultural rights into the 1990 Bill of Rights.'<sup>47</sup> During its second universal periodic review before the Human Rights Council in 2014, New Zealand received several recommendations (rejected by the Government) on the need to improve constitutional protection for ESC rights.<sup>48</sup>
55. Although it is difficult to make direct comparisons between implementation of civil and political rights and ESC rights, there are a number of indicators which suggest that there are currently some serious challenges in implementation of ESC rights in New Zealand. One of these seemingly intractable challenges is the rise in inequality which was become evident in New Zealand since the adoption of the neoliberal public policy framework in the 1980s.<sup>49</sup>

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<sup>45</sup> Joss Opie "A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990" (2012) 43 VUWLR 471 at 509.

<sup>46</sup> Colin Aikman "New Zealand and the Origins of the Universal Declaration" (1999) 29 VUWLR 1, 5.

<sup>47</sup> E/C.12/NZL/CO/3 (2012), at [10].

<sup>48</sup> A/HRC/26/3 (2014), at [128.31]-[128.35].

<sup>49</sup> Judy McGregor, Sylvia Bell and Margaret Wilson *Human Rights in New Zealand: Emerging Faultlines* (Bridget Williams Books, Wellington, 2016), at 57.

Another is the continuing challenges with realisation of the right to housing in Auckland. In addition, ongoing challenges in realising the right to housing in post-quake Canterbury more than seven years after the first earthquake suggest that there are problems with New Zealand's underlying human rights framework for protection of the right to housing.<sup>50</sup> Other examples are the inequalities in various social and economic indicators between Māori and Pacific populations and other New Zealanders, and New Zealand's high levels of child poverty.

56. As noted in *Constitution Aotearoa* (p 171), a particular challenge with ESC rights is their enforceability. While there certainly exist challenges in enforceability or justiciability of rights, these are not insurmountable. Over the years, the justiciability argument has lost much of its force given the growing body of jurisprudence on ESCR from around the world, most notably South Africa. Even in New Zealand, where the ability to file claims based on ESC rights is limited, the anti-discrimination cases filed under Part 1A of the Human Rights Act 1993 have all involved complex social policies.<sup>51</sup> The task of the courts in these instances is not to remake a social policy decision of the political branches, but to ensure that in making its decision the government properly took into account any limits on rights, and considered how it might mitigate them.
57. Currently, in the absence of statutory incorporation, New Zealand courts have occasionally referred to unincorporated ESC rights. However, as noted recently by McGregor, Bell and Wilson, 'unless economic, social and cultural rights are incorporated in a statutory framework, whether that be the NZBORA or some other legislation, it will be very difficult for individual litigants to legally enforce them.'<sup>52</sup> In essence, for the courts to offer a real remedy for breaches of ESC rights, stronger statutory or constitutional recognition of these rights is required.
58. Finally, as noted above, the rights to property, education and the cultural rights of minorities are justiciable in *Constitution Aotearoa*. However, there does not appear to be any rational basis to make these ESC rights justiciable, but not those listed in clause 106. The rationale for the different treatment of the right to education in *Constitution Aotearoa* appears to be that the right to education is already directly protected in s 3 of the Education Act 1989. However, this illustrates the point that justiciability is not necessarily problematic, and it is submitted that, to ensure consistency between ESC rights, rather than curtailing the justiciability of the right to education, this should instead be extended to the other ESC rights in clause 106.

#### *Recommendation*

59. In relation to ESC rights, we therefore recommend that clause 106 be amended to provide that the ESC rights listed are justiciable in the same way as the other rights included in Part 12 of *Constitution Aotearoa*.

<sup>50</sup> Natalie Baird "Housing in Post-Quake Canterbury: Human Rights Fault Lines" (2017) 15(2) *New Zealand Journal of Public and International Law* (forthcoming).

<sup>51</sup> See for example *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402; [2013] 3 NZLR 729; *Ministry of Health v Atkinson* [2012] NZCA 184; [2012] 3 NZLR 456.

