

NEW ZEALAND

BRIEFING TO THE UN
COMMITTEE ON
ECONOMIC, SOCIAL AND
CULTURAL RIGHTS, 48TH
SESSION, MAY 2012

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1. INTRODUCTION

Amnesty International is submitting this briefing to the UN Committee on Economic, Social and Cultural Rights (the Committee) in view of its forthcoming examination of New Zealand's third periodic report on the implementation of the International Covenant on Economic, Social and Cultural Rights (the Covenant) during its 48th session between 30 April and 18 May 2012.

Amnesty International welcomes the opportunity to comment on New Zealand's compliance with the Covenant. New Zealand has a strong and long standing reputation for promoting and protecting human rights. Amnesty International commends New Zealand's efforts to consult non-governmental organisations during the preparation of its third report, as well as when drafting the response to the list of issues published in June 2011 by the Pre-sessional Working Group to the Committee. Amnesty International also takes this opportunity to acknowledge the comprehensive nature of New Zealand's report to the Committee.

Amnesty International nevertheless remains concerned that New Zealand is not giving full effect to the economic, social and cultural (ESC) rights enshrined in the Covenant. In particular, this briefing focuses on the lack of enforceability of ESC rights within New Zealand's domestic legal system as well as the effectiveness of New Zealand's legislation in protecting the rights of indigenous peoples to non-discrimination and culture in relation to Articles 2 and 15 of the Covenant.

Amnesty International bases this briefing on paragraphs 1 and 19 of the Committee's List of Issues, which focus on domestic implementation and justiciability of the Covenant and the rights of Māori, as New Zealand's indigenous peoples, to their traditional lands and resources (including the foreshore and seabed) respectively.¹

2. ENFORCEABILITY

New Zealand is one of only three countries in the world (the others being Israel and the United Kingdom) without an entrenched written constitution.² The country's constitutional framework is instead constituted by a broad range of sources, including: the Treaty of Waitangi; various statutes of constitutional significance from both England and the United Kingdom incorporated into New Zealand law; as well as domestic legislation such as the New Zealand Bill of Rights Act 1990 (BORA) and the Human Rights Act 1993 (HRA).

¹ Pre-sessional Working Group of the Committee on Economic, Social and Cultural Rights *List of Issues: New Zealand* E.C.12/NZL/Q/3 (2011) at [1].

² Philip, Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, Brookers, 2007) page 17.

In part as a result of the unwritten nature of New Zealand's constitutional framework, the incorporation of international law into New Zealand's domestic law is not an automatic consequence of treaty ratification. Instead, the country's dualist legal system means that international law, such as the Covenant and the ESC rights it enshrines, does not have full legal effect until domestic legislation explicitly incorporating it is passed by New Zealand's Parliament.³ Until such time as it is domesticated, international law to which New Zealand is a States party, such as the Covenant, only has three indirect effects on domestic law:

- New Zealand must take account of its international obligations in its administrative decision making;⁴
- When interpreting legislation, the courts will, so far as possible, interpret its wording so as to be consistent with New Zealand's international obligations;⁵ and
- The courts may narrow the scope of a statutory discretion in accordance with this presumption of interpretation.⁶

According to the Committee, giving effect to the rights contained within the Covenant by 'all appropriate means' is a State party's central obligation.⁷ There is no obligation on States parties to the Covenant to incorporate it into domestic law.⁸ A State party's obligations are discharged once it has ensured the protection of the Covenant rights by whatever means it sees fit. While the Committee has therefore acknowledged that how the Covenant's ESC rights are given effect is a decision left to the discretion of States parties, in General Comment No. 9 they do nevertheless emphasise that the means used should ensure a full discharge of a State party's obligations under the Covenant.⁹ Accordingly, the Committee has strongly encouraged States parties to incorporate the rights recognised in the Covenant into domestic law, on the basis that this is the most effective means of realising these rights:

While the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty-obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the covenant in national law.¹⁰

When the Universal Declaration of Human Rights was being drafted at the United Nations,

³ Meikle, Karen "Economic Social and Cultural Rights: Protection in Aotearoa New Zealand - an Overview" in *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (2011) page 43.

⁴ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

⁵ *Rajan v Minister of Immigration* [1996] 3 NZLR 543 (CA) at [551].

⁶ Meikle, Karen "Economic Social and Cultural Rights: Protection in Aotearoa New Zealand - an Overview" in *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (2011) page 44.

⁷ CESCR *General Comment No. 9: The Domestic Application of the Covenant* at [1], E/C.12/1998/24.

⁸ CESCR *General Comment No. 9: The Domestic Application of the Covenant* at [5], E/C.12/1998/24.

