

OCR scan of letter received

*Te Tari Whakatau Take Tika Tangata
The Office of Human Rights Proceedings*

12 October 2005

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Dear Mr Goldsbury

RE: YOUR COMPLAINT AGAINST THE FORESHORE AND SEABED ACT 2004

Thank you for your letter dated 15 September responding to my letter dated 19 August 2005 which set out my decision relating to your application for legal representation to take proceedings in the Human Rights Review Tribunal in respect of the Foreshore and Seabed Act 2004.

You have asked me not to close your application but to suspend it so that it can be used to support any other similar application by directly affected persons which may be made in the future.

If I receive a similar application in the future and if I agree to provide legal representation for proceedings in respect of that application, I will certainly convey to that applicant your willingness to support them with their case. If this occurs and they are agreeable to you being involved I will write to you and advise you of this. I cannot however suspend your application. I have made a decision in your case and in accordance with my usual procedure I will now close your file.

Robert Hesketh
Director of Human Rights Proceedings
Tumuaki Whakatau Take Tika Tangata

15 Sept 2005

Mr Robert Hesketh,
The Director of Human Rights Proceedings,
10th Floor, Tower Centre, Corner Queen and Custom Streets
PO Box 6751, Wellesley Street, Auckland.

cc Hon Dr Michael Cullen Attorney General, Hon Helen Clark PM, Hon Dr Don Brash Leader of Opp
cc. Dame Sian Elias, Chief Judge, Supreme Court,
cc. Dame Silvia Cartwright, being Governor General and NZ representative of the Queen.

Dear Mr Hesketh,

Thank you for your letter of 19th August in which you conveyed that with the information currently available to you, on balance it was not appropriate for your office to provide me with legal representation.

I appreciated your full and honest description of the factors you are required to consider and in particular your acknowledgement that the Seabed and Foreshore Act raised significant questions of law, affected a large number of people, demonstrated harm to Maori and is clearly in the public interest to resolve. I understand that the main difficulties were jurisdictional (related to your office's legal mandate and lack of precedent), uncertainty (in relation to the success of proceedings in achieving the objective), technical (related to me as complainant not being personally disadvantaged), evidential (relating to the absence of specific evidence demonstrating disadvantage to Maori) and physical (relating to the lack of resources in your office to gather the evidence required to proceed with such a case).

From this I conclude that the complaint is acknowledged as a democratically important one, but the circumstances and evidence available made it difficult to action at this time. Accordingly, I request you do not close this application for legal representation, but rather suspend it so it can be used to support any application by other directly affected persons or groups who are able to prove what you need, namely:

- (1) the FSA either directly or in effect makes a distinction between Maori and non-Maori, or treats Maori differently from non-Maori;*
- (2) the distinction or different treatment arises from a prohibited ground of discrimination under the HRA (in this case race); and*
- (3) this causes or has caused Maori (or at least some Maori groups, iwi or hapu) some form of disadvantage.*

You assert only the second part of my complaint raises a discrimination issue under the act. I argue that such a determination if proved would require a constitutional review of parliamentary and select committee processes and values to prevent such discriminatory assumptions repeating themselves in any new legislation. I contend that the unilateral assumption of ownership and negotiation of seabed and foreshore resource rights by government provides the evidence of discrimination you require, given that the Treaty was a contract that afforded Maori the rights (including property rights) of all British subjects.

As this is a complaint made in the public domain, your office has my permission to make any aspect of it freely available to any other interested party or to refer them to the website on which it is tracked.
<http://www.converge.org.nz/pma/fspghrc.pdf>

Thanks again for your consideration of this complaint.

Peter Goldsbury

OCR Scan of original letter (may include some small scanning errors or formatting changes)

Te Tari Whakataua Take Tika Tangata
The Office of Human Rights Proceedings

19 August 2005

Mr Peter Goldsbury

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Dear Mr Goldsbury

RE: YOUR COMPLAINT AGAINST THE FORESHORE AND SEABED ACT 2004

Background

In February 2005 you complained to the Human Rights Commission (“the Commission”) about:

- the process undertaken by the select committee when considering the Foreshore and Seabed Bill, in particular you say in ignoring major submissions from individuals which questioned the constitutional validity of the Bill;
- the Foreshore and Seabed Act 2004 (“the FSA”) under which the Crown has assumed ownership of the foreshore and seabed and all its resources. This you say amounts to a breach of the Treaty of Waitangi and has overridden the human rights of a minority, namely Maori, who have a traditional role as kaitiaki of the foreshore and seabed;
- the legal ability you say the Government now has (for various reasons specified by you) to negotiate resource rights to, and licensing agreements in respect of, the foreshore and seabed. You cited an extract of a decision of the Canadian Supreme Court concerning the Canadian Government and aboriginal claims to resources.

The Commission was unable to resolve your complaint, and notified you of this by letter dated 10 March 2005.

In March this year you applied to my Office for legal representation in respect of proceedings that you now wish to take in the Human Rights Review Tribunal (“the Tribunal”) relating to the issues raised in your complaint to the Commission. In your letter to me dated 14 March 2005 you took issue with the Commission’s view that some parts of your complaint, though they may raise broader human rights issues, are not covered by the anti-discrimination provisions in the Human Rights Act 1993 (“the HRA”).

I have considered the documents you have provided me with and the discussions you have had with staff from my Office and it is my view that the first and third parts of your complaint do not raise discrimination issues.

The Commission has powers to consider a wide range of human rights issues by way of various functions and processes under the HRA. However, the HRA is very clear that only discrimination issues can be dealt with by the Commission through its complaints processes and further the Tribunal's jurisdiction is limited to considering such issues. Because of the latter I can only provide legal representation for proceedings in the Tribunal which raise discrimination issues. The importance of an issue and the genuineness of a person's reasons for wanting to take proceedings do not alter the jurisdictional limits for complaints and proceedings under the HRA. I will therefore not consider the first and third parts of your complaint any further.

Referring to the second part of your complaint I note that the Tribunal also does not have jurisdiction to consider or decide whether any action by the Government amounts to a breach of the Treaty of Waitangi. The limits on the Tribunal's jurisdiction mean that I could not provide representation for proceedings containing this allegation. However, I note that in your letter to me dated 14 March 2005 you state: *"What / am observing ... is racially discriminatory behaviour at parliamentary, governmental, institutional and cultural levels that leverage on deep colonising assumptions ... which disadvantage a minority indigenous group and their basic Human Rights. This is not limited to the current government, or specifically the Foreshore and Seabed Act."*

I understand from this, as well as the discussions you have had with my staff, that you consider that the FSA is discriminatory on the ground of race because in your view it disadvantages Maori. This is an issue which could be the subject of proceedings in the Tribunal and therefore I have considered whether I will provide legal representation to you to take proceedings in the Tribunal in respect of this part of your complaint.

