TREATY TRIBES COALITION

Ko Te Ihi o Te Tiriti o Waitangi, Ko Manawhenua, Manamoana

Follow Up Procedure – NEW ZEALAND

NGO Report Submitted by the Treaty Tribes Coalition in response to

Information supplied by the Government of New Zealand on the implementation of the concluding observations of the Committee on the Elimination of Racial Discrimination

26 February 2009

Introduction

1. This report provides commentary on the further information presented by the government of New Zealand[1] in reply to the Committee on the Elimination of Racial Discrimination (CERD) request for further information in its concluding observations on New Zealand's 15th- 17th periodic reports (follow up procedure).[2]

2. This report largely follows the structure of the New Zealand report, with preliminary comments on the submitter and state approach to implementation and follow up procedures.

Treaty Tribes Coalition

3. This report is submitted on behalf of the Treaty Tribes Coalition (TTC). TTC is a non-governmental organisation representing tribal confederations of: 12 tribes of Hauraki (represented by Hauraki Māori Trust Board), Ngāi Tamanuhiri, Ngāti Kahungunu, and Ngāi Tahu. The tribes represent over 110,000 people and hold customary authority over 60 percent of New Zealand's coastine.

4. TTC submitted a shadow report in response to the New Zealand's 15th-17th Periodic Reports in 2007, attended as observers the session during which the country report was examined, and provided an informal briefing to members of the Committee. TTC also submitted the early warning communication against the New Zealand government in response to the Foreshore and Seabed Act in 2004 that culminated in the Committee's Decision 1 (66).

State Approach to Implementation and Follow Up Procedures

5. TTC remains concerned at the state approach to implementation of the Committee's concluding observations and this specific follow up procedure in response to the Committee's request for further information.

6. TTC understands the Committee's standards for follow up and implementation activities[3] to encourage a co-ordinated approach that allows for the participation of domestic human rights institutions and non governmental organizations. As noted in our shadow report of 2007,[4] TTC considers that New Zealand has an *ad hoc* approach that does allow for transparent or participatory implementation, to the ultimate impairment of human rights recognition in New Zealand.

7. We note that the New Zealand government did not seek to engage with NGOs in response to the Committee's concluding observations of 2007. In an effort to instigate engagement, TTC submitted a request to the domestic human rights institution, the Human Rights Commissions (HRC), to facilitate engagement with the state over implementation of the Committee's 2007 concluding observations.[5] The HRC was unable to respond to our request and at no time did the state allow for open and participatory implementation to occur.

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[1] CERD/C/NZL/CO/17/Add.1
[2] CERD/C/NZL/CO/17
[3] CERD General Recommendation XXVIII; CERD General Recommentation XVII and CERD Guidelines to follow up on conulcuding observations and recommendations CERD/C/68/Misc.5/Rev.1
[4] Treaty Tribes Coalition Shadow Report in Response to New Zealand's 15th-17th Periodic Reports to the Committee on the Elimination of Racial Discrimination (2007) paragraph 5, pp 3-4
[5] Attached as Appendix One

8. More specifically, TTC requested state officials to permit us to review the state's follow up report prior to submission and to notify us of the session at which the report would be considered by the Committee. Neither request was satisfied by the government, nor were clear reasons provided for withholding this information.

9. TTC refers to our earlier submission to the Committee, to encourage New Zealand to adopt:

> "a best practice approach to implementation, consisting of a national coordinating body responsible for the dissemination of the Committee's findings and engaging with appropriate sectors of civil society, including Māori organizations and tribal collectives".[6]

New Zealand Response to the Committee Recommendation contained in paragraph 14

10. TTC supports the position in the state report that the Principles of the Treaty of Waitangi Bill was defeated and has not become law in New Zealand.

11. However, TTC is concerned that paragraphs 3-4 of the State report misrepresent the current position of the Treaty of Waitangi in domestic law and refers to the Committee's concluding observations that;

> The Committee notes that the Treaty of Waitangi is not a formal part of domestic law unless incorporated into legislation, making it difficult for Maori to invoke Treaty provisions before courts and in negotiations with the Crown.

