# A RIGHTS APPROACH TO ENVIRONMENTAL FLOWS: WHAT DOES IT OFFER?

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## Abstract

Creating a legal framework to support water resource protection is one of the many challenges faced by the South African Government in realising its Constitutional mandate to achieve sustainability. In attempting to do so it has adopted a rights approach to water resource management, largely enacted by the National Water Act (NWA) [Act No. 36 of 1998]. In legal terms, environmental flows are captured under the concept of the Reserve. This accords these with considerable status in that the Reserve is the only right to water under the new legal framework. Of particular significance is that portion of the Reserve, termed the Ecological Reserve, which places an obligation on the State to set aside (reserve) water to *maintain the ecological functions so that long-term sustainability of aquatic and associated ecosystems is not compromised.* Despite a well-developed conceptual framework, the complexities of implementing a rights-based, water-legislation is in its legal infancy in South Africa. Added to this is the need to build capacity across various sectors and within the judicial system itself to appropriately interpret legislation associated with adopting a rights-based approach to water resources protection. While the guidelines and procedures for establishing the Ecological Reserve are provided under the NWA, the specific procedures of how to maintain it and ensure that violations are monitored and corrected, have yet to be properly legislated and made justiciable. Part of the challenge presented by a rights approach is the requirement for the uptake of a diverse and complex legal discourse and practice into the water sector. In this paper we deliberate on the potential value of a rights approach in guiding the judiciary, administrative legal bodies, the government, and ecological authorities in realising environmental flows.

## 1. BACKGROUND

The South African Constitution has its origins in the international discourse on rights-based approaches making it important to understand what this means for transferral of these principles to the water sector. Thus in this paper we first set out the key elements of such an approach and then discuss some of the potential implications for the implementation of environmental water requirements.

A fundamental point is that South Africa has placed the right to sufficient water as a Constitutional Right in its Bill of Rights [Act 108 of 1996]. Consequently, the Constitution places a *legal obligation* on the government to realise the right to "sufficient water". In order to explore what this means in real terms the Association for Water and Rural Development (AWARD) has undertaken two research projects. The first, a legal research project funded by the South African Water Research Commission (WRC) aimed to explore - in the a broad sense - what a rights approach to water management might entail, and the second, an ongoing project also funded by the WRC, which aims to understand the status of compliance (or non-compliance) with the Reserve in six catchments in the north eastern part of the country (see Pollard & du Toit, this conference). The content of this paper is drawn largely from the first project with enrichment from the current research of the second. Both projects are referenced against the backdrop of aforementioned catchments.

## 2. INTRODUCTION

The South African Constitution is admired as one of the most progressive in the world because it enshrines a number of socio-economic rights, including the right of access to water (Francis, 2005). The South African Constitutional Court has ruled that these rights are justiciable (claim, issue, or matter which is appropriate for a court to review and decide by the application of legal principles, Business dictionary.com) which means that this demands specific obligations from government (Pejan et al, 2007). In this paper we are directly concerned with the nature obligations associated with

achieving the Ecological Reserve (ER). Central to this position is the notion of sustainability. We recognise that if the State aims to fulfil its obligation to provide water as a right for present and future generations it will need to secure ecosystem sustainability. Therefore the key issues that this paper is concerned with are: the legal basis for water resource protection, water for ecosystems, sustainability and environmental flows.

Whilst a rights-based approach to water resource protection is gaining international support, the actual implications for country-specific practice is poorly understood. (Pejan et al, 2007). We therefore look at some of the key issues emerging from the research in relation to the Constitutional obligations that fall to the State in this regard. We look specifically at how conferring water with the status of a right might influence decision-making in the water sector and we deliberate on the justiciability of environmental flows as part of the obligation to realise the Constitutional right to water. What is provided is not a documentation of actual jurisprudence (legal history as provided by court rulings) but rather a discussion of emergent issues in order to take the dialogue into a broader arena as the pressures on the country's limited water resources continue to grow.