Application for Legal Representation

The HRA gives me the function of deciding whether or not to provide free legal representation to people who have made complaints to the Commission, where those complaints have not been settled informally by the Commission. I receive a large number of requests for legal representation and do not have the resources to provide this in all cases.

In considering your request for legal representation I have taken into account the following matters:

- your application for legal representation;
- the Commission's file relating to your original complaint;
- the relevant provisions of the HRA and the FSA;

- discussions between you and my staff.

I have considered all of the above and I have decided **not** to provide you with legal representation.

The HRA provides a list of factors which I must consider when making my decision. I have discussed these, along with the reasons for my decision, below.

Factors I must consider when deciding whether to provide legal representation

1 Whether the complaint raises a significant question of law

The part of your complaint alleging that the ESA discriminates against Maori is covered by Part IA of the HRA which allows complaints of discrimination to be made about legislation. Whether it is likely or not that this part of your complaint would succeed in proceedings before the Tribunal is a separate question which I discuss further in section 4 below.

Because this part of your complaint is covered by Part IA it does raise two significant questions of law. These are the definition of “discrimination”, and the legal test for the “justification” defence which is available to the Government, under Part IA. Neither of these legal concepts has been tested in New Zealand Courts in relation to a complaint of discrimination under the HRA.

Because these significant questions of law are raised by your case, this weighs in favour of me providing you with legal representation. This is the case in many of the Part IA complaints which I have seen. As I have said to other applicants previously, I cannot provide legal representation to you simply to test the provisions of Part IA. I must consider all of the factors listed below, in all cases, when deciding whether to provide legal representation for proceedings in the Tribunal and then decide in each case whether on balance it is appropriate for me to do so.

2 Whether resolution of the complaint would affect a large number of people (for example, because the proceedings would be brought by or affect a large group of persons)

It appears clear to me that resolution of this complaint by way of proceedings would affect a large group of people. This factor weighs in favour of me providing you with legal representation.

3 The level of harm involved in the matters that are the subject of the complaint

When looking at the question of “harm” in relation to an application for legal representation I must of course assess “harm” by comparing the many cases that come before me. As you might expect, I am often required to consider cases involving profound harm, arising from violent and abusive behaviour.

I accept that you are genuinely concerned about the issues you have raised. However, it appears clear to me that you have not yourself suffered harm but rather any harm resulting from the FSA has been suffered by those directly affected by the Act.

It appears to me that your complaint about the FSA has been made by you because of your view that the ESA infringes important principles. I note you appear to have had longstanding concerns about some of the issues raised by the FSA. This is common in many Part IA cases which I have seen. This does not mean that the issues you have raised are not important but I cannot assess this complaint as raising any significant harm to you.

It is difficult for me to assess the level of harm suffered by those directly affected by the FSA. I have not heard from any such persons and you have not provided me with any material from any affected persons. I am aware that some of the claimed disadvantage to Maori resulting from the FSA relates to the removal of the ability to bring claims to property rights in the foreshore and seabed under the law as it stood prior to the enactment of the FSA. The nature and extent of such rights have not been established at law. I note that the decision in the Court of Appeal in *Nciati Apa, Ngati Koata & Ors v Attorney-General & Ors* [2003] 3 NZLR 643 which led to the enactment of the FSA did not discuss the nature or extent of any property rights which are held by Maori but rather upheld the right of Maori (prior to the enactment of the FSA) to bring claims in respect of property rights over the foreshore and seabed to the Courts. Though, as I discuss below, the Waitangi Tribunal in its *Report on the Crown's Foreshore and Seabed Policy* (WAI 1071, 2004) has recently given more guidance on the likely nature and extent of such rights.

I accept that the removal of the rights of Maori to bring claims in the Courts to property rights in the foreshore and seabed probably has resulted in harm to some Maori groups, iwi or hapu. But because of the uncertainty as to the nature and extent of such rights it is difficult to assess the level of any harm involved. Also relevant to this point is the fact that the FSA does provide means for Maori to establish some rights in respect of the foreshore and seabed though these fall short of property rights. As I have said I must compare harm in any case with other cases which come before me. For the reasons I have discussed it is difficult to assess where this complaint sits in the spectrum of harm in other cases I have dealt with.

However, for the purpose of this decision, particularly given the comments by the Waitangi Tribunal discussed below, I accept that the legislation may have resulted in harm to Maori at a sufficient level to weigh in favour of providing legal representation.

Page 4

for proceedings before the Tribunal. As I discuss below however, if proceedings were taken in the Tribunal, some harm or disadvantage would need to be established by evidence to prove discrimination as this is defined in Part IA of the HRA.

4 Whether the proceedings are likely to be successful

I will now discuss my assessment of the likelihood of success of proceedings alleging that the ESA discriminates against Maori. The discussion below may seem very legalistic; however it is likely that this is how the Tribunal would analyse your case. Proceedings before the Tribunal are not an informal way of resolving disputes, in the way in which, for example, mediation is, but are a formal and legalistic exercise. Also as discussed with you by my staff, the Tribunal is limited to considering whether the particular legislation complained about is discriminatory. The Tribunal does not have the jurisdiction to consider, or make decisions about, wider human rights issues, for example whether as you suggest there has been a history of practices in New Zealand which have disadvantaged Maori, as a result of colonisation. Nor does the Tribunal have jurisdiction to consider, or make a decision about, whether the FSA breaches the obligations of the Crown under the Treaty of Waitangi.

Complaints about allegedly discriminatory legislation are covered by Part IA of the HRA. The legal tests for Part IA have not yet been considered by the Tribunal or any appellate Court in New Zealand so it is difficult to predict exactly how these will be applied by the Tribunal. As well, though the Tribunal is not bound strictly by the rules of evidence (as most other Courts are), you would still need to provide sufficient evidence to the Tribunal on all the points below to satisfy it that the FSA does discriminate against Maori. It is likely that to establish a breach of Part IA you would need to prove:

- (1) the FSA either directly or in effect makes a distinction between Maori and non-Maori, or treats Maori differently from non-Maori; and
- (2) the distinction or different treatment arises from a prohibited ground of discrimination under the HRA (in this case race); and
- (3) this causes or has caused Maori (or at least some Maori groups, iwi or hapu) some form of disadvantage.