⁹ CESCR *General Comment No. 9: The Domestic Application of the Covenant* at [5], E/C.12/1998/24.

¹⁰ United Nations Committee on Economic, Social and Cultural Rights *General Comment No. 9: The Domestic Application of the Covenant* E/C.12/1998/24 (1998) at [8].

New Zealand's representative, Colin Aikman, made the following explicit affirmation of the indivisibility of human rights:

My delegation ... attaches equal importance to all the articles ... Experience in New Zealand has taught us that the assertion of the right of personal freedom is incomplete unless it is related to the social and economic rights of the common man. There can be no difference of opinion as to the tyranny of privation and want. There is no dictator more terrible than hunger. And we have found in New Zealand that only with social security in its widest sense can the individual reach his full stature. Therefore it can be understood why we emphasise the right to work, the right to a standard of living adequate for health and well-being and the right to security in the event of unemployment, sickness, widowhood and old age. Also the fact that the common man is a social being requires that he should have the right to education, the right to rest and leisure, and the right to freely participate in the cultural life of the community. These social and economic rights can give the individual the normal conditions of life, which make for larger freedom. And in New Zealand we accept that it is the function of government to promote their realisation.¹¹

Continuing to assert its comprehensive and emphatic support for the indivisibility of human rights, in its third report to the Committee in January 2011, New Zealand acknowledged:

the fundamental importance of economic, social and cultural rights, and assures the Committee that the indivisibility of human rights is a principle of paramount importance to New Zealand.¹²

In apparent contradiction to this assurance however, while New Zealand's domestic human rights legislation, including the HRA and the BORA, provides explicit legal protection for the civil and political rights enshrined within the International Covenant on Civil and Political Rights (ICCPR), it provides no legal protection to the Covenant's ESC rights other than the right to non-discrimination¹³ and the rights of minorities to enjoy their culture.¹⁴

The Committee has called for strong justification from States parties where the means used to give effect to the Covenant differs significantly from other international human rights treaties.¹⁵ New Zealand has responded to this call by intimating that it has directly incorporated the "concept of promoting economic, social and cultural well-being as an explicit part of the statutory framework."¹⁶ As such, "the applicable principles in the

¹¹ Aikman, Colin "New Zealand and the Origins of the Universal Declaration" (1999) 29 VUWLR 1 at [5].

¹² New Zealand's Third Periodic Report on its Implementation of the International Covenant on Economic, Social and Cultural Rights (2008) page 6 at [18].

¹³ See New Zealand's 3rd Periodic Report to the Covenant (2008) page 12.

¹⁴ Report of the United Nations Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Māori Peoples in New Zealand, UN Doc A/HRC/18/35/Add.4, 30 May 2011, page 17.

¹⁵ United Nations Committee on Economic, Social and Cultural Rights *General Comment No. 9: The Domestic Application of the Covenant* E/C.12/1998/24 (1998) at [7].

¹⁶ New Zealand's Third Periodic Report on its Implementation of the International Covenant on Economic, Social and Cultural Rights (2008) page 8.

Covenant will be directly relevant to the interpretation and implementation of a statute.”¹⁷

This approach to meeting a States party’s obligation to give effect to the Covenant’s ESC rights is, however, of significant concern to Amnesty International. For, while New Zealand has highlighted a number of subject-specific statutes which refer to elements of certain ESC rights,¹⁸ even these Covenant rights, or parts thereof, lack tangible protection as legal *rights* in practice.¹⁹

2.1 THE RIGHT TO ADEQUATE HOUSING (ARTICLE 11)

The right to adequate housing,²⁰ as enshrined by Article 11(1) of the Covenant and the Committee’s General Comment No. 4, is illustrative of the inadequacy of New Zealand’s approach more generally to giving effect to the Covenant. While there is not one specific statute that domesticates the right to adequate housing, elements of the right are protected by a range of central government housing policies, laws and entitlements, including: the Building Act 2004; Housing Improvement Regulations 1947; Residential Tenancies Act 1986; Local Government Act 1974 and 2002; BORA and the Resource Management Act 1991.²¹ In particular, the BORA and the Residential Tenancies Act 1986 provide legal protection against discrimination in relation to housing, allowing for the New Zealand Human Rights Commission to receive complaints which may then be heard by the Human Rights Review Tribunal.²² As such, it is theoretically possible to challenge a breach of an ESC right, or part thereof, that is referenced in one or more government policies, statutes or entitlements such as the right to adequate housing.

Nevertheless, in reality “New Zealand courts have expressed a general reluctance to bring their judicial review powers to bear in the area of socio-economic entitlement because of the “political” nature of social policy questions”²³, with *Lawson v Housing New Zealand* being a case in point. In the absence of any specific legal *right* to an adequate standard of living in New Zealand, the complainant in that case sought judicial review of a change in government policy to increase the rent of her state house by claiming that, as she was unable to meet the

¹⁷ New Zealand’s Third Periodic Report on its Implementation of the International Covenant on Economic, Social and Cultural Rights (2008) page 8.

