ANSWERS TO QUESTIONS PUT BY THE RAPPORTEUR IN CONNECTION WITH THE CONSIDERATION OF THE 15th to 17th PERIODIC REPORTS OF NEW ZEALAND (CERD/C/NZL/17)

Overview

1. New Zealand is a unitary parliamentary democracy with a single national government and legal system. It is a multicultural nation where a significant number of people value their combined Māori and non-Māori ancestry. The 2006 census results show that ethnic diversity in New Zealand is increasing:

European:	2,609,592	(67.6%)
Māori:	565,329	(14%)
Asian:	354,552	(9.2%)
Pacific:	265,974	(6.6%)

2. A further 11.1% described themselves simply as "New Zealander" (2006 is the first time that category has been recorded).[1] The fastest growing group over the past five years has been people who identified as Asian (which increased by almost 50%), followed by those who identified as Pacific (which grew by 14.7%) and those who identified as Māori (which grew by 7.4%).

3. In New Zealand, like every other nation, there are isolated instances of racialy motivated harassment. The perpetrators of such actions do not represent the vast majority of New Zealanders to whom racial discrimination is abhorrent. New Zealand has a strong history of confronting and resolving issues in race relations in a non-violent and constructive way. We seek constructive long-term engagement to provide lasting solutions. The New Zealand Government sees the open discussion of problems in race relations as a sign of a free and democratic society in which debate is encouraged and protest is a right.

4. In particular, the New Zealand Government welcomes debate on the place of the Treaty of Waitangi in the constitution. The recognition of equal rights for Māori, and special protection for Māori interests, on the one hand and the creation of a single legal system on the other are at the heart of the commitments exchanged under the Treaty of Waitangi of 1840. Accordingly, while Māori enjoy special recognition in many areas as a result of the Treaty of Waitangi, that special recognition is provided within the structure of the government and legal system as a whole.

5. Disparity still exists between different ethnic groups in New Zealand, particularly, Māori and Pacific people. Nevertheless, there have been dramatic positive changes in Māori and Pacific employment and average earnings, and improvements in Māori and Pacific educational attainment.

[1] The census percentages for ethnicity do not add up to 100% as people are able to identify with more than one ethnic group.

Māori economic development was also significant. Efforts to reduce disparities in health, criminal offending and domestic violence have been less successful to date but government programmes that target by ethnicity continue to operate where ethnicity is a suitable indicator of need.

Article 2

Question 1

Please provide updated information on the response to the Human Rights Commission's New Zealand Action Plan for Human Rights, in particular on Race relations issues. (Periodic report, § 14 and 22)

6. Since the Human Rights Commission submitted the Action Plan to the government in 2005, many of the "priorities for action" identified by the Commission have been responded to, in whole or in part, by government agencies, local government and groups in civil society. Significant government initiatives include New Zealand's role in, and accession to, the Convention on the Rights of Persons with Disabilities, enacting the New Zealand Sign Language Act 2006, and the introduction of numerous measures to improve economic wellbeing and health outcomes. A summary of developments relevant to priorities for action in the area of race relations has been prepared by the Human Rights Commission and included in its *Race Relations in 2006* report (please see *Appendix I*, also attached to this report).

7. In response to the Action Plan for Human Rights, departments are being directed to consider the appropriateness of implementing the Plan's priorities for action as part of operational business, and encouraged to identify work items in their annual reports and other organisational documents that are consistent with the Plan's priorities. Consideration of the Plan's priorities as part of operational business emphasises the relevance of human rights issues to policy development across government.

8. The Government has also noted the Commission's intention to carry out a "mid-term review" of progress against the priorities for action during 2007-8. To assist the Commission in its review, departments are encouraged to respond to the Commission's requests for information. The Commission has noted in its Statement of Intent that the review will enable an evidence based reassessment of the Commission's priorities through to 2010.

Question 2

Please provide more information on the discussion held in 2004 about special measures for the advancement of ethnic groups, which led to a re-targeting of policies and programmes on the basis of need rather than ethnicity. What is the expected outcome of this new policy? Which special measures and programmes based on ethnicity have been re-targeted? (Periodic report, § 54-55)

Further information

9. The Ministerial Review Unit was established within the State Services Commission to plan, coordinate, monitor and advise on reviews of ethnically targeted policies and programmes in the Public Service. These reviews were conducted by the relevant vote departments during the 2004/05 year. The objective of these reviews was not to eliminate targeting or targeting by ethnicity but to explain what the policies and programmes under review are intended to achieve, and review whether targeting by ethnicity helps to achieve that objective. As a result of the review completed in June 2005, changes were made to 21 programmes, 16 require further work, and 20 programmes were not changed.

Expected outcome

10. The expected outcome of the review and guidance subsequently published by the Ministerial Review Unit is that targeting of social assistance policies and programmes will be more clearly based on relevant criteria, which may include race or ethnicity, where there is evidence that this is an indicator of need.

Programmes that have been re-targeted

11. Programmes were not changed where there was sufficient evidence as to their effectiveness and the targeting is appropriate; for example, the Asian Public Health Agreement (a contract between the Ministry of Health and the Asian Network). It aims to improve the health sector's knowledge about Asian public health needs in the Auckland region. The review confirmed that it was appropriate at present to contract an Asian group to facilitate the flow of information between Asian communities and the health sector, given the Asian population in the Auckland region and the projected growth of Asian communities in the area.

12. In some of the programmes that were changed, eligibility was widened so other groups in need are also targeted. Where changes were made, it was because either there was not convincing evidence that the targeting was actually delivering the desired results or the needs have changed since the programmes were first introduced. For example, Mapihi Pounamu, is a financial assistance scheme targeting Māori students who are required to board away from home because they face barriers to learning. The scheme was changed so that both Māori and

non-Māori will now benefit. Also, several programmes and initiatives funded by the Clinical Training Agency designed to increase the number, and level of training, of Māori and Pacific people in the health workforce were changed so that skilled trainees were not excluded on the basis of ethnicity alone.

Question 3

Please explain why the State party considers that historical treaty settlements constitute special measures for the adequate development and protection of Māori and indicate the consequences of such qualification on the approach adopted by the State party to treaty settlements. (Periodic report, § 51 and following)

13. Historical Treaty settlements provide redress to Māori for past wrongs by the Crown. Settlement redress is intended to contribute to re-establishing an economic base for iwi and hapū, but is not the only means of fostering such development. The nature and extent of the redress provided is determined through negotiations. The redress therefore reflects the claimant group's interests, the relative seriousness of the breaches involved and the means/mechanisms available to the Crown to provide redress.

14. The Committee appears to be concerned that the inclusion of historical settlements under the description of special measures in the periodic report might have some restrictive or negative consequences. This is not the case. Although the settlements can be described as special measures in terms of the Convention, they also reflect the Crown's undertakings in the Treaty of Waitangi and give effect to a strong moral obligation to redress historical grievances in the interests of building stronger Crown-Māori relationships in the future. Historical settlements were not included in the review of targeted programmes noted in question 2.

15. The New Zealand Government wishes to emphasise that historical settlement redress does not replace or relieve the government of its responsibility to implement other measures that foster Māori economic and social development and culture. Many of these are detailed in the Periodic Report.

Question 4

Please provide updated information on the outcome of the public and political discussions which took place over the Treaty of Waitangi, and on the position adopted by the State party in this regard. Was the question of possible entrenchment of the Treaty in constitutional law discussed? (Periodic report, § 7 and § 27-28)

16. The government welcomes debate on New Zealand's constitutional arrangements, including debate on the place of the Treaty of Waitangi. Aside from the ongoing general debate, there has recently been opportunity to consider this issue formally. This arose in the context of a government indication in 2003 that it would be timely to enquire into New Zealand's constitutional arrangements and was supported by a growth in public interest in the complexity of New Zealand's constitutional arrangements and, in particular, the place of the Treaty of Waitangi.

17. The swell of public, academic and government interest in this topic prompted a select committee report on New Zealand's existing constitutional arrangements.[2] The Constitutional Arrangements Committee reported back in August 2005 and made a number of recommendations, several of which focussed on the need to enhance public understanding and discussion of constitutional issues, the implications of any change to this system, and the need for wide public participation in the process of any constitutional change.

18. To achieve this, the Committee recommended the government provide 'accurate, neutral and accessible public information on constitutional issues, along with non-partisan mechanisms to facilitate ongoing local and public discussion'.[3] The Committee also noted that a 'generous amount of time should be allowed for consideration of any particular issue, to allow the community to absorb and debate the information, issues and options'.[4]

19. The Committee's recommendation to ensure a 'long conversation' is held on these issues, is consistent with process followed in previous constitutional developments such as the enactment of the Bill of Rights Act 1990 and the abolition of the Privy Council in 2002. Both these issues provoked wide ranging discussion among politicians, academia and the public and illustrated a diversity of views within Māoridom regarding New Zealand's appropriate constitutional form and the place of the Treaty of Waitangi.

20. Discussion of the place the Treaty of Waitangi holds in New Zealand's constitution is a prominent issue in the constitutional debate. Indeed, the Select Committee noted in its report that 'the demand for constitutional change to give effect to the Treaty of Waitangi has been persistent and from a variety of sources'.[5] It also stated that 'the relationship between the constitution and the Treaty of Waitangi, including whether it should and how it might form superior law' was a significant and topical issue which should be addressed in any proposed constitutional reform.[6] As a result of the importance of this issue, the Committee recommended that

[2] A Select Committee is a committee made up of a small number of Members of Parliament appointed to deal with particular areas or issues
[3] Report of the Constitutional Arrangements Committee, 5.
[4] Report of the Constitutional Arrangements Committee, 5.
[5] Report of the Constitutional Arrangements Committee, 9.
[6] Report of the Constitutional Arrangements Committee, 25.

specific processes for encouraging and informing debate within Māori communities be included as part of the wider plans to inform the public about constitutional issues.