<sup>52</sup> Judy McGregor, Sylvia Bell and Margaret Wilson *Human Rights in New Zealand: Emerging Faultlines* (Bridget Williams Books, Wellington, 2016), at 65.

## **Prohibited grounds of discrimination: gender identity, socio-economic circumstances and any other status**

60. The current New Zealand Bill of Rights Act 1990 contains a list of 13 prohibited grounds of discrimination. Clause 96 of Constitution Aotearoa titled 'Freedom from discrimination' proposes to add two new prohibited grounds of discrimination, ie gender and language. We support the inclusion of these additional prohibited grounds of discrimination, and further submit that there may even be room for additional grounds, namely gender identity, socio-economic circumstances and an 'any other status' ground.

### *International law context*

61. Non-discrimination is a fundamental principle of human rights law. Over time the list of prohibited grounds of discrimination included in international human rights documents has gradually lengthened. For example, art 1(3) of the UN Charter encourages respect for human rights 'without distinction as to race, sex, language, or religion.' Article 2(1) of the ICCPR and article 2(2) of ICESCR prohibit distinctions of 'any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Article 26 of the ICCPR (equality with the law) lists the same prohibited grounds. Article 2(1) of the 1990 Convention on the Rights of the Child adds the two new grounds of ethnic origin and disability to the grounds listed in ICCPR and ICESCR.
62. The inclusion of 'or other status' in the ICCPR and ICESCR has effectively operated as a future-proofing provision and so enabled additional unjustified distinctions on the basis of other personal characteristics to be addressed as unlawful. So, for example, in *Young v Australia*, the Human Rights Committee regarded 'other status' as including sexual orientation.<sup>53</sup> The Committee on Economic, Social and Cultural Rights (CESCR) has provided that 'other status' should extend to, disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence and economic and social situation.<sup>54</sup>
63. At the international level, there is currently interest in developing international standards around 'sexual minorities', and better responding to the situation of people who are discriminated against on the grounds of their sexual orientation and gender identity (SOGI). There is currently no reference in international law to sexual orientation or gender identity. However, the Yogyakarta Principles 2007, drafted by a group of independent human rights experts, set out the obligations of states to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity. Within the United Nations itself, in 2011, the Human Rights Council adopted the first UN resolution on SOGI,<sup>55</sup> and in 2016, the Human Rights Council appointed an Independent Expert on SOGI.

### *Comparative context*

64. Around the world, different constitutions list a wide range of prohibited grounds of discrimination. A key issue, and the focus of our submission, is the approach that should be taken to new grounds of unjustified differential treatment that emerge as society evolves and

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<sup>53</sup> *Young v Australia* CCPR/C/78/D/941/2000 (2003), at [10.4].

<sup>54</sup> Committee on Economic, Social and Cultural Rights "General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)" (2009), at [27]-[35].

<sup>55</sup> *Human Rights, Sexual Orientation and Gender Identity* HRC Res 17/19, A/HRC/Res/17/19 (2011).

changes. There are three possible approaches – requiring formal amendment of constitutional provisions to add new grounds of discrimination as they emerge, creatively interpreting existing grounds of discrimination to include related situations, or including a non-exhaustive list of prohibited grounds of discrimination which is capable of adapting as society evolves.

