

Committee on the Elimination of Racial Discrimination

71st Session 30 July -17 August 2007

NGO Briefing Material

31st July 2007, 1.45-2.45pm, Delegates Room OHCHR.

On

New Zealand

15th, 16th, 17th Consolidated Periodic Report

On Behalf of

Treaty Tribes Coalition
(Representing the tribes of Ngati Kahungunu,
Hauraki, Ngai Tamanuhiri, Ngai Tahu)
Aotearoa Indigenous Rights Trust
Peace Movement Aotearoa
Maori Party
Te Whanau a Apanui



TREATY TRIBES COALITION

air
TRUST

māori
PARTY



TE RUNANGA O TE WHANAU

Peace Movement Aotearoa



1. This document provides a summary of the NGO briefing provided by the Treaty Tribes Coalition, Aotearoa Indigenous Rights Trust, Peace Movement Aotearoa, Maori Party and Te Whanau a Apanui. The mandate and membership of these organisations are detailed in the attached appendix. The organisations are represented by: Moana Jackson, Ngahiwi Tomoana and Sacha McMeeking on behalf of the Treaty Tribes Coalition; Claire Charters on behalf of Aotearoa Indigenous Rights Trust, Peace Movement Aotearoa, and the Maori Party; and Dayle Takitimu on behalf of Te Whanau a Apanui.
2. The briefing session and materials are intended to support the NGO shadow reports by elucidating, and providing supplementary information on, the systematic failings within Aotearoa New Zealand that are either misrepresented in, or omitted from, the New Zealand 15th, 16th and 17th consolidated periodic report.
3. The document is structured in five parts:
 - a. Introduction;
 - b. Update on Foreshore and Seabed Act 2004;
 - c. Identification of enduring and worsening distributive justice issues;
 - d. Update and contextualisation of recent constitutional developments;
 - e. Analysis of constitutional structure enabling breaches of the Convention.

A. Introduction – The Rhetoric and the Regression

4. New Zealand is a developed nation with stable democratic institutions that aspires to international recognition as an exemplar of human rights commitment and compliance. The primary obstacle to the recognition and implementation of human rights standards held by Maori, as Indigenous peoples, is political will.
5. The current political climate in Aotearoa New Zealand is characterised by two predominant interrelated themes: (1) superficial provision for Maori and (2) an underlying adverse hostility toward Maori. The former frequently inflames the latter, and both impede substantive implementation of the Convention.
6. A deeper attitudinal barrier is that Maori rights are misrepresented as ‘temporary measures’ that must be expeditiously addressed so that the nation can ‘move on’, having addressed Maori issues ‘once and for all’.
7. Indicative statements representing the current political climate are:

An excerpt from the Draft Education Curriculum;

“Classical languages provide access to the origins of thought and civilisations.”¹

An excerpt from a speech by Race Relations Commissioner Joris de Bres²

“The Special Rapporteurs report is unhelpful because we hoped for practical solutions rather than a catalogue of rights that is unimplementable.”

¹ At page 9

² Human Rights Commission Beyond Rangatiratanga 2006 Symposium at University of Victoria 10 April 2006

B. Foreshore and Seabed Act – The Apex and the Catalyst

8. The Foreshore and Seabed Act 2004 is both a product and creator of the political climate that has made breaches of the Convention more likely.
9. The Government has not sought to implement the Committee’s recommendations in good faith.
 - a. The Government’s response to the Committee’s decision was disparaging. For example, the Prime Minister stated on national radio:

“I know that those who went off to this committee on the outer edges of the UN system are spinning it their way but I have to say there is nothing in that decision that finds that New Zealand was in breach of any international convention at all.”

“This is a committee on the outer edges of the UN system. It is not a court. It did not follow any rigorous process as we would understand one. In fact, the process itself would not withstand scrutiny at all. And frankly, we don’t think that those who went to it got what they wanted for [phon] anyway.”

“The other thing is I don’t think we should elevate this to any statement that this is the UN making a finding against New Zealand. This is a Committee pursuant to a convention that sits on the outer edge of the UN system – this is not the UN Security Council with an open and transparent process. In fact the process really had quite a lot of shortcomings.”³

- b. The Government has not amended the Act. Notably, the Maori Party introduced a Bill to repeal the Foreshore and Seabed Act which has been defeated due to collaboration between the two major political parties.
 - c. The Government has not entered into negotiations or consultation with Maori.
10. The Government is improperly relying on the negotiations with Ngati Porou and Te Whanau a Apanui as evidence that Maori support and/or are engaging with the framework under the Act. We emphasise that:
 - a. These negotiations were initiated prior to Act being drafted;
 - b. The negotiations were commenced in circumstances where iwi had no meaningful choice but to engage with the Government in the hope of preserving and retaining pre-existing rights and relationships with the foreshore and seabed;
 - c. These negotiations are considered, by Te Whanau a Apanui, to fall outside the Act, and amount to an exemption from the prohibitive terms of the Act; and
 - d. Te Whanau a Apanui has been resolutely opposed to the Act from its conception.