21. In keeping with the Committee's recommendations, the New Zealand Government since this time has been focussing on ways to disseminate information on New Zealand's constitutional system to the wider public, in order to enhance understanding and promote educated debate on the issue (refer also government response to question 23). Examples of this include the Treaty of Waitangi Information programme 2003-6, various symposia, and community dialogue workshops facilitated by the Human Rights Commission.

Question 5

Please indicate to what extent the policy to introduce in some new legislation clear references to the responsibilities of government or local government to provide for consultation with Māori or Māori participation in decision-making in relation to specific activities, instead of general references to the Treaty of Waitangi, impacts on the effect given to the Treaty. (Periodic report, § 27)

22. The Treaty of Waitangi contains three articles. Very broadly they are an acknowledgment of government's role to govern (Article 1); Māori chiefly authority (Article 2); Māori rights as citizens (Article 3). The principles of the Treaty have been considered by the Courts and the Waitangi Tribunal. Again very broadly, the principles can be distilled to a good faith relationship (akin to partnership) between Crown and Māori and an obligation on the Crown to retain capacity to provide redress to Māori to address well-founded claims of Treaty breach.

23. The *NZ Māori Council v Attorney-General* [1987] 1 NZLR 641 (the *Lands* case) remains an authoritative articulation of Treaty principles in New Zealand. This case discussed the "principles" of the Treaty by recognising the circumstances for application of the Treaty were changing in a modern world; and that it was the "spirit" of the Treaty rather than the literal words of the Articles which was important.

24. Around the 1980s, Parliament included generic references to the "principles" of the Treaty in legislation. A new drafting approach, making specific the Crown's Treaty obligations, was adopted more recently. By way of example, this approach is reflected in section 4 of the New Zealand Public Health and Disability Act 2000 as follows:

    "In order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Māori, Part 3 provides for mechanisms to enable Māori to contribute to decision-making on, and to participate in the delivery of, health and disability services."

25. Part 3 of the legislation then goes on to specify those mechanisms.

26. The purpose of this approach was not to reduce the significance of relevant Treaty principles, but rather to provide greater clarity to those operating under the legislation as to Parliament's intended policy objectives and the tasks required of them to meet those objectives. It was a step through which Parliament hoped to give clearer direction and practical meaning to Treaty commitments.

Question 6

Please indicate to what extent the removal of statutory references to the Treaty of Waitangi, as reportedly planned through the Principles of the Treaty of Waitangi Deletion Bill (2006), will impact on the status of the Treaty and the ability of courts to adjudicate on Treaty matters. Please also comment on the information according to which references to the Treaty have been removed in some sectors, for example in the health and disability sectors. (Periodic report, § 7 and § 27-28).

Part 1

27. The Principles of the Treaty of Waitangi Deletion Bill is a private Member's bill[7] proposing that specified references to 'the principles of the Treaty', the principles of the Treaty of Waitangi' and the 'Treaty of Waitangi and its principles' be eliminated from statute. The Bill has been referred to the Justice and Electoral Reform Select Committee, and the Committee is currently in the process of receiving public submissions on the Bill.

28. Although it is not a government Bill, the New Zealand Government has supported the Bill through to Select Committee as a condition of the confidence and supply agreement with another political party[8] and as an opportunity to debate the appropriate place of Treaty principles in legislation. However the government considers that the Bill's passage would be injurious to the overall Crown-Māori relationship and will not support its progress any further.

Part 2

29. New Zealand's periodic report referred to a 'move away from general references [about the Treaty] to a clear articulation of the responsibilities of government or local government'.

[7] A 'Member's bill' is a bill dealing with a matter of public policy introduced by a member who is not a Minister.
[8] Refer Paragraph 4, New Zealand Periodic Report 2006.

30. In legislation, this means that the recent focus has been on providing clarity on how the Crown and its agents can give effect to the Treaty relationship. The New Zealand Public Health and Disability Act 2000 (refer to question 5) is an example of this approach. By moving away from the use of general references, this Act provides more specific guidance for the health and disability sector in the implementation of the Treaty principles.

31. The focus on providing more tangible guidance on the responsibilities of government to Māori is also a feature of policy and accountability documents and increasingly of contracts. Examples of this have been noted in the periodic report (para 80) and in the health and disability sector, including the *New Zealand Health Strategy,* the *New Zealand Disability Strategy* and *He Korowai Oranga* (the Māori Health Strategy).

32. The government has also developed and published a policy framework on Crown-Māori Relationship Instruments (2006). This provides clear practical guidance to departments and other agencies on developing effective relationships between Māori representative organisations and departments to address and work cooperatively on matters of mutual concern, for example to improve health or education outcomes in particular areas.

Article 4

Question 7

Please explain further why there is no hate speech offence in domestic law. Please also explain further what differences exist, in the view of the State party, between hate speech and incitement to racial disharmony. What avenues, criminal or otherwise, are at the disposal of persons subjected to offensive race-related comment, including through the media? (Periodic report, § 176-178)

Hate speech offence

33. The essential element in inciting racial disharmony in section 131 of the Human Rights Act 1993 is that the person intended to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins. The New Zealand Government considers that the current law adequately addresses racially motivated hate speech. Creation of a further offence of “hate speech” is therefore not required. As discussed in the response to question 8, prosecutions for racially motivated crime can also be commenced under the Crimes Act 1961 or the Summary Offences Act 1981 because intent to incite racial disharmony is not required.

Arrangements for the media

34. Inciting racial disharmony through the media is no different in terms of criminal liability, although the media are also subject to regulation through the Press Council and the Broadcasting Standards Authority.

35. Guidelines for free-to-air broadcasters state that broadcasts should avoid portraying persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on grounds including race or cultural beliefs. The equivalent standard for pay-television states that people should not be portrayed in a way which represents them as inherently inferior or which encourages discrimination against a section of the community protected by human rights legislation.

36. Principles published by the Press Council (which deals with the print media) state that publications should not place gratuitous emphasis on characteristics including minority groups, race or colour. Where it is relevant and in the public interest, publications may report and express opinions in these areas. The Press Council is able to hear complaints from the Public and issue rulings as to whether one of the principles has been breached.

Other avenues available

37. There are other avenues available to those subject to racial harassment. In 2006, 24% of complaints received by the Human Rights Commission were about racial harassment and complaints are often resolved through mediation. For example, when cartoons were published in a Danish newspaper depicting the Prophet Mohammed which led to global protests by Muslims, a number of New Zealand media reproduced the cartoons to illustrate the international news story. There were peaceful local protests as well as threats of international sanctions. The Race Relations Commissioner convened a meeting of the media and religious leaders to discuss the issue. The resulting joint statement emphasised:

    - the increasing diversity of cultures and faiths and the challenges this raises for the media and the New Zealand community;
    - the importance of freedom of expression, noting that such freedom however is not absolute and should reflect sensitivity of diverse cultures and the responsibility to inform the community about diverse cultures and beliefs; and
    - the importance of establishing dialogue between the media and faith communities.

38. The editors of the newspapers concerned apologised for any offence caused and undertook not to further publish the cartoons. That was accepted by the Federation of Islamic Associations. The Human Rights Commission was asked by the meeting to facilitate further discussion, in

consultation with the media, faith communities and educators, and the NZ Journalists Training Organisation was asked to address training issues arising from the controversy.

Question 8

Please explain why the police tend to prosecute offences of incitement to racial disharmony under the Crimes Act of 1961 or the Summary Offences Act of 1981, rather than under Sections 131 of the Human Rights Act. What differences does this entail? Is this the reason why only nine applications for prosecution under section 131 of the Human Rights Act have been made since 1994? Please also provide more detailed information on the eight cases to which the Attorney-General has not given his/her consent for prosecution under Section 131. (Periodic report, § 176 and 186)

39. Referrals for prosecution under s 131 of the Human Rights Act 1993 are only made to the Attorney-General following in-house scrutiny by New Zealand Police Legal Services. Only very few matters are referred because there are very few instances detected as, arguably, satisfying the elements of the offence. (The test as to whether the prosecution is likely to succeed is a dominant factor in exercising the prosecutorial discretion.)

40. In the experience of Police Legal Services, crimes motivated by race hate (although constituting behaviour that can be extremely threatening and abusive) often do not have the consequence required under s 131 that the conduct have the likely effect of exciting hostility against or bringing into contempt any racial group.

41. As drafted, section 131 is a section concerned with "incitement". The abusive, but isolated behaviour of individuals does not qualify as incitement. Having said that, other aspects of the criminal law do sanction certain conduct motivated by race hate and these criminal provisions are used because they will lead to successful convictions. A matter recently declined for prosecution under the Human Rights Act proceeded under section 8 of the Harassment Act 1997 on a charge of criminal harassment.

42. Offences involving incitement to racial disharmony are likely to be prosecuted under the generic offences of unlawful assembly and riot (sections 86 and 87 Crimes Act 1961), and disorderly behaviour and offensive behaviour or language (sections 3 and 4 Summary Offences Act 1981). Often, damage to property or violence against the person will accompany incitement to racial disharmony. Where this is the case, additional charges will be laid.