Part IA provides a defence to prima facie discrimination. In general terms the analysis which the Tribunal is likely to use is whether the discrimination is:

- (1) reasonable; and
- (2) prescribed by law; and
- (3) Demonstrably justifiable in a free and democratic society

You would have the burden of proving the first three elements above. If the Tribunal was satisfied on the balance of probabilities that you had proved each of these elements, then the Attorney-General (as defendant) would have the opportunity to try to establish the three elements of the defence. I now discuss both of these aspects below.

Before doing so I emphasise that there is as yet no clear indication in New Zealand case law as to how these legal concepts will be applied by the Tribunal. To complicate matters slightly, there are varying approaches to these concepts in overseas jurisdictions. Because of this uncertainty it is possible the Tribunal (or the appellate Courts) may see the issues differently from my discussion below.

Preliminary/jurisdictional issue

Even though I understand you have been concerned with issues about colonisation for some years, including by incorporating Maori concepts into leadership and organisational models in your work, you are not yourself affected by the alleged discrimination. Nor are you acting on behalf of any affected persons. I understand you are aware that in a separate Part IA case, currently before the Tribunal, the Crown Law Office has argued that the HRA does not permit proceedings (or even complaints to the Commission) by persons not affected by the alleged discrimination or who are not acting on behalf of affected persons.

You have said that your intuition is that such a restriction would not be valid from either a common sense, human rights or a democratic perspective. You have asked me to complete my decision concerning whether to provide you with legal representation despite the Tribunal's decision on this point remaining outstanding.

I understand that my staff have explained to you that my Office has recently argued in the Tribunal that complaints and proceedings are able to be made, and brought, respectively by unaffected persons. However, because this issue remains outstanding this point weighs against providing you with legal representation. As well, as I discuss below, because you are not yourself affected by the alleged discrimination I need to consider whether it is appropriate to provide you with legal representation given the limited resources I have for litigation. This is because in my view, it is likely that even if unaffected persons can bring proceedings in the Tribunal, it would want to hear evidence of disadvantage (in particular) from a person who is or persons who are themselves affected by the alleged discrimination. Because you cannot provide this yourself I would need to allocate probably significant resources to locate this evidence.

Discrimination

The Court of Appeal decision in Ngati Apa and the Waitangi Tribunal report (as I discuss below) (both referred to above) indicate Maori had some form of customary property rights in the foreshore and seabed under the law as it stood prior to the

enactment of the FSA. The Court of Appeal confirmed the right of Maori to make claims in respect of customary property rights to the Maori Land Court.

The Waitangi Tribunal report (which followed the Court of Appeal decision) said (in relation to the law existing prior to the enactment of the FSA) that:

- the High Court was unlikely to hold that Maori customary rights in the foreshore and seabed amounted to “qualified ownership” that is full ownership qualified only by public rights of navigation and fishing; and
- applications to the Maori Land Court concerning the foreshore and seabed were likely to result in rights being declared and though these rights would be short of amounting to fee simple title in some cases these could be extensive and exclusive (summary at pages 77-78).

As I discuss below the ESA has removed the ability to make claims to the Courts in respect of any customary property rights in the foreshore and seabed. In place of property rights which may have existed, the FSA provides for the ability to claim a territorial customary right, which if this is found to exist does not result in any rights usually associated with a property right for example exclusive use of the relevant area of land. Even where a territorial customary right is found to exist there is no ability to claim redress other than by negotiation with the Crown. As well the FSA provides for the ability to claim a customary rights order which is restricted to customary activities, uses or practices which are all well short of property rights.

The Waitangi Tribunal considered that the Crown’s policy (prior to the enactment of the FSA) did expropriate legal property rights of Maori in violation of the rule of law and that this was unfair for several reasons, including because it takes away the rights of only one class of citizens (summary at pages 124-125). Particularly relevant to your complaint, the Waitangi Tribunal concluded that by cutting off access by Maori to the Courts and effectively expropriating their property rights, they were put in a class different from and inferior to all other citizens, which it said is discriminatory (page 136). The resulting prejudice (or disadvantage) to Maori was described as very serious indeed (page 138). I note however, that the Waitangi Tribunal was not applying the test for discrimination which is found in Part IA of the HRA so while these conclusions are persuasive in terms of the assessment I am required to make, this does not mean that proceedings under the HRA would be successful.

Following the introduction of the Foreshore and Seabed Bill the (then) Attorney-General accepted that it is seriously arguable that the extinguishment of Maori customary title, as well as the absence of a guaranteed right of redress, is prima facie discriminatory. (See paragraph 79 of the Attorney-General’s *Report on the Foreshore and Seabed Bill* assessing its consistency with the New Zealand Bill of Rights Act 1990 (the NZBORA).) This concession is directly relevant to a discrimination claim under Part IA of the HRA because Part IA incorporates the NZBORA standards for discrimination.

However, the FSA as enacted appears to not only remove the ability of Maori to make claims to customary property rights (whatever these may be) but as well it includes measures for the expropriation of some freehold interests in the foreshore and seabed. Though a difference in treatment appears to remain in that Maori customary property rights were in effect fully extinguished by the FSA and freehold interests in land (in some circumstances) can only be expropriated at the instigation of the Minister of Conservation (see s 22 and s 23).

I also note that some property interests in the foreshore and seabed are not affected by the Act, for example land which was reclaimed prior to the enactment of the FSA and is held freehold (it would appear to include such land held privately) or as an estate in fee simple by local authorities (s 18). Thus there is an argument that some private interests, though it appears not all, are protected in terms of retention of property rights. On this point the Constitutional Court of South Africa held in *Alexkor and Government of South Africa v Richtersveld Community and Ors* (CCT 19/03, 14 October 2003, paragraph 99) that “*the failure to recognise and accord protection to indigenous ownership while, on the other hand, according protection to registered title*” can amount to racial discrimination.

Concerning the unavailability of guaranteed redress for loss of customary property rights, it appears that no-one (other than local authorities (s 25)) who loses a property right by the operation of the FSA is entitled to redress. This could affect the Tribunal’s view as to whether the FSA discriminates against Maori by not providing for redress for loss of any customary property right. In other words the Tribunal may have some doubts as to whether there is different treatment regarding redress.