¹⁸ In its report, New Zealand notes that it has worked to give effect to the Covenant in selected legislation, providing a number of examples such as the Education Act 1989, the Energy Efficiency and Conservation Act 2000, the Local Government Act 2002 and the Resource Management Act 1991; each of which includes objectives that relate to economic, social and cultural well-being. New Zealand’s Third Periodic Report on its Implementation of the International Covenant on Economic, Social and Cultural Rights (2008) page 8.

¹⁹ Meikle, Karen “Economic Social and Cultural Rights: Protection in Aotearoa New Zealand - an Overview” in *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (2011) page 44.

²⁰ Derived from the right to an adequate standard of living in Article 11 of the United Nations International Covenant on Economic, Social and Cultural Rights 993 UNTS 3.

²¹ Meikle, Karen “Economic Social and Cultural Rights: Protection in Aotearoa New Zealand - an Overview” in *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (2011) page 45.

²² Meikle, Karen “Economic Social and Cultural Rights: Protection in Aotearoa New Zealand - an Overview” in *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (2011) page 45.

²³ Geiringer, Claudia and Palmer, Matthew “Human Rights and Social Policy in New Zealand (2007) 30 Social Policy Journal of New Zealand 12 at [37].

rent increase, the policy deprived her of affordable shelter and therefore amounted to a breach of the Covenant's Article 11 right to an adequate standard of living. In his decision, Williams J in the High court held that the impact on the complainant was "the result of the application of those policies ... [and] any hardship which she experienced is insusceptible to judicial review. ... Whether New Zealand has fulfilled its international obligations is a matter on which it may be judged in international forums but not in this Court."²⁴

Consequently, while ESC rights, or parts thereof, that are referenced in domestic legislation are theoretically enforceable by the New Zealand judiciary, in reality they are often unenforceable as they do not take the form of *domestic* legal rights. Unless victims have access to effective remedies, New Zealand's recognition of ESC rights amounts to little more than politically expedient rhetoric.

Cognisant of this point, during the review of New Zealand's second periodic report, the Committee reminded the State party that it had an "obligation to give full effect to the Covenant in its domestic legal order, providing for judicial and other remedies for violations of economic, social and cultural rights"²⁵ and highlighted the absence of any significant difficulties impeding the effective implementation of the Covenant by New Zealand.²⁶

2.2 INCORPORATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE BILL OF RIGHTS ACT

While civil and political rights are, in relative terms, centrally and explicitly domesticated within the BORA and the HRA, in stark contrast the domestic legal recognition of ESC rights may be described as inconsistent at best. Indeed, the Ministry of Justice has highlighted that the enactment of separate issue-specific legislation and establishment of organisations to address specific domestic human rights issues has "led to a fragmentation of issues and the lack of a strategic approach in relation to community leadership and education across the entire range of New Zealand's international human rights obligations."²⁷

The inconsistent approach taken by New Zealand to domesticating ESC rights is best illustrated by contrasting it with the approach taken to domesticating other international human rights treaties. For example, in comparison to the Covenant, New Zealand has fastidiously domesticated the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Article 4 of CAT requires States parties to "ensure that all acts of torture are offences under its criminal law." To ensure its compliance with this requirement, New Zealand passed the Crimes of Torture Act 1989 which provides that "[e]very person is liable upon conviction on indictment to imprisonment for a term not exceeding 14 years who,"²⁸ amongst other things, "commits an act of torture."²⁹

²⁴ *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC) at [488] and [498] per William J.

²⁵ Committee on Economic, Social and Cultural Rights Concluding Observations: New Zealand E/C 12/1/Add.88 (2003) at [21].

²⁶ Committee on Economic, Social and Cultural Rights Concluding Observations: New Zealand E/C 12/1/Add.88 (2003) at [10].

²⁷ Ministry of Justice *Discussion Paper: Re-evaluation of the Human Rights Protections in New Zealand*, (Wellington 2000) pages 94-94.

²⁸ The Crimes of Torture Act 1989 (NZ), s 3.

Furthermore, section 2 of the Crimes of Torture Act 1989 employs the definition of 'torture' employed by Article 1 of the CAT.

New Zealand is currently undertaking a constitutional review which Amnesty International believes provides a unique and timely opportunity to ensure New Zealand gives full, consistent and explicit effect to the Covenant. Amnesty International holds that incorporating the Covenant's rights into the BORA would strengthen the recognition and protection of ESC rights.