43. There are two main reasons why offenders are prosecuted under the generic offences above. First, the generic offences will be preferred if there is likely to be an argument about whether the defendant intended

to incite racial disharmony by his or her alleged conduct. Intent to incite racial disharmony is not required with the generic offences. Secondly, the Crimes Act offences have maximum penalties of one and two years imprisonment, which are higher than the Human Rights Act offence (three months or a fine not exceeding $7000).

44. Some jurisdictions have specific offences for racially motivated crime, while other jurisdictions provide enhanced sentencing provisions. New Zealand generally follows the latter approach, choosing to punish crime that is racially motivated more severely than comparable offending that is not (see discussion of section 9(1()(h) of the Sentencing Act 2002 below).

45. In 2006, the Police produced an online resource to raise front line awareness and provide assistance to officers investigating racially motivated crime. The resource defines "hate crime" and the law under which "hate crime" charges can be laid.

46. Permission to prosecute under section 131 was declined in respect of eight individuals; however, these related to only four incidents, some with multiple defendants. In all four cases, at least part of the reason for declining consent was a lack of evidence relating to one of the elements of the offence: namely an intention to incite hostility or the likelihood that hostility would in fact be incited. While racist comments appeared to have been made, there was nothing to suggest that the remark was intended to incite hostility in others. In two of the four cases, there was an additional factor indicating that consent should not be given. In one case, delay in bringing the prosecution meant that the public interest would not have been served by consenting to the prosecution. In another, there was a difficulty in attributing the specific comments said to have been made to specific defendants, meaning that there was no evidential sufficiency as required by the Prosecution Guidelines.

Question 9

Please provide more detailed information on cases where section 9 (1) (h) of the Sentencing Act 2002 has been invoked by alleged victims and implemented by courts. Please also explain under which legislation "reported incidents where some ethnic groups have been subjected to some harassment and abuse" have been addressed. (Periodic report, § 177-178)

47. Section 9 of the Sentencing Act 2002 sets out the aggravating and mitigating factors that a court must, where applicable, take into account when sentencing an offender[9]. Section 9 codified the existing common law on aggravating and mitigating factors.

[9] Note that section 9 explicitly provides that it does not prevent the court from taking into account any other aggravating or mitigating factor that is not listed.

48. In sentencing an offender, the court usually arrives at a "starting point" for the offending that takes into account all the aggravating and mitigating factors relating to the offending including, where appropriate, that the offending was racially motivated. The courts usually specify how much the starting point has been increased by the aggravating factors as a whole, but does not usually specify the increase to the starting point as a result of each individual aggravating factor. Once the court has arrived at a starting point, it then adjusts the starting point to take into account any mitigating factors relating to the offender, such as a guilty plea, to arrive at the final sentence.

49. There have not been many cases since the Sentencing Act came into force in July 2002 where racial motivation has been a significant aggravating factor. However, there are several cases of note where section 9(1)(h) has been discussed and/or applied, or which otherwise involve sentencing for racially motivated offending:

50. *Police v Whitwell* (District Court, 19 July 2005) – In this case a woman assaulted another woman in a public toilet in a racially motivated attack. In sentencing, the judge stated that "[t]he Sentencing Act is quite clear. Racially motivated attacks are to be denounced and are to be punished". The judge increased the sentence of imprisonment that would otherwise have been appropriate by three months, from 15 to 18 months, on account of the fact that the offending was racially motivated. This is the only known case where the court has stated the increase in the sentence due solely to the offending being racially motivated.

51. *R (the Crown) v Taueki* (Court of Appeal, 30 June 2005) – In this case the Court Appeal issued a "guideline judgment" on sentencing for offences involving grievous bodily harm (guideline judgments are intended to guide all courts in sentencing for a particular type of offence). Citing section 9(1)(h), the Court stated that it would be an aggravating factor justifying a higher starting point "[w]here the attack is inspired by racism, homophobia or hostility to any other group".

52. *R v Johansen* (High Court, 2 June 2005) – This case involved the attempted murder of one inmate by another which was, at least in part, racially motivated. The Court imposed preventive detention (essentially a life sentence) on the offender on the basis of his risk of serious reoffending, which was "heightened by [his] racist belief system".

53. *R v Dixon* (High Court, 27 May 2005) – In this case the offender was found guilty of murder, with race being a factor in the selection of the victim. The Sentencing Act contains a strong presumption in favour of a life sentence for murder. If a life sentence is imposed, the court must specify the minimum period before the offender is eligible for parole, which must be at least 10 years. Section 104 of the Act provides that a minimum period of at least 17 years must be imposed if serious specified aggravating factors are present, one of which is a high level of callousness. In this case the court held that section 104 applied because

"[t]he sinister racial overtone confirms the utter callousness of Mr Dixon's approach to the murder". The court imposed a minimum period of 20 years.

54. *Police v Tomlinson* (District Court, 29 April 2005) - In this case the offender, who was taking part in a National Front[10] rally, spat on the shoes of a Māori/Indian man as he walked past. While the offending was low level, the judge took into account that "the Court's [sic] are directed to pay attention to matters where race is involved". The judge acknowledged that the defendant had pleaded guilty and had "been out of trouble for some time", but rejected defence counsel's submission that a fine was the appropriate response. The Judge imposed 120 hours community work, stating that "[o]ur country is a multi-cultural society whether you like it or not. All its citizens deserve to be respected equally".

55. In summary, New Zealand does not generally have specific offences for racially motivated crime. Instead, alleged offenders are charged with offences under the general criminal law (usually under the Crimes Act 1961 or Summary Offences Act 1981) and the fact that a specific instance of offending was racially motivated is treated as an aggravating factor under section 9(1)(h) of the Sentencing Act.

Question 10

Please explain the reasons why there is no Police recording of complaints, prosecutions and sentences relating to racially motivated crime. Does the State party envisage establishing official databases on complaints, prosecutions and sentences for such crimes? (Periodic report, § 178 and Annex 3, Race Relations in 2005, p. 44)

56. Currently, the New Zealand Police record crimes according to legal definitions of offences. The motivation for a given offence is not normally a specified ingredient. Some attributes of offences are more difficult to collect reliably than others. The nature of motivation is a particularly unreliable attribute, as it is not always evident, difficult to define, and difficult to measure consistently. As noted in relation to Question 9, New Zealand law generally treats racial motivation as an aggravating factor in sentencing, rather than as an explicit element of the offence.

Question 11

Please explain the reasons why a procedural exemption has been introduced in the Immigration Act 1987, by which the publicly funded complaints process is not available for actions that allege discrimination in relation to the

[10] The National Front is a nationalist organisation. Some of its members, and the organisation itself, have been accused of holding and promoting racist views.

Immigration Act. What is the position of the State party in relation to the recommendation of the Human Rights Commission to repeal Section 149 D of the Immigration Act, which excludes the Act from the jurisdiction of the Human Rights Commission? (Periodic report, § 180 and Annex 4, New Zealand Action Plan for Human Rights, Summary report, p. 24)

Background

57. The procedural exemption in section 149D of the Immigration Act was introduced by the Human Rights Amendment Act 2001, and replaced an exemption that was broader in nature. The Human Rights Amendment Act 2001 added a new Part 1A to the Human Rights Act 1993. Part 1A enables complaints to be brought against government agencies under a publicly funded complaints process in respect of unlawful discrimination on the grounds specified under section 21 of the Human Rights Act 1993. Complaints may be resolved by the Commission using voluntary mediated processes or may be taken to the Human Rights Review Tribunal for legal determination. In the case of legislation that the Tribunal finds is inconsistent with the right to be free from discrimination, and which cannot be justified under section 5 of the New Zealand Bill of Rights Act 1990, the Tribunal may issue a declaration of inconsistency. This does not invalidate the legislation but requires the relevant Minister to table a response in Parliament within 120 days of the declaration, or resolution of any appeals related to the declaration.

58. The effect of section 149D is that the Part 1A process cannot be followed where the complaint relates to the Immigration Act 1987 or policies made under it.

59. Section 149D also prevents the Commission from exercising its functions under section 5(2)(i) and 5(2)(j) of the Human Rights Act – essentially preventing the Commission from bringing or intervening in proceedings relating to the content or application of the Immigration Act, or regulations or government immigration policy made under it. The Commission retains the ability to exercise its other functions listed in section 5(2), including the ability to inquire generally into any law or practice, or to report to the Prime Minister on any matter affecting human rights. This includes exercising these functions in relation to immigration legislation, policy or practices.

Rationale

60. Section 149C of the Immigration Act 1987 (also introduced by the HRA 2001) states the purpose of s.149D as follows: “Section 149D recognises that immigration matters inherently involve different treatment on the basis of personal characteristics”. This recognises that it is very easy for applicants to allege that an immigration selection policy which includes criteria relating, for instance, to age or health status is discriminatory.

61. The procedural bar in s.149D gives priority to the importance of resolving immigration matters in a way which is "firm, fast and fair". It is preferable for the procedures in the Immigration Act to be the primary means of resolving disputes about individual immigration decisions, rather than creating a parallel dispute resolution system for individual cases. Without the procedural bar there is a risk that applicants will use the Part 1A complaints process for the purpose of delay, which has the potential to undermine the operation of the immigration system.