12. Furthermore, the Committee recommended that:

> **The State party should ensure that the Treaty of Waitangi is incorporated into domestic legislation where relevant, in a manner consistent with the letter and the spirit of that Treaty. It should also ensure that the way the Treaty is incorporated, in particular regarding the description of the Crown's Treaty obligations, enables a better implementation of the Treaty.**

13. TTC considers that paragraphs 3-4 in the state report indicate a continued diminution of the placement of the Treaty of Waitangi within the constitutional architecture of the state. As noted in the state follow up report, the Treaty of Waitangi is incorporated into approximately 30 statutes. However, we emphasise that statutory incorporation is confined to subservient sources of law, precluding the terms of the Treaty of Waitangi having legal force in their own terms and exposing the Treaty to being overridden should political motivations exist to do so. We also refer the Committee to our previous submissions on the failings in statutory incorporation, including a reductive approach to providing for the Treaty and failure to incorporate the Treaty into all relevant statutes.[7]

14. We also note that the Principles for Crown Action on the Treaty of Waitangi are inconsistent with, and far less than, the judicially pronounced principles of the Treaty of Waitangi. We consider that it is injurious to the Treaty of Waitangi for

[6] Treaty Tribes Coalition Shadow Report in Response to New Zealand's 15th-17th Periodic Reports to the Committee on the Elimination of Racial Discrimination (2007) paragraph 5, pp 3-4

[7] Treaty Tribes Coalition Shadow Report in Response to New Zealand's 15th-17th Periodic Reports to the Committee on the Elimination of Racial Discrimination (2007) paragraph 49, pp 16

the Crown to adopt such an approach, and note that judicial bodies have consistently reinforced the significance of the principles of the Treaty of Waitangi, as:

> [T]he "principles" are the underlying mutual obligations and responsibilities which the Treaty placed on the parties. They reflected the intention of the Treaty as a whole and included, but were not confined to, the express terms of the Treaty (bearing in mind the period of time which elapsed since the date of the Treaty and the very different circumstances to which it now applies…[8]
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> Moreover, it has also been stated that:
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> Although the [Treaty of Waitangi] Act refers to the principles of the Treaty for assessing State action, not the Treaty's terms, this does not mean that the terms can be negated or reduced. As Justice Somers held in the Court of Appeal, 'a breach of a Treaty provision … must be a breach of the principles of the Treaty'. As we see it, the 'principles' enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time.[9]

15. More specifically, the courts have consistently upheld the suite of principles of the Treaty of Waitangi to encompass the following:

    a. Partnership – imposing duties to act in good faith, reasonably and honourably. The courts have also specifically noted that these standards have a number of component parts, including:
        i. An obligation on the Crown to make informed decisions, fully cognizant of the relevant law and facts.[10]
        ii. The duty to engage in consultation with Māori;[11]
    b. Active Protection – amounting to an obligation to reasonably accommodate the rights and interests of Māori.[12]
    a. Redress - fair and reasonable recognition of and recompense for breaches of the Treaty of Waitangi.[13]

New Zealand Response to the recommendation contained in paragraph 19

16. Of paramount significance, TTC notes that the incoming government (assumed office in December 2008) have committed to reviewing the Foreshore and Seabed Act, and include the possibility of repeal within the terms of the review. We are optimistic that an enduring and principled alternative to the Act could be developed, providing that the review is approached in good faith, with a commitment to recognising the rights held by Māori under common and international law and full engagement with Māori.

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[8] New Zealand Māori Council v Attorney-General [1994] 1 NZLR 513 (Broadcasting Assets) (PC) per Lord Woolfe
[9] Muriwhenua Report (1997)
[10] New Zealand Māori Council v Attorney-General (CA) [1987] (Lands) per Richardson J at 682
[11] Lands (CA) [1987] per Cooke P at 665. per Somers J at 693 per Richardson J at 683
[12] Broadcasting Assets (PC) [1994] at 519, Whales (CA) [1995] at 553, 561. Quoted with approval by Thomas J in his dissenting judgment in Radio NZ (CA) [1996] at 182.
[13] Lands (CA) [1987] per Somers J at 693.

17. There are however initial grounds for concern. The Crown is reported to have unilaterally determined the terms of reference of the review and membership of a lay panel, which will have only advisory functions. It is also unclear whether, and to what extent, the Crown is intending to engage with Māori in the review process. TTC consider that these unknown factors will be determinative of whether the review is capable of mitigating the discriminatory effects of the current legislation.

18. TTC understands that the review will be completed this year and would welcome the opportunity for the state to submit a further report on the outcomes of the review in due course.