## 3. THE LEGAL CONTEXT OF A RIGHT TO WATER IN SOUTH AFRICA

In order to understand the legal processes and procedures that have bearing on water for environmental flows and sustainability it is important to look at the discourses that underpin the root of South African law, the Constitution. Francis (2005) maintains that the drafters of the South African Constitution incorporated norms of international human rights into the language of many of its provisions, culminating in an extensive bill of rights that protects numerous civil, political, economic, and social rights, including the constitutional right to water. The Constitution therefore reflects human rights principles, and these principles permeate all subsequent water policies and legislation. Therefore, Francis maintains, an analysis of the right to water under the South African Constitution needs to be referenced against an understanding of the developments in international law that have led to a conceptualisation of water as a *human* right as this has immediate bearing on the concept of a 'right to water' as framed by South African legislation.

The right to life, food, an appropriate means of subsistence and the right to a decent standard of living are explicitly protected in international treaties. Water is a precondition to these rights because survival, an adequate standard of living, good health and sufficient food all depend on a minimum amount of clean water for domestic use, reduce risk of disease. However, a further precondition to this is that the world's ecosystems must be in a position to provide water of an adequate quality and quantity to meet this right. The argument therefore is that in order to meet with human rights obligations there is an equal and pressing need to ensure that ecosystems and water within in these systems are accorded a similar status. This is arguably the source of the constitution right to "... an environmental that is not harmful to their health or well-being" [S.A. Constitution, Section 24a] and the right "...to have the environment protected, for the benefit of present and future generations" [S.A. Constitution Section 24b].

### THE RESERVE: THE ONLY RIGHT TO WATER UNDER SOUTH AFRICAN LAW

Although the Constitution is the document that frames the right to water, it is the National Water Act (NWA) [Act No. 36 of 1998] that gives it specific legal meaning. In addition to this the National Water Resources Strategy (2004) accompanied by Catchment Management Strategies (DWAF 2007; Pollard & du Toit in press) that are legally binding documents that concretise the policies and standards created by the NWA.

The Reserve is a key legal tool designed to help achieve the right to water. The definition of the Reserve is clear within the national legal framework dealing with water. According to Principle 3, elaborated in the White Paper on a National Water Policy (1997), the foundation for the NWA and the WSA, "[t]here shall be no ownership of water but only a right (for environmental and basic human needs) or an authorisation for its use." Principle 8 defines the Basic Human Needs Reserve (BHNR): "The water required to ensure that all people have access to sufficient water shall be reserved." Principle 9 elaborates the Ecological Reserve (ER):

> The quantity, quality and reliability of water required to *maintain the ecological functions on which humans depend* shall be reserved so that the human use of water does not individually or cumulatively compromise the long term sustainability of aquatic and associated ecosystems. (emphasis added).

Finally, Principle 10 clarifies the legal nature of the Reserve:

> The water required to meet the basic human needs referred to in Principle 8 [BHNR] and the needs of the environment shall be identified as "the Reserve" and *shall enjoy priority of use by right*. The use of water for all other purposes shall be subject to authorisation. (emphasis added)

Of particular relevance to the discussion of sustainability is that portion of the Reserve, termed the Ecological Reserve (ER), which places an obligation on the State to set aside (reserve) water to maintain the ecological functions so that the long-term sustainability of aquatic and associated ecosystems is not compromised. The NWA and the Principles in the National Water Policy (1997) make clear that the Reserve will be a guaranteed right and not subject to institutional discretion and negotiation like licenses and other entitlements to use water. In this sense, the Reserve trumps all other claims to water use.

Whilst water for basic human needs (termed the Basic Human Needs Reserve) has been quantified as a minimum of 25 litres of water available to the user at no more than 200 meters, the Ecological Reserve is a far more complex issue to determine making it more challenging from a legal point of view. While the guidelines and procedures for establishing the Ecological Reserve are provided under the NWA, the specific procedures of how to maintain it and ensure that violations are monitored and corrected have yet to be properly legislated and made justiciable (Pejan, 2007). The point is that despite a strong conceptual framework, the complexities of implementing a rights-based, water-legislation that addresses ecosystem security has a long way to go before being adequately realised. Added to this is the need to build capacity across various sectors and within the judicial system itself to appropriately interpret legislation associated with adopting a rights-based approach to ecosystem protection.

## THE POTENTIAL VALUE OF A RIGHTS FRAMEWORK FOR IMPLEMENTATION OF THE RESERVE

In this section we look at what a rights-framework might offer in terms of implementation of the Reserve.