Safeguards

62. Section 149D does not exclude the operation of the New Zealand Bill of Rights Act 1990. The government still has an obligation to ensure that immigration policy and practice are consistent with the right to be free from discrimination under section 19 of NZBORA. This means that distinctions which may be drawn on the basis of one or more of the prohibited grounds of discrimination must still be capable of justification under section 5 NZBORA as limitations justifiable in a free and democratic society. Cases alleging inconsistency with NZBORA must, however, be brought in the High Court which is a more formal and expensive process than the publicly funded (free) process under Part1A of the Human Rights Act.

63. The Committee may also wish to note that the procedural bar does not exclude complaints being brought on the basis of discriminatory conduct by immigration officials (e.g. the use of racist language) outside the scope of government immigration policy.

Recent developments

64. During 2006, the New Zealand Government undertook a comprehensive review of the Immigration Act. In its submission on a public discussion document on this review, the Human Rights Commission submitted that section 149D should be repealed. For the reasons noted above, the government decided that an equivalent provision to the current section 149D should be retained in the Immigration Bill to be introduced in 2007.

Article 5

Question 12

Please comment on the information according to which in 2005, approximately 6 per cent of land remained in Māori ownership and 94 per cent of Māori ancestral land base has been appropriated through various processes conducted over time.

Introduction

65. Māori land is governed by a separate tenure system and is defined by Te Ture Whenua Māori Act 1993 as one of the following:

- Māori freehold land: where the beneficial ownership has been determined by the Māori Land Court and the court continues to exercise jurisdiction and power in relation to effective use, management and development of the land. The court also maintains the ownership list;
- Māori customary land: land that has not had its ownership determined by the Māori Land Court or ceded either to the Crown or by private sale; and
- general land: Māori can also own land in an estate in fee simple which is known as general land. General land is private land that can be owned by anyone.

66. From 1840 to 1974 the main driver behind the Māori land legislation had been to convert as much Māori customary land to Māori freehold land as possible for the purpose of sale and management. Since 1974, there has been recognition that Māori land is a taonga[11] that should be retained in Māori ownership. A more detailed explanation of Māori Land policy from 1840 to the present day is set out in Appendix II.

67. Around 1.3 million hectares of land in New Zealand is designated as Māori freehold land[12], just under five percent of the total 26.4 million hectares in the country. The exact amount of customary land is unknown but is believed to be extremely small. The extent of general land owned by Māori is also unknown. In most cases, the land transferred to Māori as part of the Treaty settlement process is held as general land rather than Māori land under Te Ture Whenua Māori Act.

68. In recent times sales of Māori land have been rare due to Te Ture Whenua Māori Act. There is a greater recognition that Māori land has characteristics which are markedly different from general land.

Question 13

Please explain why and how 2008 and 2020 have been chosen as cut-off dates for, respectively, the lodging and settlement of historical Treaty claims. Please also explain further what "contemporary matters" are, and why September 1992 has been chosen as criteria to distinguish between historical claims and contemporary matters. (Periodic report, § 34 and 38)

[11] treasure (tangible and intangible)
[12] Māori Land Court http://www.justice.govt.nz/Māorilandcourt/aboutmlc.htm (06.07.07)

69. A closing date of 1 September 2008 for the submission of historical Treaty claims was set by an amendment to section 8 of the Treaty of Waitangi Act 1975. Claims submitted before 1 September 2008 can still be amended after this date and extra information can be added, but all historical claims must be submitted by 1 September 2008.

70. Māori can still negotiate settlements of their Treaty claims with the Crown without registering a claim with the Waitangi Tribunal.

71. This is one of several current policy initiatives closely linked to the government's target of settling all historical Treaty of Waitangi claims by 2020, and will give claimant groups, the Waitangi Tribunal, the government, and all New Zealanders greater certainty about the number and scope of historical claims still to be settled.

72. The target date to settle all historical Treaty claims is 2020. This is broadly consistent with a forecast of what settlements remain to be negotiated and current rates of achieving settlements. It recognises that the process of settling historical claims is not intended to carry on indefinitely.

73. "Contemporary claims" (relating to acts or omissions by the Crown in breach of the principles of the Treaty of Waitangi after September 1992) are not affected by the closing date and can be submitted to the Waitangi Tribunal at any time.

74. The distinction between historical and contemporary claims was drawn in the early 1990s when the policy framework for negotiating historical claims was established. If a Crown act or omission causing a Treaty grievance occurred before 21 September 1992 (the date of the signing of the Commercial Fisheries settlement), redress for the grievance is covered by the process for negotiating historical claims through the Office of Treaty Settlements. Redress for acts or omissions from after that date are addressed on a case by case basis by the relevant government department.

Question 14

In relation to the Foreshore and Seabed Act 2004, please provide more detailed information on the proportion of indigenous groups that have entered into negotiations with the Crown or applied to the Māori Land Court for customary rights orders, in comparison to those that have not done so. What follow-up has been given by the State party to the recommendations made by the Committee in its decision 1 (66)? (Periodic report, § 64)

75. In New Zealand's last census (in 2006) 565,329 people said they were Māori. For territorial customary rights applications, the Foreshore and Seabed Act provides for applications to be made by a "group". This term is not defined. An application for a customary rights order can be made

by a whanau (family/extended family), hapu (sub-tribe or large extended family grouping) or iwi (tribe).

Groups currently in territorial customary rights negotiations

76. Three representative groups have entered into negotiations with the Crown for an agreement on redress for territorial customary rights. These are rights that the groups would have had, were it not for the vesting of the foreshore and seabed in Crown ownership under the Foreshore and Seabed Act.

77. The first group is *Te Runanga o Ngati Porou*, which holds a mandate to represent 40 out of 51 hapu (sub-tribes) of the iwi (tribe) Ngati Porou in the foreshore and seabed negotiations. Ngati Porou is the second largest Māori grouping in New Zealand. In the 2006 census, 71,910 people (approximately 12.7% of all Māori) claimed an affiliation with Ngati Porou.

78. The second group is *Te Runanga o Te Whanau* which, for the purposes of foreshore and seabed negotiations, represents all 14 hapu of Te Whanau a Apanui. In the 2006 census, 11,808 people (approximately 2.1% of all Māori) claimed an affiliation with Te Whanau a Apanui.

79. The third group is the *Ngati Porou ki Hauraki Trust*, which represents a discrete group for the purposes of foreshore and seabed negotiations. In the 2006 census, 1,173 people (approximately 0.2% of all Māori) claimed an affiliation with that group.

Groups with Customary Rights Order applications currently before the Court

80. Eight groups, of varying sizes, have applied to the Māori Land Court for Customary Rights Orders. Of these, four applications have been publicly notified and the first judicial conferences held to co-ordinate the collection of the relevant information. Two applications are in the preliminary stages of public notification. Two applications have been dismissed by the Court.

Comparison

81. There are many other groups with potential claims, especially for Customary Rights Orders. Our assessment is that such groups are treating the current matters as test cases and are awaiting the outcomes before deciding whether to file their own application.

What follow-up has been given by the State party to the recommendations made by the Committee in its decision 1 (66)?

82. The implementation of the Foreshore and Seabed Act is still relatively new. The implementation of the legislation is still in a “testing” phase.

No applications to the High Court or Māori Land Court have yet been completed. The government is taking a pro-active role in both territorial customary rights negotiations and applications for customary rights orders. Once the first applications under each process have been completed the government will be in a position to re-assess whether the legislation meets the objectives.

83. The nature of the New Zealand democratic system means that dialogue on the Foreshore and Seabed legislation, as with all other legislation, is unrestricted and ongoing.

84. The choice by three groups to opt for negotiated redress agreements, rather than seeking the redress available under the Act has enabled the government to take a flexible and open-minded approach to the development of redress options, based on the interests and objectives of each particular group.

Question 15

Please provide information on results achieved by the implementation of section 27 of the Sentencing Act 2002. In addition to the reasons provided in relation to the over-representation of Māori "as offenders", has the State party assessed the extent to which the over-representation of Māori in prisons could be due to racial bias in arrests, prosecutions and sentences? How does the State party explain the over-representation of Pacific people in prisons? (Periodic report, § 151, 158 and 167).

Section 27

85. The Ministry of Justice does not record how often section 27 is utilised by offenders prior to sentencing. Section 27 creates a presumption that the Court will hear from anyone called by the offender on any of the matters specified in that section unless the Court is satisfied that there is some special reason that makes this unnecessary or inappropriate. Section 27 essentially carries over Section 16 of the old Criminal Justice Act 1985. In *R v Bhaskaran* 25/11/02 CA333/02, the Court of Appeal indicated that it placed considerable emphasis on those representations:

> Community support for rehabilitation may be very relevant to the nature or length of sentence. Where, as in this case, there is a bad past record, support systems to assist rehabilitation upon release from prison could tend to mitigate a sentence influenced by considerations of personal deterrence and rehabilitation … Moreover a Court must be astute to recognise the valuable assistance it may obtain from another cultural, ethnic or other community insight, including on matters of penal concern.

Potential for racial bias to contribute to over-representation

86. The New Zealand Government has considered whether the over-representation of Māori and Pacific people in prisons could be due to racial bias in arrests, prosecutions and sentences. The Ministry of Justice and the New Zealand Police carried out a preliminary assessment of existing research and other evidence on this issue in 2006. No conclusive picture as to the existence and extent of actual bias emerged, although perceptions of bias are held by many members of the affected communities. In May 2007 Cabinet directed the Ministry of Justice to develop a detailed research proposal to investigate the way that discretionary powers in the criminal justice system are exercised, using a whole-of-system approach that enables officials to identify the various points of potential bias throughout the system, and the potential impact that bias has on Māori and Pacific peoples. This research will also take into account work done by the Department of Corrections in 2006-7 on these issues (Periodic Report para 159).