Such incorporation would not, however, on its own guarantee the protection of ESC rights in the face of inconsistent legislation, but would make a significant contribution to the protection of ESC rights. First, the reform would strongly encourage transparent, consistent and comprehensive incorporation of ESC rights during the development of future legislation.³⁰ Second, it would direct government policies and administrative actions to be consistent with ESC rights.³¹ Third, incorporating the Covenant's rights into the BORA would also give practical effect to New Zealand's rhetorical support for the indivisibility of human rights by affording the Covenant the same domestic legal standing as the International Covenant on Civil and Political Rights and other human rights treaties. The BORA is recognised by New Zealanders as a critical component of New Zealand's human rights framework. The inclusion of Covenant rights in the BORA would therefore also increase awareness of ESC rights among the broader public, empowering the very individuals whose rights the Covenant seeks to protect.

2.3 ADDITIONAL AMENDMENTS TO THE BILL OF RIGHTS ACT

Currently during the legislative process, the Attorney General is required by section 7 of the BORA to bring to the attention of the House of Representatives a provision in a bill if it appears to be inconsistent with the rights enshrined in the BORA.³² As ESC rights are currently not included in the BORA, the Attorney General need not report a bill's inconsistency with these rights. Amnesty International therefore recommends section 7 of BORA be amended to also include reference to the rights contained in international human rights law to which New Zealand is a States party. Such an amendment would ensure any bill's inconsistencies with New Zealand's Covenant obligations were brought to the attention of Parliament so that it could debate and vote on the bill with a full awareness of its potential impact on ESC rights in New Zealand.

Even in the event that the Covenant's rights are explicitly incorporated into the BORA, ESC rights would still remain legally unenforceable in the presence of inconsistent legislation. Section 5 of the BORA does purport to make the rights contained in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic

²⁹ The Crimes of Torture Act 1989 (NZ), s 3(a).

³⁰ Department of Prime Minister and Cabinet *Cabinet Manual 2008* (Wellington, 2008) sections 4.3, 7.60, and 7.62.

³¹ Department of Prime Minister and Cabinet *Cabinet Manual 2008* (Wellington, 2008) sections 4.3, 7.60, and 7.62.

³² The Bill of Rights Act 1990 (NZ), s 7.

society.”³³ Nevertheless, section 5 is subject to section 4 of the BORA which specifies that “[n]o court shall, in relation to any enactment ... hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or decline to apply any provision of the enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights.”³⁴ The result of section 4 is that, in New Zealand, human rights can currently be breached by Parliament without justification or recourse. The domestic legal protection of human rights during the legislative process in New Zealand must therefore be strengthened to better enable Parliament to develop legislation that is consistent with the BORA and the fundamental human rights it is, and should be, charged with protecting.

Legislation can change significantly from the time it is introduced to Parliament to the time it receives royal assent and becomes law. While a bill may be consistent with the BORA when it is introduced, as a result of the select committee process and through the introduction of supplementary order papers, its provisions may be significantly altered during the legislative process such that it would severely impinge on the BORA’s provisions if Parliament were to pass it. Amnesty International therefore recommends an amendment to section 7 of the BORA to require the Attorney General to table reports on the consistency of legislation with the BORA on a bill’s third reading as well as, as is currently required, at its introduction to Parliament. Such a change would ensure any amendments made after a bill is introduced that were likely to adversely affect the realisation of human rights were brought to the attention of Parliament so that it could debate and vote on the bill with a full awareness of its potential impact on human rights in New Zealand.

In bringing to the attention of the House of Representatives any provision in the bill that appears inconsistent with the BORA,³⁵ the Attorney General is currently not required to provide a full justification for that opinion. Requiring the Attorney General to furnish his or her justification would guarantee greater transparency of why he or she believed a bill to be consistent or inconsistent with the BORA’s provisions and, if inconsistent, why such an inconsistency would, or would not be, demonstrably justifiable. The guaranteed provision of this information would enhance Parliament’s ability to reconcile any inconsistency with the BORA and, in lieu of reconciling a bill’s provisions with the BORA, vote on the bill with a full awareness of its potential impact on human rights in New Zealand. Where provisions in a bill are found to be inconsistent, Amnesty International therefore recommends that section 7 of the BORA be amended to require the Attorney General to give full reasons for his or her opinion on the consistency or otherwise of legislation with the BORA.

Similarly, to ensure informed legislative decision-making, Amnesty International further recommends that section 7 of the BORA be amended to require the Member of Parliament responsible for a bill to respond to reports from the Attorney General which highlight an inconsistency of the proposed legislation with the rights contained in the BORA. Again, this requirement would ensure Parliament debated and voted on bills with a fuller awareness of their potential impact on human rights in New Zealand.