19. In respect of the specific content in the state follow up report, TTC recognises that the government has engaged with certain Māori groups concerning implementation of the Foreshore and Seabed Act 2004. However, consistent with our previous submissions, we emphasise that:

    a) The discussions with Ngāti Porou and Te Whānau a Apanui predated the passage of the Act;

    b) Te Whānau a Apanui considers that 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 and that they extend beyond fall outside of the terms of the Act. Te Whānau a Apanui also notes their resolute opposition to the Bill;[14]

    c) The discussions are confined to implementation of the Act and do not extend to considering legislative amendment or other mechanisms to mitigate the Act's discriminatory effect; and

    d) The discussions are confined to four tribes and that there has been no discussion with tribes who oppose the Act.

20. It is therefore our reiterated submission that the state has, until the recent change of government, willfully refused to engage with Māori on the discriminatory implications of the Act.

East Coast Negotiations

21. TTC recognises the right of Ngāti Porou to engage in negotiations as considered appropriate by their leadership and membership and does not comment on the content of the Heads of Agreement reached between the Crown and Ngāti Porou.

22. We do however, provide the following commentary from Te Whānau a Apanui:

    Te Whanau a Apanui have, in good faith, and by way of testing the Crown's position, been in intense negotiations with the Crown for five years, and state that the contents of the state report have proven to be completely false. Te Whānau a Apanui further state:

[14] See Briefing Material provided to Committee at 71st Session by TTC, Te Whānau a Apanui, Aotearoa Indigenous Rights Trust,

The Crown are not being honest with the CERD Committee. They point to the Foreshore and Seabed Act which allows for indigenous groups that meet the extremely (and unrealistically) high thresholds contained in the legislation to enter into direct negotiations with the Crown regarding redress[i]. The Crown want the international community to think that the Foreshore and Seabed Act does not fall short of human rights minimum standards on the basis that they will treat honourably with the indigenous groups in negotiations, and 'recognise and provide for' their rights, and therefore. What the Crown fail to tell the international community is that the Crown themselves then unilaterally determine the negotiations process, the negotiations parameters and the negotiation outcomes. They bully indigenous peoples domestically and deny their basic right to access justice through a fair and equitable process, and before an independent body. The Crown have been happy that the international community have accepted their assertion that the legislation provides the opportunity for justice, without examining the implementation policies and practices of the Crown which clearly show this is not occurring.

For example, Te Whanau a Apanui are widely recognised as a tribe with customary rights at the 'extremely high end of the spectrum'. However our customary rights have been viewed by the Crown to fall short of ownership interests (which, via the legislation, it has vested in itself without indigenous consent), exclude any rights to minerals, exclude ownership rights to artefacts found within the territory, exclude rights to manage areas that have been recognised as 'under the exclusive possession and control' of the indigenous group. In addition, any redress mechanisms modify the exercise of customary rights by indigenous groups under these 'negotiated agreements' because they are required by the Crown to "be consistent" with Crown controlled management regimes contained in further disempowering legislation like the Resource Management Act, the Fisheries Act, the Wildlife Act, the Crown Minerals Act, the Conservation Act etc. The modifications required by the Crown amount to extinguishment and denial of the customary rights themselves, and the Crown require the indigenous group to accept that they are merely rights they 'would have held BUT FOR the passing of the Foreshore and Seabed Act'. This removes the inherent nature of the indigenous right, and converts it into modified (but statutorily created) right derived from the Crown.

Te Whanau a Apanui were also told on 26 February 2009 by the new government that their almost completed negotiations were to be put on hold by the Government (without their consent), and that they should put their hopes into 'seeking to influence the review by making a submission along with all other New Zealanders'.

New negotiations

23. Referring to paragraphs 17-22 of the state follow up report, we emphasise the following further interpretations of the facts presented:

    a. Customary rights orders commentary – we note that the state appears to veil the fact that the sole customary rights order (CROs) application that has proceeded to being judicially considered was abandoned, and that no further applications have reached the stage of being heard. Given that hundreds if not thousands of Māori could have pursued CROs, we

[i] Redress presupposes these groups have 'lost' their interests to the Crown by virtue of section 13 of the Act in which the Crown vests the 'full and beneficial ownership' in itself without indigenous consent.

encourage the Committee to view the limited number of applicants to reflect the widespread opposition to the Act and the restrictive construction of the Act.

b. Negotiations in parallel with historical Treaty Settlement Negotiations – we note that the state is presenting the parallel negotiation of historical claims and foreshore and seabed matters as a 'flexible and open minded application of the legislation'. TTC notes that the Crown contemplated parallel process such as this prior to the Act.

New Zealand response to the recommendation contained in paragraph 20

24. TTC agrees with the state representation at paragraph 23.

New Zealand response to the recommendation contained in paragraph 23

25. TTC does not comment on paragraph 26 in the state report.