87. In addition to the planned bias research, the government also in May 2007 approved a range of other research and practical initiatives to address rates of offending, re-offending and imprisonment among Māori communities, known as the Programme of Action for Māori. There is an emphasis in this Programme on increasing support and funding for practical initiatives that are designed, developed and delivered by Māori. Examples include iwi crime reduction plans, youth gang mediation work and an initiative in Auckland to assist re-integration of released prisoners into the community (Manukau Urban Māori Authority). Evaluation of the results of initiatives to gain a better understanding of "what works for Māori" is also a critical feature of the Programme.

Over-representation of Pacific people in prisons

88. Pacific peoples constitute 6.9% of New Zealanders, but this proportion is predicted to reach 13% by 2016. They are a predominately young population, with close to 40% under 15 years of age. Around 60% were born in New Zealand. New Zealand Pacific peoples are primarily Samoan (47%), Cook Island (20%) and Tongan (18%), along with Niuean, Fijian and Tokelauan ethnicities. Sixty seven percent of Pacific peoples live in Auckland, 13% in Wellington and 4% in Canterbury. There are distinct differences in Pacific cultures (and offending patterns) between, for example, Fijians, Samoans and Tongans. There are also differences in attitudes depending on whether individuals were born in New Zealand or the islands.

89. A number of features have a particular bearing on the nature and level of offending by Pacific peoples in New Zealand, including language and communication issues and the community and cultural experience of a largely village-based migrant group in New Zealand society. This experience includes the breakdown of traditional social control infrastructure and the contrast of traditional attitudes towards children,

violence and sexual behaviour with those of New Zealand and its criminal justice system.

90. Most Pacific peoples in New Zealand live in strong, vibrant, supportive and law abiding families. However, whilst the drivers associated with offending in this population can be very similar to other groups, the patterns of offending are significantly different. Key differences in the pattern are:

- late onset of offending
- lower re-offending rates
- higher incidence of violent and sexual offending
- significant association of offending with alcohol abuse and problem gambling.

91. The Ministry of Justice has worked with the Ministry of Pacific Island Affairs and representative organisations of Pacific people to develop a Pacific Programme of Action to harness the enthusiasm, skills and strengths of Pacific communities. It is acknowledged that government agencies need to work together to support communities, providers and other agencies to deliver practical initiatives and address gaps in delivery in a way that reflects the particular characteristics of offending by Pacific peoples. Progress will be reviewed in 2009.

Question 16

Please indicate to what extent the support provided by the State party to Māori language learning is sufficient to satisfy the demand for such education. (Periodic report, § 109-110)

92. The Education Act 1989 provides universal free education for children and young people between the ages of 5 and 18 (s3 refers). It also:

> (a) requires that all schools must aim to ensure that all reasonable steps are taken to provide instruction in tikanga Māori (Māori custom) and te reo Māori (Māori language) for full-time students whose parents ask for it (s61 (3) (a) (ii) refers); and
>
> (b) facilitates the establishment of schools that operate according to Māori principles and teach through the medium of the Māori language where there is demand from the parents of at least 21 children (s 155 refers).

93. Enrolments in these programmes have remained constant since 2001, indicating that there is not significant unmet demand for these services. The Ministry of Education is currently developing a Māori Language Education Outcomes Framework to strengthen the delivery of these

services, and to ensure alignment with other Māori language programmes and services provided by the government through its Māori Language Strategy.

Question 17

Please report on action taken by the State party to ensure that migrant selection criteria and procedures are not discriminatory in their effect, as recommended by the Human Rights Commission. (Periodic report, § 208-210 and Annex 7; and Race relations in 2006, p. 7)

94. Government immigration policy is set with the aim of not discriminating against any particular nationality, race, or ethnicity, except where there are overwhelming reasons (either humanitarian or recognising international obligations) to positively discriminate. While the Immigration Act contains a provision that limits the application of the Human Rights Act (question 11 refers), the New Zealand Government seeks to ensure that human rights legislation is complied with wherever possible and, where apparent departures do occur, ensures that there is sufficient reason for maintaining a distinction.

95. Immigration criteria test individuals against specific policy parameters (such as the individual's skills and potential contribution, or their family relationship to a New Zealand citizen or permanent resident), regardless of those individuals' citizenships. New Zealand has many different immigration residence categories, catering to skilled/business, family, and humanitarian migrants. A wide range of nationalities successfully gains residence through these policies.

96. In 2006/07, for example, the United Kingdom contributed the highest percentage of migrants at 26%. This was followed by: China (12%); India (9%); South Africa (8%); the Philippines (6%); Fiji (5%); Samoa (4%); the United States (3%); and South Korea, Tonga and Germany (all on 2%). Another 129 nationalities made up the final 20%.

97. There are two major residence policies which specifically discriminate in favour of certain nationalities: the Samoan Quota and the Pacific Access Category, which recognise New Zealand's special relationship with the countries of Samoa, Tonga, Kiribati, and Tuvalu. In addition, from time to time time-limited special residence policies have been put in place for humanitarian reasons: most recently a Special Residence Policy has enabled Zimbabweans in New Zealand on temporary permits to be granted permanent residence.

Question 18

Please provide more concrete information on results achieved by the 2004 New Zealand Settlement Strategy. (Periodic report, § 211)

98. Since the Settlement Strategy was developed, the government has approved a Settlement National Action Plan. The Action Plan builds on existing settlement initiatives and government commitments, and responds to issues identified through consultations with migrant and refugee communities, to be the basis for ongoing interagency activity to enhance settlement outcomes in New Zealand.

99. The Action Plan both encourages strategic planning and collaboration going forward, and sets out 25 activities (amongst 17 agencies) which build specifically on current settlement initiatives. They primarily focus on addressing gaps in current settlement service delivery, and on the identification of good practice for new or extended services. Some of the initiatives are:

    - advice on the whole-of-government benefits and costs of broadening the provision of government-funded settlement-related services to temporary permit holders;
    - a Home School Partnership Scheme in secondary schools to improve learning outcomes for migrant and refugee young people from cultural and language diverse backgrounds through the involvement of family in the learning of students;
    - a "road show" style series of education and training sessions with Housing New Zealand Corporation area units in the primary refugee resettlement areas;
    - improved settlement information for newcomers to New Zealand so that they have a better understanding of life in New Zealand and realistic expectations about living in New Zealand; and
    - innovative initiatives to increase the number of New Zealand born Cook Islands, Niue and Tokelau people who can speak their heritage languages and communicate in these languages with recent arrivals.

100. In addition, as part of the Auckland Sustainable Cities Programme, the Auckland region (led by the Auckland City Council) has developed the Auckland Regional Settlement Strategy. It supports and advances the New Zealand Settlement Strategy at a regional level, as Auckland is the primary point of entry to New Zealand and a key place of settlement for migrants and refugees. It aims to attract migrants who can contribute to the region's economic growth. Having well-settled migrants and refugees helps ensure that benefits around new ways of thinking, new knowledge and links to global markets are realised, enriches Auckland communities and benefits New Zealand as a whole.

Question 19

Please provide information on the extent to which undocumented children are entitled to benefits and other protection, in particular in the area of education and health.

Education

101. Under the Immigration Act 1987, it is currently an offence for education providers to enrol any child without the appropriate permit. The New Zealand Government has resolved to lift its reservations on the United Nations Convention on the Rights of the Child that limit access to publicly funded education and health services for children unlawfully in New Zealand.

102. As a consequence of this, the new Immigration Bill, which is in its introductory phase, proposes to eliminate the offence of enrolling unlawful children and to enable undocumented children to attend school conditional upon steps being taken to regularise immigration status (i.e. their parents are appealing their unlawful status). This Bill will not be enacted until 2008. As an interim measure, children are able to receive limited purpose permits for them to attend school during this time, provided these children are not alone in New Zealand, and their parents are taking steps to regularise their status.

Health

103. The Minister of Health's Eligibility Direction to health providers means that they have legal, as well as professional, obligations to provide acute services, irrespective of the person's immigration status and ability to pay. (People who have access to publicly-funded health services include New Zealand citizens and residents, people on work permits of more that two years' duration, and the dependents of eligible people.) For children unlawfully in New Zealand who are not the dependents of eligible people:

- treatment arising from accidents is provided on the same terms as for citizens and residents (i.e. the costs are substantively met from the public purse);
- emergency care is provided on the basis of the acute need, but cost reimbursement will be sought;
- non-acute medical care and disability services can be accessed, although charges may apply; and
- public health services, such as control of infectious diseases, are provided for the whole community, regardless of immigration or health funding eligibility status.

Question 20

Please provide updated information on the follow-up given by the State party to the concerns expressed by the Committee in paragraph 429 of its previous concluding observations, in relation to the detention of asylum-seekers (Periodic report, § 3).

104. The Mangere Accommodation Centre (MAC) is an approved premises for detention, and is generally only used for asylum claimants. The detention regime at the MAC is one of 'administrative' as opposed to 'penal' detention.

105. People detained at the MAC generally do not pose a particular threat to members of the public, but their identity is unconfirmed. They remain at the MAC while their refugee status claims are processed and their identity is satisfactorily established, unless released into the community on conditions.