As well, I note that some redress is possible pursuant to s 37 and s 38 following a finding that a territorial customary right exists (defined in s 32). Though this is not guaranteed and it is limited to being negotiated with the Crown. It is difficult to assess whether the Tribunal would consider that this is sufficient to result in the FSA not being discriminatory in respect of the redress issue.

Both the extinguishment of customary title and redress issues were considered in the decision of the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee) (Decision 1(66), 11 March 2005) which said in relation to the FSA (at paragraph 6):

Bearing in mind the complexity of the issues involved, the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Maori, in particular in its extinguishment of the possibility of establishing Maori customary title over the foreshore and seabed and its failure to provide a guaranteed right of redress, notwithstanding the State party’s obligations under articles 5 and 6 of the Convention [the Convention on the Elimination of Racial Discrimination].

This decision is highly persuasive in my view though I note that the Tribunal will not necessarily take this view particularly because of the recognition in the decision itself that the issues involved are complex.

In summary therefore, it appears to me reasonably strongly arguable that the FSA does discriminate against Maori in particular because as a result of the enactment of the FSA, the ability to take proceedings to claim what the Waitangi Tribunal found were likely to be (at least in some cases) extensive and exclusive property rights or interests in the foreshore and seabed, has been removed. I note however, that you would be unable to rely in proving your case solely upon the conclusions in the Waitangi Tribunal report or the Attorney-General's report or the CERD Committee decision, but would have to satisfy the Tribunal with direct evidence that the elements of discrimination as this is defined in Part IA of the HRA were proven. Because the legal tests which will apply to discrimination under Part IA are not yet settled, in my view, the evidence in your case would need to be reasonably substantial particularly in terms of disadvantage. I anticipate the Tribunal would be uncomfortable dealing with this issue in the abstract and that it would expect some concrete examples of disadvantage by particular Maori groups to be provided to it.

You have said that you understand that at least one other case concerning the FSA is with the Commission and you believe this might be a complaint by an affected person. I do not have any information about this possibility and nor am I entitled to such information even though my Office is part of the Human Rights Commission. My decision in your case will not prejudice the possibility of me providing legal representation to any affected person who does apply to me with a complaint about the FSA.

Justification

If you succeeded in proving that the FSA is discriminatory the Government would then have the opportunity to try to prove that even though the Act may prima facie discriminate, this is justified. I have set out the likely analysis for this defence above.

In Part IA cases where the Crown Law Office has been notified of the complaint (which did not occur in your case) there is usually an opinion on file from that Office setting out the matters the Government considers justify any apparent discrimination. I do not have the benefit of this in your case and therefore I cannot predict with any certainty exactly what issues the Government might raise as part of this defence in respect of the FSA. However, I note that the Attorney-General raised the following matters in her report on the Foreshore and Seabed Bill, as to whether the prima facie discrimination is justifiable:

.The reasons for introducing the Bill include creation of a new integrated scheme to:

- Preserve the public foreshore and seabed in perpetuity for all the people of New Zealand
- Provide for general rights of public access to the foreshore and seabed
- Acknowledge the expression of kaitiakitanga of Maori
- Provide for the recognition of customary rights to undertake and engage in activities, uses and practices in respect of the foreshore and seabed (via

- the then proposed Ancestral Connection Orders and Customary Rights Orders);
- Clarify the law for both Maori and non-Maori;
 - Provide certainty particularly as New Zealand is an island nation and the coastline plays and continues to play an important part in the economic, social and cultural lives of all New Zealanders;
 - Provide clarity for the Crown and local authorities in performing their regulatory functions including in the day-to-day management of the foreshore and seabed;
 - Provide for redress through negotiation rather than litigation.

Most of these points are repeated in the object and purposes sections of the FSA (s 3 and s4).

On the last point I note that the (then) Attorney-General has said that she accepts there is a risk that a human rights body may regard the lack of a compulsory right of redress as imposing an unjustifiable limitation on the right to be free from discrimination (paragraph 102 of the Attorney-General's report).

I do not have the resources to fully investigate or research all of these points for the purposes of this decision. Though I note that the Human Rights Commission took issue with some of the claimed benefits of the legislation in its submissions to Parliament on the Bill including in terms of the legal analysis which will probably apply to the assessment of justification by the Tribunal. It is probable that if proceedings were brought in the Tribunal some if not all of these points would be part of the Crown's defence, and though the Crown has the burden of proof in respect of these points, you would also need to deal with them to some extent in the evidence you provided to the Tribunal.

Further, I note that some of the provisions in the FSA are positive for Maori, for example the process available for prohibiting or restricting access to the foreshore and seabed to protect wahi tapu. It is likely that the Tribunal would consider protections such as these as relevant to the justification defence though it is difficult to predict what weight these would be given.

In my view, the Tribunal will be most concerned with the purpose of the FSA in preserving the foreshore and seabed for all New Zealand people. It may take the view that this is a sufficient justification for the prima facie discrimination (if it finds this as a first step). Also, in my view, the Tribunal will be uncomfortable in second-guessing Parliament over what is a controversial and political issue. I am aware of case law from New Zealand and overseas, some of which the Crown Law Office has referred to in other cases, which gives some support to the proposition that deference to Parliament should be shown by the Courts in respect of policy issues at the political end of the spectrum. I am not saying I necessarily agree with this proposition or agree with the Crown Law Office as to how far this might extend, however, I anticipate this will be a key part of the Crown's defence in your case. Based upon my experience I believe that the Tribunal is likely to accept this point to some extent.

Conclusion

I have tried above to fairly set out the issues which could arise if you took proceedings in the Tribunal. Any hearing of your complaint is likely to be lengthy and complicated, and if you were unsuccessful on even one point in the chain of elements of discrimination which you need to prove, the case would fail. I am particularly concerned in your case about the combination of the jurisdictional point (you being an unaffected person and the uncertainty about whether you can take proceedings in the Tribunal), the lack of any concrete examples of disadvantage caused by the ESA (though this could be remedied by work by my Office, however this raises the issue of my limited resources which I discuss below), as well as the fact that the legal concepts under Part IA have not yet been clarified by either the Tribunal or the appellate Courts.

Overall, I am unable to assess your complaint as being likely to succeed before the Tribunal. This is a critical factor in my decision not to provide you with legal representation.