³ Prime Minister Helen Clark, Newztel News: TRN 3ZB “Breakfast Show”, 14 March 2005

11. No tribal collective has entered into negotiations under the Act, which we consider to be highly probative of continued Maori opposition.
12. All applications under the Act to the Maori Land Court are reported to have stalled. We also emphasise that six applications represents a minute proportion of the hundreds, if not thousands, of Maori collectives able to seek a customary rights order, which we also consider to indicate continued Maori opposition.

C. Distributive Justice Issues – Entrenching Inequality

13. Maori constitute approximately 15% of the general population of Aotearoa New Zealand and remain disproportionately disadvantaged in all measurable social indices. We note the following indicative statistical representations:
 - a. Māori constitute 37% of those living in poverty;⁴
 - b. In 2007, the Māori unemployment rate was 8.6%; the non-Māori unemployment rate was 3.7%; and the Pākehā unemployment rate was 2.9%;⁵
 - c. In 2005 53% of Māori boys and 45% of Māori girls left school with no qualifications, compared with 20% of Pākehā boys;⁶
 - d. In 2005, 48.3% of the total male prison population was Māori, and 56.5% of the total female prison population was Māori;⁷
 - e. The difference in Māori and non-Māori life expectancy is 8.5 years.⁸
14. The review of ‘special measures’ was duplicitous, motivated by political expediency, and is likely to worsen the entrenched inequality experienced by Maori, as was recognised by the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples (Special Rapporteur).⁹

D. Constitutional Issues – Repeating History

15. The Treaty of Waitangi remains politically and legally fragile as it is not recognised as possessing a formal or enforceable legal status. The right to a remedy for historical or contemporary breaches is therefore slender; the courts possess limited jurisdiction over contemporary breaches where there is an empowering statutory clause, and whilst the Waitangi Tribunal has a broad jurisdiction, its recommendations are not binding.
16. The persistent rhetoric that the Treaty is the ‘founding constitutional document’ does not elevate the Treaty’s legal status or the ability of Maori to secure a remedy for rights breaches.

⁴ Based on 2001 census data.

⁵ From *Household Labour Force Survey* results.

⁶ *New Zealand Schools: Nga Kura o Aotearoa 2005* (2006), Ministry of Education.

⁷ Information contained in response to Parliamentary written question 13919.

⁸ “Life Expectancy Continues to Increase” (media release), Statistics New Zealand, 30 March 2004.

⁹ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3

17. A number of recent developments further compromise the Treaty's tenuous legal and political status, and, in combined effect, could result in Maori being denied the right to access justice and the right to a remedy:
- a. The Principles of the Treaty of Waitangi Deletion Bill 2006 will, if it is enacted, remove the jurisdiction of the courts over Treaty matters, resulting in the non-binding jurisdiction of the Waitangi Tribunal being the only domestic avenue to pursue Treaty compliance.
 - b. The jurisdiction and standing of the Waitangi Tribunal is presently subject to assault in three principal respects:
 - i. The historical jurisdiction of the Waitangi Tribunal is now subject to a statutorily imposed arbitrary cut off date, whereby all historical claims must be submitted by 1 September 2008.
 - ii. The Treaty of Waitangi (Removal of Conflicts of Interest) Amendment Bill proposes fundamental changes to the membership of the Waitangi Tribunal, significantly reducing the pool of legal experts possessing the requisite understanding of Maori law available to the Tribunal.
 - iii. The Government is consistently refusing to implement Waitangi Tribunal recommendations and frequently responds disparagingly. A report completed by the Maori Law Commission in 1999 found that approximately 2% of the Tribunal's recommendations are implemented by Government.¹⁰ An example of the Government's dismissive response to the Tribunal is:

Deputy Prime Minister Michael Cullen today described the Waitangi Tribunal report on foreshores and seabed as "disappointing." He said careful consideration would be given to a number of the matters raised by the Tribunal but rejected some of the central conclusions of the report. Those conclusions - particularly surrounding supposed breaches of the Treaty of Waitangi and the rule of law - depend upon dubious or incorrect assumptions by the Tribunal.¹¹

18. Treaty settlements provide for reparative justice and national reconciliation, and therefore possess significant constitutional implications. The process and content of Treaty settlements are lauded internationally. They are, however, flawed in a number of respects, of which we emphasise three:

- a. Treaty settlements contain an imposed waiver of impartial review; in order to secure settlement, claimant groups must surrender their right to access to the courts and due process;
- b. The fiscal quantum of settlement packages is estimated to equate to 1-2% of the actual losses suffered by the claimant groups. We note the following findings of the Special Rapporteur:

The overall land returned by way of redress through settlements is a small percentage of the land claims, and cash paid out is usually less

¹⁰ Copies of this report can be made available to the Committee. We also note that these findings are supported by research conducted by an eminent Maori academic. However, the later study has not yet been published, and the material made available to the delegation was preliminary in nature.