106. The Refugee Council of New Zealand Inc and others brought representative proceedings in 2002 on behalf of persons detained in the MAC while their applications for refugee status were determined under the Immigration Act 1987. (*Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577). The principal issue in the proceedings was whether the statutory provisions relied on by the government applied to those who claimed refugee status upon arrival in New Zealand, and if so, what constraints arose under the UN Convention Relating to the Status of Refugees, and the New Zealand Bill of Rights Act 1990.

107. A further question was the lawfulness of the operational instruction issued to immigration officers to guide the exercise of their discretion under the Immigration Act to detain persons claiming refugee status.

108. In November 2002, the Court of Appeal held that claimants for refugee status could be detained under the Immigration Act. This provision was intended to enable an applicant's removal as soon as practicable after an application for refugee status has been declined. The Court also held that operational instructions did not require an unlawful approach by officers; though it had a precautionary theme, it had no bias towards detention and required assessment for detention purposes on the basis of the relevant factors and was consistent with the approach mandated by the Refugee Convention.

109. Data indicates that penal institution detentions are always fewer than detentions at MAC. In proportion to those granted permits straight away, however, approximately 60-65% of spontaneous asylum seekers are detained.

110. Note that border claims in the last three financial years to date made up 26.3%, 27.1% and 22.2% respectively of the total asylum claims lodged. A majority of asylum claims are made by those already in New Zealand, who may hold a permit.

Article 6

Question 21

According to the Human Rights Commission, the effectiveness of procedures to address racial discrimination may be compromised by a lack of public knowledge about the most appropriate avenue for particular complaints, inadequate accessibility by vulnerable groups and a lack of confidence by such groups in their effectiveness. What measures has the State adopted to address this issue? (Annex 4, New Zealand Action Plan for Human Rights, Full report, p. 335)

111. In the NZ Action Plan on Human Rights (published in 2004), the Commission identified accessibility to dispute resolution services as a potential barrier to human rights and harmonious relations in New Zealand. It noted that the effectiveness of procedures to address discrimination, including discrimination on the grounds of race, may be compromised by a lack of public knowledge about the most appropriate avenue for particular complaints, inadequate accessibility by vulnerable groups and their lack of confidence in the effectiveness of such an avenue.

112. The Commission acknowledges it has a role to play in addressing the issue, along with other State agencies such as Crown Law, the Human Rights Review Tribunal and the Ministry of Justice.

113. Recognising the need to address this issue from its perspective, the Commission has embarked on a staged process to raise awareness of its dispute resolution service and to address barriers that might inhibit access to it. It began by undertaking some research to determine the extent of the problem - both quantitative research looking at general access and qualitative research focussing on vulnerable groups where there was a perceived lack of access. From that research the Commission has developed a plan to address as effectively as possible (within limited resources) the issue of accessibility. Some initiatives include:

- greater engagement with targeted vulnerable groups to identify and establish their needs in terms of service delivery;
- a publication schedule to produce more accessible resources (simple documents in plain English with graphics, where appropriate translated into other languages) and customised appropriately for different audiences. One publication - '10 case studies that made a difference' - received good publicity. This (and the ongoing publication of 25 case studies a year) helps ensure that the Commission's processes are understood and demonstrates the value it adds;
- developing links with referral agencies so that they understand what the Commission does and how it can help so that these agencies are able to make appropriate referrals;

- linking with other complaints agencies in a 'complaints website' that enables parties to see that the Commission is the appropriate avenue for discrimination complaints;
- development of the Commission's systems to ensure easy access and customer focussed services;
- beginning to collect demographic data as a means of monitoring the profile of those who contact the Commission.

114. These initiatives will continue to be advanced in the 2007/08 year.

Article 7

Question 22

Please comment on information received by the Committee according to which the State party envisages removing references to the Treaty of Waitangi from the mainstream education curriculum.

115. The *New Zealand Curriculum*, *Draft for Consultation 2006* was published for consultation in 2006. This draft version did not contain explicit references to the Treaty of Waitangi as it was considered that the regulatory requirement on schools in regards to the rights of Māori students was explicitly expressed through other regulations already applying to New Zealand schools. The *New Zealand Curriculum* is one part of the National Education Guidelines, which also include the National Education Goals (NEGs) and National Administration Guidelines (NAGs). Through these, the government expresses and regulates its requirements on schools, including an explicit commitment to the Treaty of Waitangi. The Education Act 1989, requires school boards of trustees to develop school charters which give effect to the government's National Education Guidelines (see above). The Act also requires school charters to include policies and practices that reflect New Zealand's cultural diversity and the unique position of Māori culture; and to ensure schools take all reasonable steps to provide instruction in tikanga Māori and te reo Māori.

116. Through a range of statements in The *New Zealand Curriculum, Draft for Consultation 2006,* the government further reinforced the expectation that schools will ensure all students experience a curriculum that reflects New Zealand's bicultural heritage and its multicultural society. The curriculum also ensures that those students who identify as Māori have the opportunity to experience a curriculum that reflects and values their language and culture. The Treaty of Waitangi and Māori perspectives are also made explicit in three learning areas: health and physical education, learning languages and social sciences.

117. Since the publication of the *New Zealand Curriculum*, *Draft for Consultation 2006* an extensive public consultation process has been completed. Over 9,000 submissions were received and analysed by both independent researchers and the Ministry of Education. A significant number of submissions highlighted the value of making references to the Treaty of Waitangi more explicit in the final version of the *New Zealand Curriculum*. This recommendation is now being considered by the government.

Question 23

Please explain to what extent information conveyed through the Treaty of Waitangi Information programme has been elaborated with the participation of Māori peoples. Please provide further information on the extent to which diverging views on the status and meaning of the Treaty are presented and addressed. (Periodic report, § 27)

118. The State Services Commission has produced several publications providing information about the Treaty of Waitangi:

- a set of five booklets on the Treaty - *All about the Treaty*; *Timeline of the Treaty*; *The story of the Treaty - part 1*; *The story of the Treaty - part 2*; and *The journey of the Treaty*. These booklets can also be downloaded from the website http://www.nzhistory.net.nz/politics/treaty/treaty-faqs#WherecanIobtainprintedbookletsabouttheTreaty
- a CD-Rom for PCs and Macs entitled Step into a world where a nation was born. This CD-Rom is aimed at secondary school age students (Years 7 to 10 students); and
- a bi-lingual book for primary school children (Years 3 to 7 students) entitled *The Tree Hut Treaty / Te Tiriti o te Whare Rākau*.

119. Following its launch in April 2004 until June 2006, a quarter of a million visitors accessed the Treaty of Waitangi website. The website has now been incorporated into New Zealand History online - a website produced by the Ministry for Culture and Heritage. The Treaty of Waitangi section of that website is available at http://www.nzhistory.net.nz/category/tid/133.

120. Other initiatives organised through the programme included a travelling educational road-show (the Museum of New Zealand Te Papa Tongarewa's Treaty 2U touring exhibition) attended by tens of thousands of New Zealanders, community workshops and the distribution of quality educational resources for schools.

Question 24

According to the Human Rights Commission, there is insufficient public information, education, dialogue and exchange on issues of cultural diversity, the contemporary place of the Treaty of Waitangi, New Zealand history, and the stories and cultures of New Zealanders' countries of origin, and there is a lack of public education on human rights and race relations, including the rights of indigenous peoples, the human rights dimension of the Treaty of Waitangi, freedom from discrimination and the right to language and culture. Please comment. (Annex 4, New Zealand Action Plan for Human Rights, Full report, p. 336)

121. These comments from the Human Rights Commission are a summary of findings from the public consultation process for the development of the NZ Action Plan for Human Rights. The Action Plan subsequently identified a number of key priorities for action, and these are listed in the plan under the section headed "Getting it Right in Race Relations". Progress in achieving these actions is outlined in an appendix to the most recent Race Relations Report (Race Relations in 2006, published in 2007, p. 49ff). Copies of this report have been supplied to the Committee.

122. To amplify this response, below are a number of specific initiatives currently being undertaken to increase availability of information, education, dialogue and exchange. These initiatives support the government's priorities of *national identity*, *families, young and old* and *economic transformation*. Each agency has a number of intermediate outcomes that contribute to these three priorities. These goals are also outlined below.

Office of Ethnic Affairs (OEA)

123. OEA (refer to page 17 of CERD/C/NZL/17 for more information about the OEA and its purpose) contributes to the outcome of *sustainable communities/hapu/iwi* through a goal aimed at ensuring *communities recognise and enjoy the economic, social and cultural benefits of diversity*.

124. To achieve this goal, OEA has increased its capacity by one third in the last year in order to assist all communities enhance their intercultural competencies and to engage communities in dialogue about issues of racism and discrimination.

125. To this end, OEA has developed two training programmes aimed at enhancing intercultural communication skills in the workplace and intercultural awareness in developing government policy. These are called 'Ethnic Perspectives in Policy Training' and the 'Intercultural Awareness and Communications Training'.

126. In addition, OEA is about to launch a new authentic dialogue programme. This programme is designed to assist diverse communities

from both majority and minority cultures to openly discuss issues of difference, racism, intercultural understanding, adaptation and tolerance.

127. The visual resources for both these facilitated programmes and the training programmes include film clips, interactive activities, education kits and posters. These resources can be supplied on request.

128. OEA has also initiated a project in partnership with the Muslim community to build bridges with the host community. 'Building Bridges' has focused on the five areas of:

- Youth;
- Leadership;
- Media;
- Women; and
- Strategic directions.

129. Some of these strands have included Muslim communities arranging education for media and host community schools. It has also included building leadership among Muslim youth.