5 Whether the remedies available through any proceedings are likely to suit the particular case

If proceedings were successful in respect of the FSA (which I cannot assess as likely) the only remedy available to you is a Declaration of Inconsistency which is a declaration by the Tribunal that the FSA is inconsistent with the right to be free from discrimination. As I have said above, your view of the seriousness of the issue you have raised does not affect the clear words of the HRA which provides this as the only remedy available in proceedings concerning allegedly discriminatory legislation

The HRA makes clear that these declarations do not affect the validity of legislation and thus the FSA would continue to apply. However, if such a declaration was made, the Minister responsible for the administration of the FSA would have to provide a written report to Parliament about the fact that a declaration had been made and what response the Government considered was appropriate. A report does not need to be completed until all appeals are disposed of.

In my view, it is very likely that if you were successful, the Tribunal's decision would be appealed by the Government. This is because this would be one of the first cases decided under Part IA and the Government may wish to clarify the legal tests which apply to Part IA even if it did not want to directly challenge a finding that the ESA was discriminatory. It is therefore likely that this case would not be finally concluded for possibly several years.

If, and when, a report was presented to Parliament there would be no guarantee that any changes would be made to the FSA. Ultimately it would be for Parliament to decide this. The Government could consider the issue and decide to retain the status quo and, if a majority of Parliament agreed, no changes would eventuate.

Because a Declaration of Inconsistency can raise awareness and possibly lead to law and policy changes it may be that this is suitable for your purposes. Though as I have explained above I cannot assess your case as likely to succeed in the Tribunal and therefore I cannot assess as likely that a Declaration of Inconsistency would be made in your case.

6 Whether there is likely to be any conflict of interest in the provision of representation by me

It does not seem likely that any conflict of interest would arise in this case if I agreed to provide legal representation to you.

7 Whether the provision of representation is an effective use of resources

I have limited resources and cannot provide legal representation to all those who apply to my Office for this. This is a critical factor in my decision in this case. At present I have a large number of complaints before me and there is serious competition for resources.

Because this case would be one of the first cases under Part IA, I expect the hearing would be lengthy and preparation for this would require significant resources. The Tribunal is likely to expect significant research to be completed from multiple jurisdictions on all the legal tests relating to Part IA.

I also note that you are not an affected person and as I understand it your complaint is not specifically supported by any persons directly affected by the FSA. I have said above that in my view this does not mean you cannot bring proceedings in your name (though a decision by the Tribunal on this issue is pending). However, because of this I anticipate I would need to use significant resources to locate and involve affected persons to provide evidence of disadvantage (which is a key element of discrimination) in order to prepare for the hearing. Without this evidence proceedings are unlikely to succeed.

Given my on-going case load, available resources, the likely resources required for this particular case, and the other factors I have mentioned, on balance it appears to me that it would not be appropriate to use my limited resources to provide legal representation in this case.

8 Whether or not it would be in the public interest to provide representation

In my view the issue you have raised is of significant public importance. It is clear from recent media reports and other public commentaries that the FSA is of great concern to a large number of people. Because of this, despite the problems I have

discussed above, I have given serious consideration as to whether to provide legal representation to you in order for this issue to be aired before the Tribunal.

The likely resources needed to prepare for this case, my limited resources for litigation, other competing applications for legal representation and the fact that given the likelihood of appeals because of the untested nature of Part IA and the result that your case is unlikely to be resolved one way or the other for several years, are critical factors weighing against providing you with legal representation. As well, because two other authoritative bodies (the Waitangi Tribunal and the CERD Committee) have recently concluded that policy behind the FSA is discriminatory, on balance it does not appear to me that a decision by the Tribunal in your favour (which I have said I cannot assess as likely) will necessarily achieve the changes you want. The comments from the Waitangi Tribunal, a body with particular expertise concerning some of the issues your complaint raises, did not appear to do so. I understand you see a value in having this issue raised again because it involves, in your view, a substantial injustice. However, in my view, on balance, given the other problems which I have discussed, the public interest factors raised by your complaint do not favour providing you with legal representation.

There do not seem to me to be public interest factors, in addition to those touched upon above, which lead to a different conclusion. I note that it is important for people harmed by allegedly unlawful actions to have an effective remedy though I note that you are not a person who is directly harmed by the alleged discrimination in this case so this point does not weigh in your favour to the extent it would if an affected person had applied to me for representation. As well I note that you are free to take your case to the Tribunal.

9Any other matters I consider relevant in this case

There are no other matters which appear to me to be relevant to my decision in this case.

Decision

For the reasons discussed above, I have decided not to provide you with representation.

You are however entitled to take your own proceedings to the Human Rights Review Tribunal. You can do this on your own or by using a private lawyer. You may be entitled to legal aid. A lawyer can assist you to determine this.

The Registrar of the Human Rights Review Tribunal is Chris Smith, telephone (04) 918-8300. Mr Smith can provide you with information you may need about how the Tribunal operates.

Finally, you should be aware that this decision is protected by legal professional privilege because it contains legal advice about your case. This means that I cannot disclose it to other people, although you can if you wish to do so. However, you cannot be required to provide others with a copy of this decision. If you do take proceedings in the Tribunal you should not feel obliged to give a copy of this letter to either the Tribunal, or to the Crown Law Office.

Yours faithfully

Robert Hesketh
Director of Human Rights Proceedings
Tumuaki Whakatau Take Tika Tangata

Office of Hon Dr Michael Cullen
Deputy Prime Minister

Minister of Finance
Minister of Revenue
Attorney-General
Leader of the House of Representatives

23 AUG 2005

Dear Peter Goldsbury

I refer to your further letter of 23 July 2005 which sets out your concerns with parliamentary processes and the Foreshore and Seabed Act 2004.

I refer you to my response of 18 December 2004 in terms of the process for considering submissions on the Foreshore and Seabed Bill. With regard to your comments about provisions of the Foreshore and Seabed Act, there are two matters that I would like to comment on.

The first is that the Foreshore and Seabed Act provides for groups of Maori and non-Maori to apply to the Maori Land Court and the High Court for customary rights orders. Customary rights orders relate to an activity, use or practice in the public foreshore and seabed that has been carried on substantially uninterrupted since 1840. I do not agree with the comment in your letter that the rights that can be recognised in this way relate to "trivial activities" and neither, I imagine, do the four groups that have filed applications for customary rights orders to the Maori Land Court. Customary activities sit on a spectrum ranging from the activities that may be recognised and protected under customary rights orders through to the interests that come under the definition of territorial customary rights. This leads me onto my second point.