### a. Rights approaches assist in prioritising water allocation

The first and most obvious feature that a rights approach offers is that of prioritising water allocation. The NWA creates a hierarchy of water uses. The first priority is to allocate water to the Reserve, followed by sufficient water to honour international agreements and make inter-basin transfers in the national interest. Thereafter water may be distributed by licence, to economic uses, such as industry, mining, and agriculture.

Figure 1 shows the prioritisation procedure followed in water allocation. The important issues to note are:

- The Reserve (once determined) is deducted from the total available resource before allocation to any other use can be specified.
- The Reserve is specified in the National Water Resources Strategy (NWRS) and is the responsibility of the Minister (Department of Water Affairs and Forestry).
- The Reserve determination is a technical process out of which comes a *recommended* ecological category- but this by no means has to be accepted and is part of a scenario development process which is a publically negotiated process.

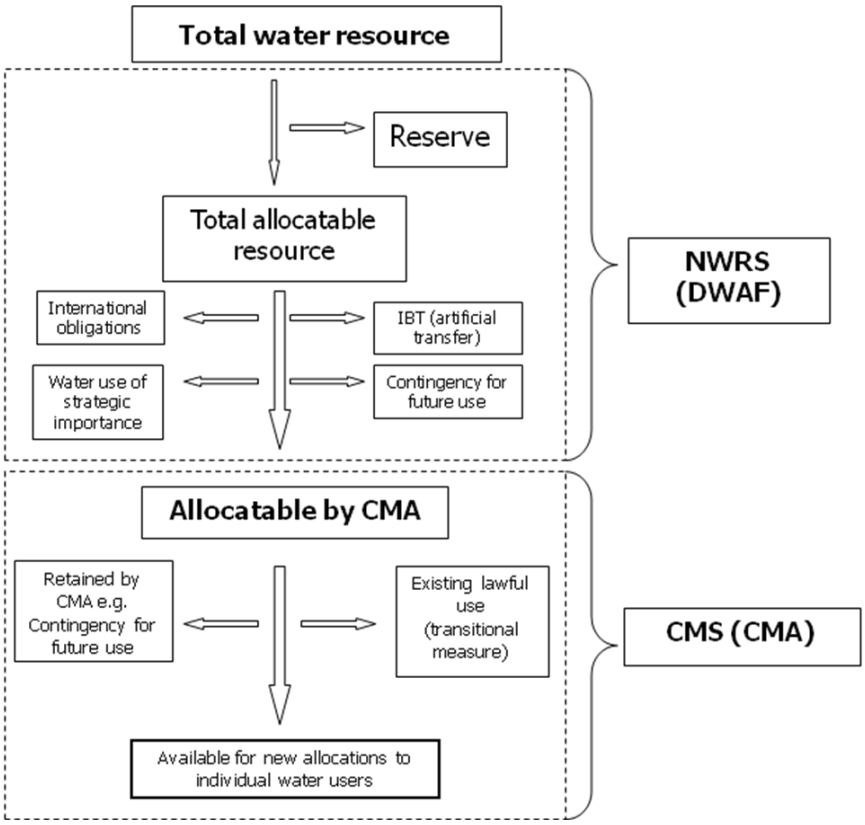


**Figure 1. Overall water allocation responsibilities. The Reserve is the only right to water and has the highest allocation priority. Exisiting lawful use gives temporary entitlements until all users are licensed through compulsory licensing (IBT = interbasin transfer, CMA = Catchment Management Agency, NWRS = National Water Resources Strategy, CMS = Catchment Management Strategy) (DWAF, 2007)**

That part of the resource that is deemed allocatable is subject to an authorisation process that is the mandate of a Catchment Management Agency (CMA). The authorisation process is guided by principles (such as equity, sustainability and efficiency) and the publically negotiated allocation plan (contained in the catchment management strategy). Where applications for new entitlements compete with existing uses, the basis for decision making is "beneficial use in the public interest" (Francis, 2005). Most importantly licences cannot be issued without taking the Reserve into consideration as that would be in violation of a Constitutional obligation.

**b. A rights framework conceptualises the relationship between principles, obligations and violations**

During the research phase of the project it was noted that participants had difficulty conceptualising what a rights focus in the water sector might entail. It was found to be useful to have a holistic view of the legal framework on which tools such as the Reserve are built. The framework for a right to water is depicted in Figure 1 and summarised in Table 1 (a detailed discussion of the framework can be found in Pejan et al, 2007).