130. To provide more public information, OEA has led a number of projects aimed at increasing the visibility of ethnic minorities and their contribution to NZ's development. These have included increasing the visibility of immigrant minorities to the Pacific in events such as NZ's largest Polynesian festival. In the South Island, OEA has organised in conjunction with local councils a touring art/museum exhibition entitled 'Around the World in 30 Lounges', which aims to show how different ethnic minorities fuse NZ and other cultures in their lounges. A radio programme using resources from the exhibition has also sparked dialogue about NZ's emerging ethnic diversity.

Human Rights Commission

131. In addition to the actions identified in the appendix, which cover the issues identified by the Committee, the Human Rights Commission will be carrying out the following key activities through to 30 June 2008, as identified in its 2007-8 Statement of Intent:

- annual review of race relations (2007) – to be published in March 2008;
- continued expansion of the New Zealand Diversity Action Programme – a voluntary network of organisations, facilitated by the HRC, undertaking projects or programmes that contribute to cultural diversity and the maintenance and development of positive race relations (currently over 200 participant organisations);
- organisation of the annual New Zealand Diversity Forum;
- further development of established networks of organisations and individuals actively involved in language policy, interfaith dialogue,

refugee resettlement and diversity in the news media, including monthly newsletters for each network;
- continued acknowledgment of positive contributions to race relations, through the award of certificates and a monthly electronic newsletter;
- promoting government and community participation in Race Relations Day, the International Day for the Elimination of Racial Discrimination;
- identifying and promoting examples of good practice in Crown-Māori relationships, and raising awareness of indigenous rights and the Second International Decade on the Rights of Indigenous Peoples; and
- promoting participation in Māori Language Week.

Ministry of Culture and Heritage

132. The Ministry for Culture and Heritage supports the government's priorities through the outcome of enhancing: *the diversity, visibility and accessibility of our culture, and participation in cultural experiences*.

133. To deliver that outcome the Ministry gives high priority to making digital and online cultural content available more easily and to more people. Current web-based initiatives to achieve that include:

    - NZHistory**.net.nz** includes resources for teachers and students of New Zealand history or oral histories that draw on family memories as well as engaging people in the 'experience of history' through online interactivity and diverse content matter.
    - **Te Ara: the Encyclopedia of New Zealand** is an online encyclopedia that aims to be a comprehensive guide to New Zealand – its people, land, culture, history and identity. Te Ara's first theme, 'New Zealanders', covers the history, heritage and contemporary experiences of Māori people and the other peoples who have settled in New Zealand.
    - **NZLive.com** brings together and promotes information on New Zealand's cultural activities, services and products to local and overseas audiences. It is intended to improve the visibility of and access to New Zealand's cultural experiences and talent, and creative industries and services.

134. In addition to the above web-based programmes and initiatives the Ministry produces and contributes to historical publications of public interest. Its Broadcasting Programme of Action supports the role of public broadcasting in contributing to New Zealand's sense of cultural identity and to democratic participation.

135. The Ministry operates a cultural statistics programme jointly with Statistics New Zealand. This programme makes public a wide variety of information about various aspects of culture in New Zealand, including

cultural diversity. First published in 2006, the programme has produced a report series *Cultural Indicators for New Zealand*. The "Diversity" theme of this report contains indicators about Lottery Grants Board grants which are disbursed to minority ethnic cultural groups, and attendance and/or participation in ethnic cultural activities.

136. In addition, within the "Cultural Identity" theme, there is an indicator relating to Māori language retention in New Zealand. The Ministry is in the process of developing additional indicators relating to cultural identity, and diversity, which will augment those already in the report.

137. The Ministry administers several funds including:
    - commemorating Waitangi Day Fund, which is designed to encourage a wider spread of communities participating in Waitangi Day events; and
    - New Zealand History Research Trust Fund Awards in History, which offer financial assistance to people carrying out projects that will significantly enhance the understanding of New Zealand's past.

APPENDIX I - MANA KI TE TĀNGATA: THE NEW ZEALAND ACTION PLAN FOR HUMAN RIGHTS- EXTRACT FROM THE HUMAN RIGHTS COMMISSION'S RACE RELATIONS IN 2006 REPORT

Mana Ki Te Tāngata: The New Zealand Action Plan for Human Rights was launched by the Human Rights Commission in March 2005 as part of its specific responsibilities under the Human Rights Act. The Action Plan includes a section on "Getting it Right in Race Relations", which is reproduced below, along with key actions taken in relation to the identified priorities. The government is yet to formally indicate its response to the Action Plan as a whole, but a number of government agencies, as well as local government, community and private sector organisations are undertaking actions that are consistent with it.

Overall, action is being taken on most of the priorities.

1. Social and economic equality

Social and economic equalities arising from racial and ethnic discrimination are eliminated.

Note: Priority actions addressing specific issues of social and economic inequality are contained in other sections of the Action Plan. The priorities for action in this section focus on the legitimacy of special measures which aim to achieve equality.

Priority for Action	Key Actions taken by end 2006
Promote public understanding of the legitimacy of special measures to achieve equality under international and domestic law	Roundtable (March) and forum (August) on special measures organised by the Human Rights Commission and Victoria University Institute of Policy Studies, to be followed by a publication on the subject by the Institute of Policy Studies in 2007
Regularly review all special measures to achieve equality to ensure they are meeting their objectives	Government conducted a review of the effectiveness of "race-based" programmes in 2004-05 and developed guidelines for future programmes, including review

2. Indigenous rights

The particular rights of Māori as the indigenous people of New Zealand are respected and valued alongside the rights of all New Zealanders.

Priority for Action	Key Actions taken by end 2006
Promote public understanding of the rights of indigenous peoples and extend community dialogue on human rights and the Treaty of Waitangi	Human Rights Commission conducted community dialogue project on human rights and the Treaty 2003-06 State Services Commission Treaty

	Information Unit was established to run a three year Treaty Information Programme 2003-06
Contribute actively, with the participation of Māori, to the development of international human rights law relating to the rights of indigenous peoples	New Zealand supported a resolution tabled by African countries calling for further consultations on the text of the draft Declaration. UN resolved to defer consideration till 2007

3. Languages

By the bicentenary of the signing of the Treaty of Waitangi in 2040, New Zealand is well established as a bilingual nation, and communities are supported in the use of other languages.

Priority for Action	Key Actions taken by end 2006
Progressively provide opportunities for all New Zealanders to develop knowledge of tikanga Māori and the ability to communicate in both English and te reo Māori	Māori Language Week and awards Māori in the Mainstream curriculum development
Include te reo Māori and tikanga Māori in teacher education and professional development to ensure their effective use in teaching	No report
Ensure the continued survival and use of the Cook Island Māori, Niuean and Tokelauan languages in New Zealand and foster the retention and use of other Pacific languages	Government funding for Niuean language programme in 2005-06 and Cook Island and Tokelauan language programme in 2006-07. Curricula completed for Cook Is. Māori and Samoan
Develop a languages policy that encourages the learning of a range of languages and supports community efforts to teach heritage languages	Language Policy Network established Forums on language policy and on community languages at the 2005 and 2006 NZ Diversity Forums
Ensure all new migrants and refugees have access to appropriate English language tuition	Range of English language tuition programmes funded through the NZ Settlement Strategy and delivered through education institutions and voluntary groups such as ESOL Home Tutors
Extend the availability of the Language Line interpreter service to all public agencies	Government provided additional funding and by end of 2006, 39 public agencies were participating in Language Line

4. Migrants and refugees

The human rights of migrants, asylum seekers and refugees are protected at all stages of the migration process. Migrants and refugees are welcomed by their host communities and given the necessary assistance to settle and integrate in New Zealand.

Priority for Action	Key Actions taken by end 2006
Repeal section 149D of the Immigration Act which excludes the jurisdiction of the Human Rights Commission in respect of government immigration policy and individual decisions giving effect to immigration policy	Following a review of the Immigration Act the government decided in December 2006 to retain an exclusion relating to individual immigration decisions
Work towards ratification of ILO Convention on Migrant Workers (Supplementary Provisions) and the UN Convention on the Rights of All Migrant Workers and their Families	Government considers aspects of these conventions to be inconsistent with New Zealand policy and legislation, and therefore has no plans to ratify
Further develop and resource the New Zealand Settlement Strategy for migrants and refugees	Strategy reviewed and amended in 2006
Develop migrant and refugee settlement plans for each local authority	New Zealand Settlement Support has established settlement support programme coordinators in 19 regions Auckland regional settlement strategy completed 2006
Increase resources for non-governmental and community groups to support settlement of newcomers to New Zealand	Refugee and Migrant Service, ESOL Home Tutors, Auckland Regional Migrant Service and other NGOs supported through Settlement Strategy funding

5. Cultural diversity
New Zealanders value and celebrate their diversity

Priority for Action	Key Actions taken by end 2006
Strengthen the networks of people and organisations that contribute to harmonious race relations and cultural diversity	NZ Diversity Action Programme established, with 184 participating organisations by end of 2006
Establish a cultural diversity website and portal that provides access to information on New Zealand's diverse communities and facilitate communities to develop their own websites and resources	Ministry for Culture and Heritage has developed major resource on Māori and migrant communities in Te Ara, the online New Zealand encyclopaedia, and in 2006 launched NZLive.com, a cultural portal
Establish a diversity centre that is able to lead research, inform debate and connect researchers in different institutions and organisations	Victoria University Centre for Applied Cross-Cultural Studies has established a national network of diversity researchers and led discussion on research priorities together with the Office of Ethnic Affairs
Improve the reflection and promotion of cultural diversity in the media and communications industry	Media and Diversity network established A number of initiatives taken by the Journalism Training Organisation New intern scheme established by Fairfax Newspapers Ltd Asia NZ media programme developed

Provide increased central and local government support for the celebration of cultural diversity through the arts and through religious, cultural and national festivals and events	Cultural Diversity strategy developed by Creative NZ Growth in public support for major cultural festivals and events
Support the participation of ethnic communities in historic, cultural and environmental conservation	Chinese Heritage Trust established
Foster community dialogue between people of different views, cultures and faiths	National Interfaith Network established National Interfaith Forum (February) and Religious Diversity Forum (August) held annually Draft national statement on religious diversity developed 2006

APPENDIX II: MĀORI LAND POLICY AND OWNERSHIP SINCE 1840

1840s

1. Pre-European settlement, Māori had customary title to all land in New Zealand. The Treaty of Waitangi was signed in 1840 and established the Crown's right of pre-emption over the sale of any Māori customary land. During 1844-1846 Governor Fitzroy waived the right of pre-emption. Much of Auckland city land was purchased under this system. Pre-emption was reintroduced by The Native Lands Purchase Ordinance 1846, which prohibited private selling and leasing of Māori land under customary title. However, the law was widely ignored and by 1848 most of the South Island was signed away by Māori in exchange for promises of reserves.