¹¹ Hon Michael Cullen, 8/03/04 *Waitangi Tribunal Report Disappointing*
<http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=19091>

than 1 per cent of the current value of the land. Total Crown expenditure on the settlement of Treaty breach claims over the last decade (approximately NZ\$ 800 million) is about 1.6 per cent of the government budget for a single year.¹²

[S]uch redress as may be negotiated in the historical claims process seems, on the basis of experience so far, to fall short of “just and adequate reparation or satisfaction for any damage suffered” (within the meaning of article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination).¹³

- c. The Government has imposed a policy of negotiating only with ‘large natural groupings’ which; creates artificial units within Maori society; deconstructs iwi identity; and causes inevitable conflict between and within Maori collectives. In a recent example, the Waitangi Tribunal expressed concern over the divisive implications of the policy:

“Te Arawa [a prominent North Island tribe] is now in a state of turmoil as a result. Hapu are in contest with other hapu and the preservation of tribal relations has been adversely affected.”¹⁴

19. The corroborating and synergistic effect of international law and institutions toward the Treaty of Waitangi is similarly being dismissed and eroded by the Government. We note three specific examples:

- a. The Government response to the Special Rapporteur’s report mirrored the response to the Committee’s decision:

“His raft of recommendations is an attempt to tell us how to manage our political system. This may be fine in countries without a proud democratic tradition, but not in New Zealand where we prefer to debate and find solutions to these issues ourselves.”¹⁵

- b. The Government response to the Declaration on the Rights of Indigenous Peoples has been characterised by persistent objection to the codification of international legal standards and a continued failure to engage with Maori. We note that the Government has adopted stalling strategies in the General Assembly processes, despite the Declaration now being an instrument of the Human Rights Council.
- c. We also emphasise that the reductive and polemical approach adopted in the domestic arena is now permeating our international presence. For example, CERD General Recommendation XIV calls on States to:

¹² Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 27

¹³ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 26

¹⁴ Waitangi Tribunal media release

¹⁵ Deputy Prime Minister Michael Cullen, Press Release: Response to UN Special Rapporteur report 04/04/2006 available at <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=25366>

“Recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.”

In contrast, the New Zealand Government, during negotiations on the Declaration, has advocated for a lesser standard: “that States shall provide effective mechanisms for redress.” Moreover, the Government has, in rationalising its opposition to the Declaration, also stated that:

“[N]o government can accept the notion of creating different classes of citizenship. Nor can one group in society have rights that take precedence over the rights of others”¹⁶

E. Constitutional Structure – Identifying the Cause

20. New Zealand’s constitutional structure concentrates power in the executive and renders the legislature immune from judicial review. The absence of effective domestic human rights safeguards results from the following features of our constitutional framework:
 - a. Unicameral parliamentary structure;
 - b. Subservient human rights instruments and reticence towards entrenched law;
 - c. Weak administrative review mechanisms; and
 - d. Over- reliance on non-justiciable constitutional conventions.
21. The constitutional structure creates an enabling environment for the vicissitudes of political expediency to triumph over Maori rights and principles of responsible governance.

¹⁶ UNGA Third Committee 61st Session Item 64(a) The Declaration on the Rights of Indigenous Peoples, Statement on behalf of Australia, New Zealand and the United States

Appendix I – NGO Mandate and Membership

Treaty Tribes Coalition

The Treaty Tribes Coalition is an Indigenous Non-Governmental Organisation formed in 1994 to represent its four constituent members: the Hauraki Māori Trust Board (representing the 12 iwi of Hauraki); Ngati Kahungunu Iwi Incorporated; Ngāi Tamanuhiri; and Te Rūnanga o Ngāi Tahu. The TTC iwi represent 15-20 percent of the Māori Population; comprising of over 110,000 members according to the 2001 census. The TTC petitioned the Committee in 2004 under the early warning procedure in respect of the New Zealand Foreshore and Seabed Bill (as it was then)

Aotearoa Indigenous Rights Trust

AIR Trust is a small organization made up of Maori individuals with close associations with their tribes. It has been most involved in working groups on the UN Declaration on the Rights of Indigenous Peoples but has also been active in other issues. For example, one member was the legal representative of the Treaty Tribes Coalition and Te Runanga o Ngai Tahu, large organizations representative of tribes, before the CERD Committee in its consideration of New Zealand's Foreshore and Seabed Act 2004 in 2005.

Peace Movement Aotearoa

Peace Movement Aotearoa is the national networking peace organisation in Aotearoa New Zealand. We are a Pakeha (non-indigenous) organisation, and our membership and networks mainly comprise Pakeha organisations and individuals.

Maori Party

The Māori Party was formed out of the intense discontent, marginalisation and frustration felt by many Māori over the New Zealand Government's 2004 decision to legislate away Māori rights to the foreshore and seabed. Officially launched in July 2004, and with 21,500 plus members (a political party membership record in Aotearoa/New Zealand), the Māori Party has four members in New Zealand's 121 member Parliament. Our purpose is to articulate a strong and independent Māori voice in Parliament, for the good of the nation.

Te Whanau a Apanui

Te Whanau a Apanui is an Indigenous tribal group made up of 14 hapu (tribal subgroups) representing approximately 11,000 descendants. Te Whanau a Apanui are a coastal people with a 35 kilometre coastline on the far east cape of the North Island. For the purposes of the foreshore and seabed negotiations, all hapu of Te Whanau a Apanui are represented by Te Runanga o Te Whanau.