The Act provides two processes for the recognition of territorial customary rights. Territorial customary rights, in relation to a group, means a customary title or aboriginal title that could be recognised at common law and that is founded on the exclusive use and occupation of a particular area of the public foreshore and seabed and, until the commencement of the Act, entitled the group to exclusive use and occupation of that area. The first process for recognising territorial customary rights is through the High Court and the second is through negotiations with the Crown (which is then confirmed by the High Court). It is not, as you suggest, through the Waitangi Tribunal process.

We have been through an exhaustive process in developing the policy contained within the Foreshore and Seabed Act. I believe the final legislation provides a lasting solution which can take us forward as a country.

Yours sincerely

Hon Dr Michael Cullen
Attorney General

23 July 2005

Honourable Dr Michael Cullen
Attorney General
Deputy Prime Minister.
Parliament Buildings,
Wellington

cc The Director, Human Rights Tribunal
cc The Director, Waitangi Tribunal
cc Public Domain website copy - <http://www.converge.org.nz/pma/fspghrc.pdf>

Dear Michael Cullen,

Thank you for your letter of 18th July.

I am sure you are aware that in my letter to MP's the issue of marginal strips was used as an example to draw Parliament's attention to some politically inspired decision-making behaviour that fails to consider information and realities related to a bigger and longer term future picture for the country.

Much more importantly, my letter used that example to demonstrate discrimination in the democratic processes, that over many years has allowed parliament to assume that on the basis of majority public support it has the right to legislate away the rights of a minority group (in this case Maori) to treat them significantly different from other groups better positioned with resources to lobby for their position; often under the umbrella of international protocols and treaties, which in themselves ensure preferential treatment for the majority and commercial interests concerned. Please recognise that this is not a behaviour confined to the current government in term, it stretches from 1840 and is still embodied within the mindset (and now around election time publicly in the behaviours) of most parties.

I commend you for reinforcing in your letter "the important constitutional principal that all people including foreign citizens are subject to and equal before the law in New Zealand". However that position is seriously undermined when in the next sentence you refer to the concept of "Customary Rights" which is included in the Foreshore and Seabed Act as an instrument to curtail that very concept of equality. I fail to understand how a group who were guaranteed rights as British Citizens under the Treaty of Waitangi, including continued control of their resources, have now had those rights reduced to the level of arguing about such trivial activities as the "right to collect hangi stones" from the beach.

From a Human Rights perspective many consider it totally inappropriate and unbecoming of a just society that legislation should be passed which takes away a minority group's rights, then forces them to argue for redress or compensation as disadvantaged persons within a very constrained legal mechanism – in this case the Waitangi Tribunal. There have been numerous strong messages and submissions to government and parliament on this issue from the High Court, Human Rights Commission, The United Nations, thousands on the Hikoi, Human Rights Groups, and via international conventions that have been consistently ignored.

I understand that there are also now moves afoot within government and The Crown Law Office to attempt to limit the Human Rights Tribunal to consider only cases brought to them by "disadvantaged parties", restraining them from taking any proactive position. My human rights complaint to the Director as a concerned pakeha continues and we will argue, with the support of effected people if necessary, that this restrictive approach is nonsense and another attempt to manipulate the rights of NZ citizens.

Yours sincerely,

Peter Goldsbury

OCR scan of letter received

Office of Hon Dr Michael Cullen

Deputy Prime Minister

Minister of Finance

Minister of Revenue

Attorney-General

Leader of the House of Representatives

18 July 2005

Dear Peter Goldsbury

Thank you for your letter of 17 June 2005 about your concerns with the Parliamentary legislative process and current issues relating to access to marginal land strips near waterways.

I can comment generally that it is an important constitutional principle that all people, including foreign citizens, are subject to, and equal before, the law in New Zealand. Property rights, including customary rights, are respected in New Zealand through principles established under common law and statute. The Foreshore and Seabed Act 2004 provides a system for dealing with rights and interests in the foreshore and seabed, including the recognition and protection of customary rights. Parliament has established a process to deal with claims for breaches of the Treaty of Waitangi and the Government is committed to achieving settlements which are fair to all New Zealanders.

I recognise the valuable initiatives that are being taken by some land owners and other groups in the community in the use and development of marginal land strips. The Parliamentary legislative process will ensure that any legislation affecting these strips will be informed by public submission and a careful and considered examination of the issues.

I appreciate you taking the time to write.

Yours sincerely

Hon Dr Michael Cullen
Attorney-General

17 June 2005

Honourable Members of Parliament.
Parliament Buildings,
Freepost
Wellington

cc The Director, Human Rights Tribunal
cc The Commissioner for the Environment

I refer you to the following article by Ruth Berry published in the NZ Herald on 1 June 2005, which indicates to me that the parliamentary negotiating process for getting support for bills is being distorted by some narrow single issue party political thinking particularly now elections are looming.

Government drops plan for foreign land buyers –

The Government has been forced to abandon plans to force foreign buyers of land adjoining waterways to surrender 20m marginal strips to the Crown, after failing to gain political support. The provision was included in an amendment to the Overseas Investment Bill when it was reported back from a select committee last month. But the Government's refusal to pay compensation for the seizure of land was a sticking point for United Future and it yesterday said it would not support the bill in its current form. The Government was forced to drop the plans in order to get the party's support to pass the rest of the bill, which aims to toughen controls of overseas residents' purchases of special heritage or environmental values.

The marginal strips proposal was designed to ensure continued public access to the country's coast, lakes and rivers - effectively extending the Queen's Chain. The select committee said it had "clear evidence" that foreign ownership of large rural properties was concentrated around water bodies "in our most scenic areas". "This lends weight to the submissions we received that foreign owners from jurisdictions with low tax regimes or higher concentrations of wealth can and do outbid New Zealanders and obtain access to some of our waterways." Sometimes the ethics of foreign buyers around public access to waterways was "more restrictive than has been the historical norm", the committee said. It proposed foreign buyers would hand over the marginal strips, which would be vested in the Crown, where sizeable sales were involved.

But Deputy Prime Minister Michael Cullen conceded yesterday the amendment would be removed from the bill "to ensure a parliamentary majority for the legislation". United Future MP Gordon Copeland, also deputy chair of the committee which considered the bill, said the refusal to pay compensation was a "clear breach of property rights". The proposal would have created a precedent, setting aside an important common law principle, which United Future could not abide.

I generally commend this devotion to preserving property rights, and for compensation based on today's value of what was seized, the but would ask three wider questions that are deserving of parliament's consideration.