1850s

2. Large scale government purchasing continued especially in Northland, Wairarapa, Hawkes Bay and Manawatu. By 1852 Māori ownership of land had been reduced to 13.7 million hectares.

1860s

3. About two-thirds of the country, including virtually the whole of the South Island had passed out of Māori ownership by 1862. Under the New Zealand Settlements Act 1863 over 0.4 million hectares of Māori land in Taranaki, the Waikato, South Auckland, the Bay of Plenty, and Hawke's Bay was confiscated by the Crown during 1864 -1867. Most of the confiscated land was granted to private individuals or retained by the Crown.

4. The Native Lands Acts 1862 and 1865 waived the Crown's pre-emptive right to purchase Māori land, so Māori could sell to anyone. The Acts saw the establishment of the Native (now Māori) Land Court where Māori could go to convert their customary title to freehold title. Ownership would be granted to no more than ten owners. The Court issued titles at a rapid rate and much land was sold, particularly to pay debts. Between 1865 and 1875 an estimated 4 million hectares of land was sold.

5. The 1867 amendment to the Native Lands Act required the names of any other owners to be endorsed on the back of the title. The ten owners listed on the front could lease but not sell. The Native Lands Act 1869 allowed the sale of Māori land but prohibited alienation by a minority of owners.

1870s

6. The Native Land Act 1873 required that all owners be registered, and presumed they all had equal rights. Titles became very crowded and a block could not be sold or leased without the consent of every owner. Owners could however sell their individual shares and the Crown commenced purchasing these shares and applying to the court to

partition (subdivide) out their interest. A majority of owners could apply to partition out their interests and sell them, but any undivided interests were protected against any action to recover debt.

1880s-1900s

7. Under the Native Equitable Owners Act 1886 owners left off titles under earlier legislation could apply to have their names added. The Native Land Act 1887 saw large-scale direct purchase of Māori land. During 1873-1885, around 0.4 million hectares of Māori land were sold for £326,965.

8. The Liberal party came to power in 1890 and abolished the Native Department. By 1891 there remained 4.4 million hectares of Māori land. Pre-emption was reintroduced in 1894.

1900s and 1910s

9. The Native Land Act 1909 consolidated a lot of the previous legislation. The objective of the Act was to restrict Crown purchasing of undivided shares in Māori freehold land. It permitted the resumption of private purchasing and intended to extinguish Māori customary title. However the practical consequences of the Act do not seem to have been very significant.

1920s – 1940s

10. By 1920 there remained only 7.7 hectares of Māori land per head of North Island Māori, much of it marginal land.

11. During this period successive governments began to accept that Māori needed assistance and encouragement to develop their own lands. The Native Lands Act 1929 and the Native Land Claims Adjustment Act 1929 provided for large-scale development schemes. The rate of Māori land purchasing declined rapidly after 1935 and much more effort was concentrated on correcting the problems caused for Māori land ownership by overcrowded titles. The Native Minister Sir Apirana Ngata used large-scale depression era schemes to develop unproductive Māori land using unemployed Māori labour and credit provided by the State.

12. During the war years large-scale migration of Māori took place, from rural areas to the cities and towns. This increased due to the Town and Country Planning Act 1953 which prevented Māori from building on their land.

1950s – 1980s

13. The Māori Affairs Act 1953 consolidated many previous Acts. The main effect of the Act was to introduce provisions for conversion. Any uneconomic interests in Māori land would be compulsorily acquired and

pooled by the Māori Trustee who could then on-sell such interests to a restricted class of alienees.

14. Conversion was not popular and was abolished by the Māori Affairs Amendment Act 1974. This Act reflected a very different approach to dealing with Māori Land by recasting the functions of the Department of Māori Affairs to include "the retention of Māori land in the hands of its owners, and to its use or administration by them for their benefit."

15. The Treaty of Waitangi Act 1975 established the Waitangi Tribunal to investigate current breaches of rights provided under the Treaty of Waitangi. By 1980 the issue of Māori land was highly politicised and concentrated on preventing further alienations of Māori land. In 1985 the jurisdiction of the Waitangi Tribunal was extended back to 1840.

1990s

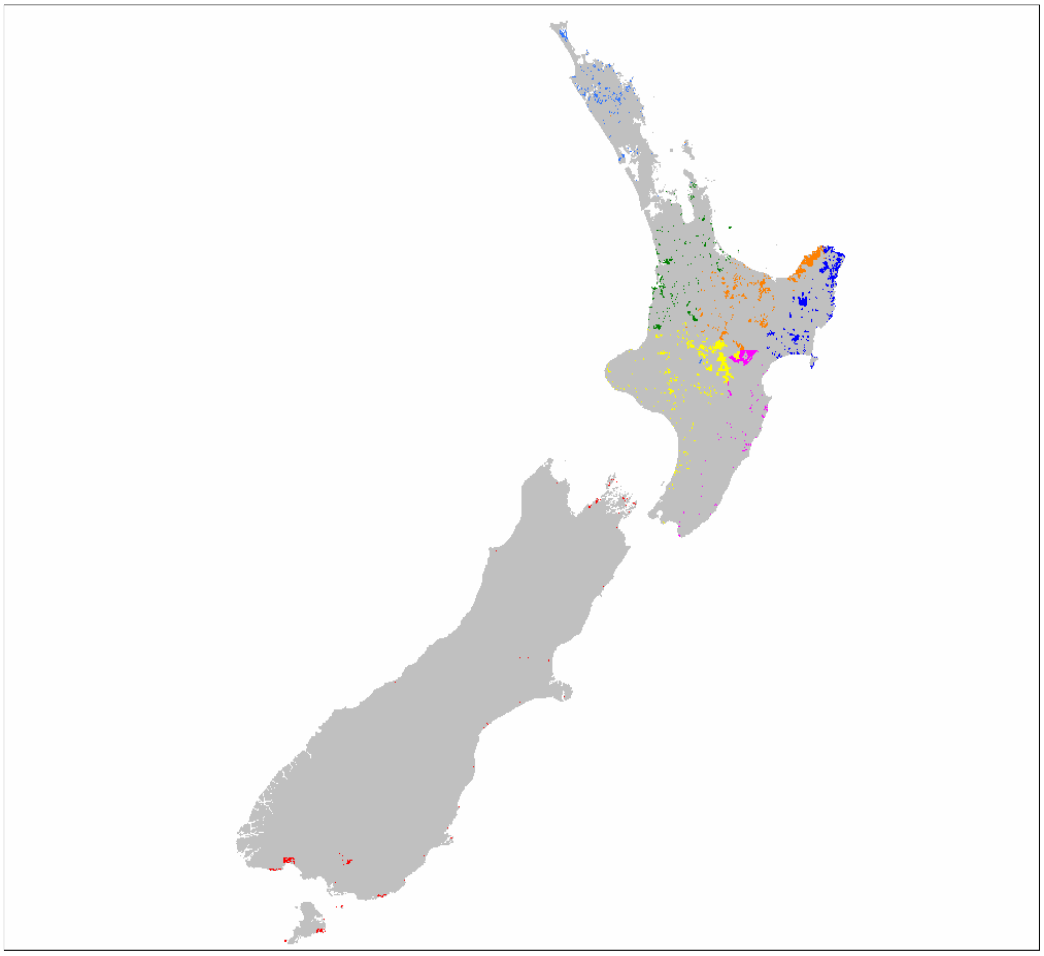
16. Te Ture Whenua Māori Act 1993 promotes the retention of Māori land in Māori ownership. It aims to protect wāhi tapu (sacred sites) and to facilitate the occupation, development and utilisation of Māori land for the benefit of its Māori owners, their whānau[13], and their hapū[14]. Māori land must be offered to the preferred class of alienees and have the support of 75% of beneficial owners before it can be sold. The Act also provides for various types of trust management to ensure better utilisation and to enable succession.

2000s

17. Te Ture Whenua Māori Amendment Act 2002 was a result of a review undertaken to identify how to make the Act more effective and useful, and in particular to make it easier to retain, occupy, develop and use Māori land.

[13] family
[14] sub-tribe

Māori Freehold Land in 2007•



• Does not include customary title or general land owned by Māori