³³ The Bill of Rights Act 1990 (NZ), s 4.

³⁴ The Bill of Rights Act 1990 (NZ), s 4.

³⁵ The Bill of Rights Act 1990 (NZ), s 7.

2.4 HUMAN RIGHTS PARLIAMENTARY COMMITTEE

Select committees perform a crucial role in the legislative process, not least because they are able to closely examine the human rights implications of proposed legislation and because they allow citizens the opportunity to actively exercise their right to participate in decision-making affecting their rights.³⁶ However, the pace at which legislation is currently being passed in New Zealand limits the ability of select committees to adequately consider such implications and restricts citizens' participation in the process. Furthermore, as an increasing number of bills are being passed under 'urgency' (meaning a bill can conceivably pass through all stages in one day),³⁷ the select committee process is being bypassed entirely. Amnesty International recommends New Zealand allow greater time for comprehensive public consultation so as to give citizens the opportunity to fully exercise their political rights and enable select committees to scrutinise legislation with the assistance of a wider variety of experts, including members of marginalised and vulnerable groups. This would improve the ability of select committees to identify when bills create a risk of breaching human rights, ensure appropriate safeguards are put in place to protect these rights and that any limitations on these rights are consistent with the relevant provisions set forth in human rights instruments, including Article 4 of the Covenant in relation to ESC rights.

Amnesty International also recommends the establishment of a human rights parliamentary committee tasked with identifying and resolving inconsistencies between bills and New Zealand's international and domestic human rights obligations. Such a committee would enable Members of Parliament to develop a particular expertise in analysing the human rights implications of legislation and, in so doing, enable Parliament to debate and vote on bills with a greater awareness of their potential impact on human rights in New Zealand.

2.5 REMEDIES

The BORA does not currently provide a mechanism to ensure remedies for the victims of rights violations. The New Zealand courts have partially remedied this omission, particularly in the case of civil and political rights, by developing judicial remedies (such as the *prima facie* exclusion rule for evidence obtained in breach of the BORA and declarations of incompatibility with the BORA).³⁸ However, they remain constrained by the legislation itself. Unlike many other countries,³⁹ section 4 of the BORA means New Zealand courts cannot repeal or decline to apply legislative provisions which are inconsistent with the human rights recognised in the BORA and section 5 prohibits this even when such inconsistencies are

³⁶ Article 21 of the Universal Declaration of Human Rights, Article 25 of the International Covenant on Civil and Political Rights, Committee on Economic, Social and Cultural Rights, *Poverty and the International Covenant on Economic, Social and Cultural Rights* (2001) UN Doc E/C.12/2001/10 at[12].

³⁷ Parliament of New Zealand *Urgency in the House* (<http://www.parliament.nz/en-NZ/Features/8/f/a/00NZPHomeNews170220091-What-is-urgency.htm>).

³⁸ Philip, Joseph *Constitutional & Administrative Law in New Zealand*(3rd ed, Brookers, 2007) page 1179.

³⁹ Meikle, Karen "Economic Social and Cultural Rights: Protection in Aotearoa New Zealand - an Overview" in *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (2011) page 50.

unreasonable. The most New Zealand courts can do is attempt to interpret legislation so as to make it consistent with the rights contained in the BORA.⁴⁰

The Committee has highlighted, in General Comment No. 9, that although there is no explicit provision for domestic remedies in the Covenant, the duty to *give effect* to the Covenant in domestic law dictates that the State must provide appropriate means of domestic redress.⁴¹ Amnesty International therefore recommends the inclusion of a remedies section in the BORA providing courts the explicit discretion to issue remedies for human rights violations, which would provide a transparent and effective domestic avenue of legal redress for breaches of the BORA. Until such time as the Covenant is fully domesticated through inclusion of ESC rights in the BORA, Amnesty International also recommends New Zealand incorporate remedies sections in those subject-specific statutes which refer to ESC rights, or elements thereof.

2.6 OPTIONAL PROTOCOL

At the international level, New Zealand has shown its commitment to ensuring access to effective remedies for breaches of civil and political rights by acceding to the Optional Protocol to the ICCPR. However, New Zealand has not shown a similar commitment to ESC rights by acceding to or ratifying the Optional Protocol to the ICESCR. Consequently, breaches of ESC rights cannot be appealed as a matter of last resort to the Committee. Amnesty International therefore recommends New Zealand become party to the Optional Protocol and in so doing provide a clear and transparent international avenue of redress of last resort. In addition, New Zealand should recognise the competence of the Committee to receive and consider inter-State communications and to undertake inquiries under Articles 10 and 11 of the Optional Protocol to the Covenant respectively. These avenues of redress would enhance the Committee's ability to review possible violations and are essential in cases where victims may be unable to submit communications themselves.