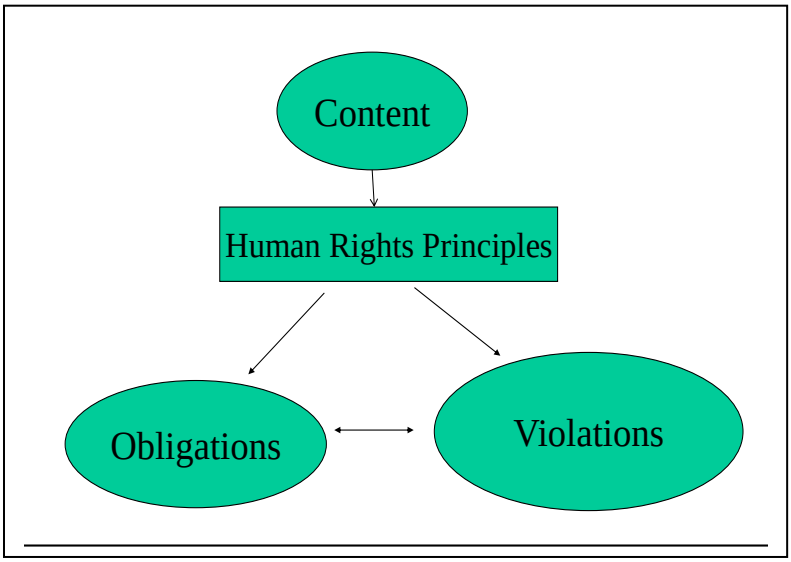


**Figure 2. A conceptual framework for understanding the elements of a rights approach (after Pejan et al. 2007)**

**Table 2. An analysis of the elements of a rights framework in relation to the Reserve (adapted from Pejan et al., 2007)**

| Aspect | Detail |
|---|---|
| Content | The content is the foundation of the framework as it is the basis from which the rights are derived. The remaining parts of the framework relate the ultimate purpose of realising the content of the right. The content, from international human rights law, usually encompasses three aspects: *accessibility, quantity and quality*. The Reserve is a direct expression of these three elements with the Ecological Reserve being a specific articulation for the purposes of sustainability. The concept of the *basic minimum* is often applied. |
| Principles | The respect for rights is based on the principle that they are indivisible and interdependent. For example violations of other rights often have an impact on the realization of the right to water. Such rights include the right to life, adequate food, health, housing, self-determination and the environment. The provision of the ER is a commitment by the state to secure ecosystem goods and services, including water, so that other Constitutional rights can be honoured. Additionally, fulfilling the right to water is a vital step in ensuring sustainable development and ultimately poverty reduction. |
| Obligations | The international legal discourse on human rights imposes three specific obligations on states: respect, protect, and fulfill. One type of obligation is not more, or less, important than another and the various state obligations are inter-related and applicable to all state actions. Obligations in relation to the Reserve are discussed in more detail below. |
| Violations | Violations are defined as the as a non-realisation of obligations or an unreasonable progress toward achieving an obligation. The norms and standards specified in the obligations are the same standards that are used to determine whether a violation has occurred or not. The ability of the regulator to determine the nature and extent of a violation is based on adequate norms and standards as well as monitoring mechanisms that detect a violation. Non-compliance or violations in terms of the Reserve are discussed below. |

In summary, South Africa's efforts, initiatives and steps to realise the Reserve stemming from the Constitutional right can be interpreted using the framework in Table 1. It is possible, from a legal point of view, to analyze implementation of the Reserve in light of a framework of obligations and violations, principles, and ultimately the realisation of the content of the right to water.

### c. A rights framework clarifies responsibilities as legal obligations

An international rights discourse imposes three *specific obligations* on States: obligations to *respect*, obligations to *protect*, and obligations to *fulfil* (UN 2002). The framing of these obligations is important with regard to the right to water as they provide a degree of specificity with which to evaluate government action. Furthermore, the South African Constitution also clarifies the existence of these obligations in relation to all the rights contained in the Bill of Rights. The obligation to *respect* is a negative obligation, requiring that the State refrain from interfering directly or indirectly with the enjoyment of the right. The obligations to *protect* and *fulfill* are considered positive obligations, in that they require an active role and are generally subject to *progressive realisation*, a term discussed in more detail below.