- 1. Given that as the founding document of our nation the Treaty of Waitangi 1840, was the mechanism / contract that allowed the Crown to transfer property (land) in New Zealand from Maori to new immigrants (and all the evidence suggests that much of this was then illegally seized), is it honourable that foreign purchasers with no commitment other than an investment one and the ability to fight an expensive legal battle with the Crown, should enjoy property rights and treatment greater than that afforded to our citizens and in particular our Maori Treaty partners whose rights were "guaranteed" under the Treaty and today are supported by UN declarations and international precedents as indigenous peoples?**
- 2. Is it right that English property law conventions should override or redefine all customary rights, practices and ethics (e.g. the concept of Kaitiakitanga – living in balance with the earth) that were in place before the arrival of pakeha, particularly now when with our current rate of environmental degradation these are even more relevant for us as a nation and world?**

These principles are the subject of the official complaint I have submitted to The Human Rights Tribunal highlighting the constitutional assumptions and institutional discrimination that the parliamentary majority process

has employed in passing the Foreshore and Seabed Act. This is also the basis of the official complaint I have submitted via the speaker to the Standing Orders Committee about discriminatory practices used in select committee processes. This letter will be added as further evidence in the audit trail for this complaint (in the public domain on the web; <http://www.converge.org.nz/pma/fspghrc.pdf>)

3. With land ownership are there landowner responsibilities associated with its use, particularly regarding long term environmental impacts and effects on the community amenities and local or government systems it intersects with?

The article above implies that United Future and others narrowly portray the marginal strip as a landowner property rights issue. In other forums farmers see it largely as a public access issue. Proper consideration of its benefits in a new spirit would uncover many win-win opportunities for all parties concerned.

- *Marginal strips provide run-off filtering and use nature's bio-remedial water purification processes to counter the soil erosion, effluent, nitrate, toxin and other undesirable effects of high intensity farming and other land uses.*
- *Marginal strip planting can help provide a local compensatory sink for the animal CO2 emissions that account for almost half our country's Kyoto protocol tax burden. This is about taking local responsibility for our own pollution.*
- *The evidence suggest that most farmers who retire, fence and plant their marginal strips in fact gain more than compensatory benefits in animal health, resultant productivity, fertilizer effectiveness and farm value etc.*
- *The resultant water quality provides resources for human consumption, recreation and enjoyment. This also helps return our rivers, lakes and seas to healthy places that nurture plants, birds, animals, fish and diversity.*
- *Most waterway strip planting and restoration is done locally (with very little official support) by environmentally proactive Iwi, Hapu, farmers, volunteer school and other community groups as an investment for future generations. They should have the right to be able to freely enjoy the new amenity and access to renewed resources they thus create.*
- *By relinquishing the marginal strips, communities (and nature) effectively take over farmer's long term responsibility for maintenance, and at the same time resolving their environmental protection obligations.*
- *For NZ, this reconnection with nature and the local action it drives is an essential part of developing a society and country that is committed to a sustainable future.*

Can any new legislation you pass please take a wider view and encourage this long term balance. I noticed in Wellington last week a quote by Earl Warren in the largest letters on the window of our High Court

“It is the Spirit, not the form of the law that keeps justice alive.”

If the law is appropriately framed, I am certain that the common sense of our public and judiciary means we are all very able to understand and action this difference to everyone's advantage.

I trust that in the interests of all our country's future grandchildrens, when bills like this come up for voting in parliament you will seek and share additional information to help you make bold and wise decisions that in retrospect many later generations will thank us for.

Yours faithfully

Peter Goldsbury

17th April 2005

Hon Margaret Wilson,
Speaker of the House,
Parliament Buildings,
Wellington.

Dear Ms Wilson,

Thank you for your prompt reply of 13th April to the complaint I made to you on 1st April 2005.

It was an unexpected surprise for me to find that as Speaker of the House it was not within your powers to conduct or initiate a review of the actions of a committee of the House, even when faced by a complaint about behaviours that contravene the spirit of the laws that Parliament has set in place to safeguard the rights of its people and minorities.

Will you please forward the official complaint I made to you on 1st April, together with all the attached supporting documentation to the Standing Orders Committee of the House for their urgent consideration.

In addition, I request that as Speaker you advise the House formally that an official complaint has been made to both the Human Rights Commission and via you as Speaker to the Standing Orders Committee, then pose for all Members of Parliament the following two questions to draw their attention to the seriousness of the matters being raised:

1. "If ordinary New Zealand citizens, or minority groups who raise valid constitutional, human rights or other concerns that question the ethics and honour of the House, Government and our Country, can not have them heard by a Parliamentary Select Committee, then where else in the world can these be raised?"
2. "Why does Parliament, whose members are "the elected directors of the nation", not need to have in place the governance ethics, procedures, controls and accountability to ensure that it is in compliance with the human rights, contractual, constitutional and other legislation that it passes in an attempt to influence the behaviour of all other members and groups within the New Zealand community.

I look forward to Parliament urgently addressing these and related concerns that are also being voiced by many others. I contend that such courageous action and some serious internal reflection by Parliament would be an example that would help grow our country Aotearoa, New Zealand as a vibrant, sustainable, rich and healthy democracy that will share a "best practices" model in our global world.

Yours faithfully,

Peter Goldsbury

HON MARGARET WILSON MP
OFFICE OF THE SPEAKER
HOUSE OF REPRESENTATIVES
WELLINGTON, NEW ZEALAND

13 April 2005

Dear Mr Goldsbury

Thank you for your letter of 1 April.

The manner in which the select committee considered the Foreshore and Seabed Bill during the course of 2004 was a matter for that committee. It is not within the powers of the Speaker to conduct any review of the actions of a committee on a bill that is no longer before the House.

The general procedures of the House are examined by a select committee, the Standing Orders Committee, from time to time. If you would like me to place your correspondence before the committee or if you have specific suggestions to changes in procedures that you would like to make, I would be pleased to place these before the committee.

Yours sincerely



Hon Margaret Wilson
SPEAKER

Following my email submission to you on 14th April and the email acknowledgement from John Thompson on 15th April, I am now back in my office so am able to send you the formal copy that includes the supporting information which follows.

14 April 2005

The Constitutional Arrangements Committee Secretariat,
Bowen House,
Parliament Buildings,
Wellington.

Attn John Thomson,

To Peter Dunne (Chairperson), David Parker (Deputy Chairperson), Lianne Dalziel, Mita Ririnui, Nandor Tanczos, Russell Fairbrother, and Stephen Franks.

To the Select Committee on Constitutional Arrangements.