2.7 RECOMMENDATIONS

Amnesty International makes the following recommendations to New Zealand to ensure the enforceability of the Covenant's rights:

- Incorporate the Covenant's provisions into the New Zealand Bill of Rights Act (BORA)
- Amend section 7 of the BORA so that the Attorney General is required to consider a bill's consistency with the rights contained in international human rights law to which New Zealand is a States party;
- Amend section 7 of the BORA so that the Attorney General is required to table reports on the consistency of legislation with the BORA on a bill's third reading as well as at its

⁴⁰ The Bill of Rights Act 1990 (NZ), section 6.

⁴¹ United Nations Committee on Economic, Social and Cultural Rights *General Comment No. 9: The Domestic Application of the Covenant* E/C.12/1998/24 (1998) at [2].

introduction to Parliament;

- Amend section 7 of the BORA so that the Attorney General is required to give reasons for his or her opinion on the consistency or otherwise of a bill with the BORA;
- Amend section 7 of the BORA so that the Member of Parliament responsible for a bill is required to respond to section 7 reports from the Attorney General which highlight an inconsistency with the BORA;
- Add a section to the BORA which explicitly provides courts the discretion to issue remedies for breaches of the BORA's provisions;
- Add sections to the BORA which explicitly provide courts the discretion to issue remedies for breaches of ESC rights referred to in subject-specific statutes;
- Allow greater time for comprehensive public consultation during the select committee stage of the legislative process; and
- Establish a specialised human rights parliamentary committee;
- Become party to the Optional Protocol to the Covenant, including opting-in to its inquiry and inter-State procedures.

3. THE RIGHTS TO NON-DISCRIMINATION AND CULTURE (ARTICLES 2 AND 15)

Amnesty International welcomes New Zealand's recent efforts to protect the rights of Māori through the significant decision to endorse the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Amnesty International also welcomes the New Zealand Government's efforts to settle the historical claims of Māori under the Treaty of Waitangi. Nevertheless, progress in New Zealand towards the recognition of indigenous rights and in particular, the ESC rights of indigenous peoples, has been inconsistent.

In general, the historical and ongoing breaches of the Covenant rights of Māori have led to their extreme socio-economic disadvantage⁴² and have resulted in entrenched inequalities in

⁴² Anaya, James Report of the Special Rapporteur on the Rights of Indigenous Peoples: *The Situation of Māori Peoples in New Zealand* (2011) page 2.

health, education, employment, justice and housing in New Zealand.⁴³

In 2003, the Judiciary recognised the right to claim indigenous land rights in *Ngāti Apa v Attorney General*,⁴⁴ whereby it was held that Māori could apply to the Māori Land Court to determine whether areas of the foreshore and seabed constituted Māori customary land. The Court of Appeal held, in a unanimous decision, that the Māori Land Court had jurisdiction under the Te Ture Whenua Māori Act 1993 to determine such claims.

The Foreshore and Seabed Act 2004 (the 2004 Act) was passed by Parliament in response to the decision in *Ngāti Apa v Attorney General*. The 2004 Act was deemed, on balance, to contain discriminatory aspects against Māori by the United Nations Committee on the Elimination of Racial Discrimination, in particular by extinguishing the possibility of establishing customary Māori property rights to the foreshore and seabed and by its failure to provide a guaranteed right of redress.⁴⁵ Many voiced their concerns about these breaches, including Māori, the Special Rapporteur on the rights of indigenous peoples⁴⁶ and Amnesty International.⁴⁷

The subsequent Government review, consultation and proposed repeal of the 2004 Act in 2009 were welcomed by Amnesty International. While Amnesty International acknowledges that this issue is complex and commends the Government's efforts to find an enduring solution to it, it remains concerned that the replacement for the 2004 Act, the Marine and Coastal Area (Takutai Moana) Act 2011 (the 2011 Act) does not adequately address the discriminatory effect of the 2004 Act and is not consistent with international human rights standards that seek to protect indigenous rights.

For further information on Amnesty International's concerns, please refer to Amnesty International's submission on the Marine and Coastal Area (Takutai Moana) Bill.⁴⁸

3.1 NON-DISCRIMINATION

The right to non-discrimination as enshrined in Article 2 of the Covenant is provided for in Section 19 of the BORA.⁴⁹ Furthermore, the HRA of 1993 makes the following grounds of discrimination unlawful: sex (including pregnancy and childbirth), marital status, religious belief, ethical belief, colour, race, ethnic or national origin (including nationality or citizenship), disability, age, political opinion, employment status, family status and sexual

⁴³ New Zealand Human Rights Commission Tūi Tūi Tuitiā Race Relations in 2010 (2010).