The relationship of a rights focus to the Reserve is potentially an important one from a number of perspectives. The obligation to *protect* requires that the state prevents third parties (i.e. individuals, groups, corporations, other entities) from interfering in any way with the enjoyment of the right. This is a useful concept in relation to environmental flows in that it requires the state to use the concept of the Reserve to intervene where the ecosystem security is compromised. The obligation to *fulfill* is the most difficult to implement within a rights framework. In effect, it requires the State to take positive steps that often have long-term implications, and involve issues of resource allocation and capacity building. In relation to the Reserve this means ensuring adequate monitoring through the development of skills and infrastructure such as gauging weirs, data management systems etc. A sub-category of the obligation to *fulfill* is the obligation to *promote*, also stressed in the Constitutional Bill of Rights as a separate category of obligation. This obligation requires the state to actively promote the right to water in terms of educating people of their rights and helping to raise awareness regarding wise water use and issues surrounding sustainability of the resource.

### d. Obligations create standards against which actions can be monitored

The implementation, enforcement, justiciablility, and redress of the right to water are parts of the well-defined obligations to 'respect and promote' under human rights legal doctrine (Pejan et al. 2007). The application of a rights approach obliges government agencies and authorities to generate definitive and justiciable standards for the Reserve as soon as is possible since, without legal protection, the Reserve is simply a policy instrument that cannot be truly challenged or litigated outside of "desperate" or "emergency" circumstances (Petit, 2007). If it can be shown, for example, that the government has shirked its obligation to develop a monitoring system for the Reserve, the government could be held to have violated its obligations to protect and respect the right to water as expressed by the law. It should be noted that the Minister is required by the NWA to include a legally binding set of guidelines and standards for the Reserve, as well as perform the actual setting of the Reserve for each of the major water systems listed in the National Water Resources Strategy. In addition, the CMA (or DWAF as acting CMA) is obligated to develop a Catchment Management Strategy that takes cognisance of a Reserve for a specific catchment. As the CMAs come into existence and achieve management independence, they will be responsible for a CMS that will be effective for a 5 year period.

### e. A rights approach provides a legal discourse against which actions can be judged

A rights approach presents us with a legal discourse that has important implications for the development of day-to-day practice. In the conducting the research a number of concepts were important for the realisation of the Reserve and these are outlined in Table 3.

**Table 3: Some important legal terms associated with a rights approach to the Reserve**

| Term | Brief explanation |
|---|---|
| Non-compliance | States violate the right to water through non-compliance with their obligations to ensure the *content* of the right. Presumably a reasonability test would apply in deeming the level of non-compliance in a legal case. This however adds the complication of having to involve experts in assessing non-compliance and the involvement of an informed tribunal and judiciary. |
| Progressive realisation | Progressive realisation is a concept that is applied to the *rate of implementation* of a particular plan, policy or program (PPP). This means that in order for the government to satisfy its constitutional obligations, it must move "as expeditiously as possible" toward its goal, but it need not achieve its goal immediately (Francis, 2005). International human rights law and the South African Constitutional Court have placed concrete |

| | |
|---|---|
| | requirements concerning progressive realization, including that measures should be non-retrogressive (moving backwards from the *status quo*), deliberate, concrete and targeted towards the full realisation of the right. In the case of the right to water it refers to the plans, policy, or programs that are put in place for the determination and implementation of the Reserve. |
| Severe prejudice | In the case of a user contributing to a violation of the Reserve, that user has an obligation under the Constitution to cease the excess usage that is contributing to the violation or to curtail usage to a level that is acceptable in terms of meeting the Reserve. Users would need to show evidence of "severe prejudice," (the common law term in the UK and US is "immeasurable harm") meaning that they will suffer serious financial (or other harm) such as bankruptcy or loss of a crop to possibly make a case that they should be able to continue their usage (Petit, pers.com.). In international law, mere loss of profits does not constitute enough evidence to be able to claim "severe prejudice." The user would need to demonstrate that their usage could not be made more efficient and sustainable. |
| Burden of Proof | When there has been a violation of a right the responsibility to prove or disprove this through the provision of evidence is called the 'burden of proof'. According to law the burden of proof falls to the defendant or plaintiff. An important aspect of the burden of proof is associated with the costs of collecting evidence. Determining the burden of proof in relation to the Reserve is complex as it depends who is perceived to have caused the violation. For example, if the Reserve is violated due to over allocation of the resource it can be argued that the precautionary principle (Section 2.4 NEMA, 1998) has been ignored by the State. The State would therefore have to provide the evidence in mitigation of its actions. |

While what is presented here is not a comprehensive collection of legal terms, it highlights key concepts that are likely to have direct bearing on the justiciability of the Reserve. Developing the discourse and a workable understanding of these terms can only be achieved over the long term by means of legal cases, professional support and education programs.