65. The first approach, that of exhaustive listing of the grounds of discrimination which then requires formal amendment to add new grounds of discrimination as they emerge, is essentially the approach which has been taken in New Zealand to date, and which is also reflected in clause 96 of Constitution Aotearoa. So, for example, the prohibited grounds of discrimination in New Zealand were extended in 1993 to include the new grounds of disability, age, political opinion, employment status, family status, and sexual orientation.
66. In the New Zealand context, arguments have since been made that s 21 of the HRA should be amended to add ‘gender identity’ as a prohibited ground of discrimination,<sup>56</sup> and socio-economic status.<sup>57</sup> Both of these suggested grounds find support in other constitutional provisions around the world. For example, ‘gender identity’ (cf ‘gender’) is now listed as a prohibited ground of discrimination in s 5B of the Australian Sex Discrimination Act 1984, and s 6 of the Victorian Equal Opportunity Act 2010. Class or socio-economic status or circumstances, is listed as a prohibited ground of discrimination in the laws of countries as diverse as Austria, Bolivia, Ecuador and Fiji. While recognising these additional grounds as prohibited grounds of discrimination is strongly supported, a problem with this approach of exhaustively listing the prohibited grounds is that statutory or constitutional amendment is then required to include additional grounds, with the result that the statutory or constitutional provision can become out of date as society evolves.
67. The second general approach to the grounds of discrimination is that of creative and flexible interpretation by the courts of the enumerated grounds. This is the approach taken in Canada, where the Supreme Court has extended the reach of s 15 of the Canadian Charter of Rights and Freedoms to discrimination on grounds that are ‘analogous’ to the seven grounds explicitly listed in s 15. The grounds recognised by the Court in this way include citizenship, sexual orientation, marital status and off-reserve band member status.<sup>58</sup> This approach has been taken even without an ‘any other status’ provision in s 15. Whether an approach of this kind might be taken in New Zealand has not yet been thoroughly tested in the courts.
68. The third approach, that of non-exhaustively listing the prohibited grounds of discrimination, is the approach reflected in the ICCPR and ICCESCR. It is also found in some domestic and regional human rights documents. For example, s 9(3) of the South African Constitution provides that:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, **including** race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.  
(Emphasis added.)

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<sup>56</sup> Heike Polster “Gender Identity as a New Prohibited Ground of Discrimination” (2003) 1 NZJPIL 157.

<sup>57</sup> Natalie Baird “Housing in Post-Quake Canterbury: Human Rights Fault Lines” (2017) 15(2) New Zealand Journal of Public and International Law (forthcoming).

<sup>58</sup> Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015), at [17.2.3].



69. Similarly, article 14 of the European Convention on Human Rights and Fundamental Freedoms provides:

The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured **without discrimination on any ground** such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth **or other status**. (Emphasis added.)

70. Article 21(2) of the European Charter of Fundamental Rights also provides:

**Any discrimination based on any ground such as** sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. (Emphasis added.)

### *Discussion*

71. As noted by CESCR, ‘the nature of discrimination varies according to context and evolves over time.’<sup>59</sup> A flexible approach is therefore needed to capture future forms of unjustified differential treatment. This may occur for example in relation to ‘social groups that are vulnerable and have suffered and continue to suffer marginalization.’<sup>60</sup>

72. In order to preserve maximum flexibility, it is submitted that a future-proofing formula should therefore be adopted in clause 96. This is particularly the case given that, unlike an ordinary statute, it is proposed that Constitution Aotearoa will require either a super-majority in Parliament or a majority in a popular referendum to be amended (clause 116). The challenges which this may pose in terms of future amendment suggests that an approach in the text of Constitution Aotearoa which enables maximum flexibility is most appropriate.

### *Recommendations*

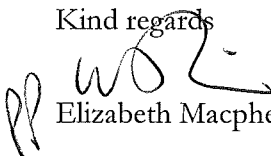
73. In order to preserve flexibility and to future-proof the prohibited grounds of discrimination in Constitution Aotearoa, we recommend that clause 96 be amended by:

- a. including a specific reference to gender identity as a prohibited ground of discrimination;
- b. including a specific reference to socio-economic circumstances as a prohibited ground of discrimination; and
- c. including a specific reference to ‘any other status’ as a prohibited ground of discrimination.

### **Conclusion**

74. We are happy to expand on our submission and provide further information if necessary.

Kind regards

  
Elizabeth Macpherson

<sup>59</sup> Committee on Economic, Social and Cultural Rights “General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)” (2009), at [27].

<sup>60</sup> At [27].