⁴⁴ *Ngāti Apa v Attorney General* [2003] 3 NZLR 643.

⁴⁵ United Nations Committee on the Elimination of All Forms of Racial Discrimination 'Decision 1(66): New Zealand Foreshore and Seabed Act 2004' (2005) CERD/C/66/NZL/Dec.1.

⁴⁶ Report of the Special Rapporteur on the rights of indigenous people: Preliminary note on the mission to New Zealand, UN Doc. A/HRC/15/37/Add.9, 26 August 2010

⁴⁷ Amnesty International Aotearoa New Zealand, Submission on Foreshore and Seabed Act 2004 to the Ministerial Foreshore and Seabed Review Panel, (2009).

⁴⁸ Amnesty International Aotearoa New Zealand, Submission on the Marine and Coastal Area (Takutai Moana) Bill, (2010).

⁴⁹ Section 19 of the BORA states "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993."

orientation.⁵⁰

In broad terms, the 2011 Act creates a framework for transmuting indigenous title and rights to the foreshore and seabed and, in doing so, strips the rights of their proprietary and inherent characteristics, rendering their recognition contingent on oppressive and reductive evidential tests.

Amnesty International therefore believes that the 2011 Act continues the discriminatory effects against Māori that were first enacted under the 2004 Act. In particular, Amnesty International considers the 2011 Act to be discriminatory by virtue of the fact that, unlike specified freehold title, customary interests cannot include the right to exclusive occupation (section 9 and section 26(1)).⁵¹ Therefore, while Māori may be granted customary marine title areas under the 2011 Act, they do not have the right to exclude members of the public from accessing these areas.

The acting Attorney General at the time, Hon Simon Power, concurred with this conclusion, noting that “because the Bill treats [customary] interests differently from other categories of interest in land, notably private freehold titles, the Bill indirectly draws a distinction based on race or ethnic origin. As that distinction involves greater, but also lesser, relative rights, it gives rise to a *prima facie* limit on the right to be free from discrimination under s 19 of the Bill of Rights Act”.⁵²

He went on to state that the discrimination is demonstrably justifiable under section 5 of the BORA⁵³ because the 2011 Act strikes an appropriate balance between the customary rights to property of Māori and the rights and interests of the general public and individual landowners, as well as promoting the public benefit of predictability and certainty of the law.⁵⁴

In 2004 the acting Attorney General, Hon Margaret Wilson, stated in her section 7 report on the 2004 Act’s consistency with the BORA that the discrimination under the Act was demonstrably justifiable for almost identical reasons to those employed by her successor in relation to the 2011 Act.⁵⁵ She stated that the law protected both Māori customary interests and those of the general public, while also resolving the legal uncertainties created by the Court of Appeal’s decision in *Ngāti Apa v Attorney General*.⁵⁶

The 2011 Act’s almost identical justification for its discriminatory effect to that employed to justify the 2004 Act’s discriminatory impact is of concern. Amnesty International disagrees

⁵⁰ The Human Rights Act 1993 (NZO), s 21.

⁵¹ Amnesty does note that certain exclusions apply to these public rights of access, including the right to recognise wahi tapu under section 78.

⁵² Ministry of Justice (2010). Marine and Coastal Area (Takutai Moana) Bill, Opinion of the Acting Attorney General.

⁵³ Section 5 of the BORA specifies that “[s]ubject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

⁵⁴ Ministry of Justice (2010). Marine and Coastal Area (Takutai Moana) Bill, Opinion of the Acting Attorney General.

⁵⁵ Ministry of Justice (2004). Attorney General’s comments to the Foreshore and Seabed Bill.

⁵⁶ Ministry of Justice (2004). Attorney General’s comments to the Foreshore and Seabed Bill.

with the then acting Attorney General's conclusion and suggests that the limitations the 2011 Act places on the Covenant's right to be free from discrimination are not demonstrably justified in a free and democratic society. Amnesty International considers the 2011 Act's choice of means to be disproportionate to the objective it seeks to achieve. This is because Amnesty International believes the 2011 Act's objective of achieving a determinate and durable solution to the issue of ownership of the foreshore and seabed can be achieved in a way which infringes less on the Article 2 right to be free from discrimination. The options and models proposed by the Ministerial Review Panel,⁵⁷ set up to review the 2004 Act and the law governing Māori customary interests in the foreshore and seabed,⁵⁸ provided workable solutions which limited less (if at all) the right to be free from discrimination.

In particular, Amnesty International recommends the discriminatory element of the 2011 Act⁵⁹ be addressed by amending sections 26(1)(a)-(c) so that every individual has the right to access areas of "the common marine and coastal area that are not customary marine title areas".