## THE JUSTICIBILITY OF THE RESERVE

The South African Constitution enshrines numerous socio-economic rights which the South African Constitutional Court has ruled are justiciable. Despite this the Constitutional Court has yet to preside over a case testing the justiciability of the Reserve. Much therefore needs to be inferred from how a rights framework can be applied to the ER. Presumably elevating the ER to the status of a constitutional right implies that the same or similar legal procedures and standards apply.

Within the framework of socio economic rights, the unit of analysis is *government action* and the yardstick of constitutionality is *reasonableness* (Francis, 2005). The Constitution places on obligation on the government to take reasonable action to give effect to the generalised rights for the population. In order for a case to be brought before the court requires an individual or group to assert that the government's action, or inaction, is unreasonable within the meaning of the Constitution. Governmental action, in this case, refers to the form of a plan, policy or program (PPP) that is designed to achieve the " progressive realisation" of constitutional rights. The court uses *reasonableness* as the yardstick to evaluate a PPP (Weeson, 2004).

In the evaluation of a PPP, the *reasonableness* consists of three elements: (a) substantive measures being put in place (i.e. comprehensive, coherent, balanced, flexible and feasible); (b) the rate of implementation must reflect "progressive realisation" and (c) the government's obligation is subject to availability of resources. The third presents a potential obstacle in the sense that the government can claim a lack of available resources. If the plaintiff prevails, the only remedy that the court can provide is an order requiring the offending government department to devise a new PPP that *is* reasonable (Slye, 2003).

If a party sues the government regarding the constitutionality of its PPP, the plaintiff bears the burden of proof for showing that the government's actions are unreasonable. Francis (2005) claims that the

government retains a great deal of discretion within this legal framework because, in the course of litigation, the burden of proof falls to the plaintiff. However, in relation to the Reserve, Petit (2007) maintains that the burden of proof may be shifted to the state through the application of the precautionary principle (NEMA, section 2.4, 1998) as a key aspect of the ER. Here the burden is put on government to prove that the combination of development projects or licenses, that are being undertaken, will not result in a violation of the ER. Since water is identified as a public trust, with the Minister as trustee, the government has an obligation to ensure that developments do not violate the public's right to water, including the ER. The government is therefore obliged to employ the precautionary principle in all decisions, as a decision made that violates the ER, necessarily violates the public trust, and the government must take every step to ensure that does not occur.

Francis (2005) maintains that the Constitutional Court has made it extremely difficult to demonstrate that the government has violated the Constitution. This, the author claims, reflects reluctance to issue rulings that implicate the allocation of budgetary resources. Furthermore, while the Court can provide guidance, the details of a remedial PPP are left to the government department that was responsible for the constitutional violation in the *first place*. This arduous burden of proof and lack of specific relief leads legal scholars to suggest that this will discourage individuals from litigating. Also adequate monitoring systems need to be in place to properly determine whether there is a violation of the ER in a particular time and space, or whether a project under consideration presents a threat to the ER. One of the major problems with having a 'flexible standard' (in terms of space and time) is that courts might be left to determine violations of the Reserve, constitutional obligations and individual licenses on a case by case basis – a potentially time and resource consuming endeavour. If obstacles are insurmountable a rights focus could represent a false promise for the realisation of environmental water requirements. However this will need to be tested in the courts over time.

**In conclusion**

Water for 'environmental requirements' and sustainability is a relatively new concept in South African law which means that much needs to be done in order to clarify its justiciability. But regardless of whether cases make it to court it is clear that the state has interim responsibilities for the clarification of procedures and the establishment of a robust and sound monitoring system before we can really see what the rights approach holds. Additionally consideration needs to be given to need to build capacity across various sectors and within the judicial system itself. As the project (reported here) progresses tangible examples are likely to come available. It is hoped that in the interim we have been able to highlight some of the important issues that a rights framework brings to the initial implementation of the Reserve.

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