3.2 THE RIGHT TO CULTURE

Amnesty International welcomes New Zealand's acknowledgment that the "complicated, restrictive judicial and administrative procedure"⁶⁰ provided for by the 2004 Act was a key issue the 2011 Act sought to redress.

Amnesty International believes the tests for establishing protected customary rights and customary marine titles, under sections 51 and 58 respectively, should be removed from the 2011 Act so that courts can develop appropriate tests over time. While the Act's codification of tests would create certainty and may reduce litigation costs initially, Amnesty International believes that, in the interest of guaranteeing access to justice, and given their experience in developing such tests in the past,⁶¹ courts are in the best position to create such tests.

Like the right to non-discrimination, the right to culture as enshrined in Article 15 of the Covenant is also included in the BORA, which states under section 20 that:

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

Nevertheless, Amnesty International notes that the 2011 Act's requirement for iwi and hapū to prove 'exclusive use and occupation without substantial interruption'⁶² when applying for

⁵⁷ Ministry of Justice (2009), *Pākia ki uta, pākia ki tai: Report of the Ministerial Review Panel (Ministerial Review of the Foreshore and Seabed Act 2004)*, pages 149-151.

⁵⁸ Ministry of Justice (2009), *Pākia ki uta, pākia ki tai: Report of the Ministerial Review Panel (Ministerial Review of the Foreshore and Seabed Act 2004)*, page 10.

⁵⁹ By virtue of the fact that, unlike specified freehold title, customary interests cannot include the right to exclusive occupation.

⁶⁰ Ministry of Justice (2009), *Reviewing the Foreshore and Seabed Act 2004*, page 9.

⁶¹ For example: *Ngāti Apa v Attorney General* [2003] 3 NZLR 643 and *In Re Ninety Mile Beach* [1963] NZLR 461.

⁶² Marine and Coastal Area (Takutai Moana) Act 2011 (NZ), s 58(1)(b).

customary marine title under section 58(1)(b) is inconsistent with tikanga Māori (Māori values and customary law).⁶³ Furthermore, when continuity of occupation since 1840 has been severed, it has characteristically occurred because of the unlawful actions of the Crown. Amnesty International therefore considers the requirement of exclusive and continual use and occupation to be both restrictive and unnecessary, particularly given the presence of alternative approaches in other jurisdictions such as Canada.⁶⁴

If the 2011 Act does retain the tests in their current form, iwi and hapū will largely be unable to access legal recognition for their customary rights and their legal disenfranchisement from their ancestral relationship with the foreshore and seabed will likely continue. However, removing the 2011 Act's codified tests would enable courts to develop tests which fully realise the right of Māori to culture and the development of that culture and guarantee their access to justice.

In light of the right to culture, the development of that culture, and legal recognition of the property rights of Māori which respects their land tenure system, Amnesty International also believes that codification of the proprietary rights which attach to customary marine title, under sections 66 to 82 of the 2011 Act, should be removed. This would enable courts to determine the proprietary rights of customary marine title in a way that accommodates the right of Māori to culture and the development of that culture.

Māori must not be punished or constrained from developing their culture, practices and land by static and reductive proprietary rights. As the 2011 Act already recognises the evolutionary nature of protected customary rights under section 51(1)(b), removing the codification of the proprietary rights of customary marine title would ensure Māori have access to justice and would enable courts to ensure consistency between these two categories of rights.

Amnesty International believes the 2011 Act should be amended to take better account of New Zealand's obligations under the Covenant, and other domestic and international human rights instruments, to ensure that Māori are not discriminated against and that their Covenant rights are upheld.

Discussion of how to give effect to indigenous rights within New Zealand's constitutional framework during the upcoming constitutional review is an opportune time to ensure that the Covenant rights of Māori as the indigenous peoples of New Zealand are adequately protected in the future and that New Zealand's obligations under the Covenant are met.

3.3 RECOMMENDATIONS

Amnesty International recommends New Zealand amend the Marine and Coastal Area

⁶³ For example, Māori legal tradition of manaaki.

⁶⁴ Canadian courts have asserted that both common law and aboriginal perspectives must be taken into account when deciding whether or not customary interests equate to a right to exclude others, given that the recognition of customary interests involves reconciling indigenous rights with the Crown's assertion of sovereignty. See *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

(Takutai Moana) Act 2011 so that it upholds the rights of Māori to non-discrimination, culture and development by:

- Amend section 26(1)(a)-(c) so that every individual has the right to access areas of “the common marine and coastal area that are not customary marine title areas”;
- Remove sections 51 and 58 which codify the test for establishing protected customary rights and customary marine titles; and
- Remove sections 66 to 82 which codify the proprietary rights which attach to customary marine title.

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