My submission to this select committee covers the same Human Rights, Contractual and Constitutional issues regarding the Treaty; A CONTRACT signed between the Crown and Maori that is the subject of my official Human Rights complaint in relation to the seabed and foreshore, and also my subsequent complaint to the Speaker of the House Margaret Wilson regarding the processes used, validity and assumptions made by select committees.

These are all available for all to see in the public domain at <http://www.converge.org.nz/pma/fspghrc.pdf>
The Government has no right to pretend that it can unilaterally nullify the place of the treaty as a signed contract, or to remove it from its status as the founding document of our nation.

We look forward to your committee taking a courageous approach to this. Please do not repeat the politically expedient assumptions, inappropriate processes and colonising behaviours that Government has used in the past to consistently override the rights of minority groups whose potential contribution to the diversity and resultant long term strength of our country is immense.

Peter Goldsbury

1st April 2005

Hon Margaret Wilson,
Speaker of the House,
Parliament Buildings,
Wellington.

Dear Ms Wilson,

On 14th March 2005 I copied you with my complaint to the Director of Human Rights Proceedings and you acknowledged it on 17th March thanks.

You may have noticed in the correspondence attached that on 10th March the Human Rights Commission advised me that my complaint (item1) about the approach of the Seabed and Foreshore Select Committee was beyond the unlawful discrimination jurisdiction of the act, so was not able to be pursued by them. I was advised to take this particular matter up with the Speaker of the House, who is responsible for Select Committee processes. I disputed this legislative argument so it remains as a Human Rights issue in my official complaint application to the Director of 14th March 2005.

In parallel with my complaint to The Director, I now lodge an official complaint with you as Speaker of the House about the process used by the Seabed and Foreshore Select Committee. I appreciate that you were not Leader of the House at the time, but trust that you will ensure that this issue is seriously revisited and that the process and procedures for select committees are changed to ensure that the deliberate ignoring of substantial submissions that raise major constitutional, human rights, legal, contractual or other issues implied by a proposed bill, "can never happen again".

The question that I pose for the House to address is: "If ordinary New Zealand citizens, or minority groups who raise valid constitutional or other concerns that question the ethics and honour of the House, Government and our Country, can not have them heard by a Parliamentary Select Committee, then where else in the world can these be raised?"

I look forward to your action on this matter to help restore the public credibility and integrity of our processes of government. Without this assurance, examples like the constitutional select committee process that is underway, will likely be seen by many in New Zealander and the international community as a window dressing farce.

Yours faithfully,

Peter Goldsbury

24th March 2005

The Human Rights Commission,
Level 8 Vogel Building
8 Aitken Street
PO Box 12411, Wellington

Attention Susan Freeman-Greene

Dear Susan,

Thank you for your letter of 20th March 2004, and in particular for alerting me to the pro-active approach that the HR Commission has taken, using every possible opportunity to put before the government and the public a human rights perspective on the foreshore and seabed issue and subsequent legislation.

I was pleased that you pointed out that the Human Rights Commission Submission to the Seabed and Foreshore select committee dated 12 July 2004 is on your website. I was able to find it at:
<http://www.hrc.co.nz/hrc/worddocs/f%20&%20s%20Foreshore%20and%20Seabed%20Bill%20submission24%20Final%20version%2012%20July%20Submission.doc>
and the appendices to this at:
<http://www.hrc.co.nz/hrc/worddocs/f%20&%20s%20Foreshore%20and%20Seabed%20Bill%20submission24%20Final%20version%2012%20July%20Appendices.doc>

I repeat that all correspondence relating to my complaint is in the public domain at <http://www.converge.org.nz/pma/fspghrc.pdf>, so I have no objection to it being disclosed to any other party including the other complainant regarding the foreshore and seabed policy. If they wish to invite me as an interested party in mediation, that is always possible. However this would be an independent activity, so in no way would I allow it to prejudice or delay my outstanding request to Director of Human Rights Proceedings, as this is an urgent issue for resolution.

Thanks again for your assistance and look forward to the Director's action on this complaint.

Yours faithfully

Peter Goldsbury

20 March 2005

Dear Mr Goldsbury

Thank you for your telephone message and your email informing us that you have requested the Director of the Office of Human Rights Proceedings to take your complaint. We will therefore close your complaint file within our dispute resolution team.

We would, however, like to take this opportunity to clarify some of the points made in our respective communication and to explain how the Commission is, and has been, approaching the broader human rights issues you raise.

We agree with your view that this is an important human rights issue that the Commission should be able to consider and influence.

The Commission can approach important human rights issues in two ways —proactively and generally through its broader mandate or reactively and specifically through its complaints mechanisms. While our complaints jurisdiction is limited to issues of unlawful discrimination affecting those who have suffered detriment (and the three elements of your complaint either fall outside the unlawful discrimination jurisdiction and/or there is no evidence of detriment to you, the complainant), the Human Rights Commission takes a proactive approach to legislation that may impact on human rights in a range of ways.

On this issue the Commission has taken (and continues to take) every possible opportunity to put before the government and the public a human rights perspective on the foreshore and seabed issue and subsequent legislation.

In November 2003 the Commission wrote to the Prime Minister, outlining the human rights aspects of the foreshore and seabed policy. The Commission also facilitated two public Speaker Forums in Wellington, where Moana Jackson and the Deputy Prime Minister, Michael Cullen, put forward their views on the issue. In July 2004 (and at a later oral hearing) the Commission provided the Select Committee with comprehensive submissions on the Bill's impact on the rights of minorities; the right to freedom from discrimination; the right not to be arbitrarily deprived of property (and compensation issues); and the right to development. These submissions are available on the Commission's website.

The views the Commission expressed on discrimination have largely been supported by the United Nations Committee on the Elimination of Racial Discrimination in its recent decision on the foreshore and seabed legislation. Race Relations Commissioner, Joris de Bres on National Radio (Nine to Noon, Friday 18 March 2005) endorsed the decision of the Committee on the Elimination of Racial Discrimination that further dialogue on the issue between the parties be resumed. The Commission will continue to look for opportunities on which to engage and discuss this issue further.

Further, as indicated in my letter we have also received another complaint about the Foreshore and Seabed Act 2004 which we may be able to accept (if we receive confirmation of detriment). Should this progress to mediation, there is still the option of putting your name forward for consideration to attend as an interested party. If mediation is not successful the complainant would then have the option to proceed to the Human Rights Review Tribunal (with or without representation by Office of Human Rights Proceedings depending on the Director's decision on such a request).

Please do not hesitate to contact me further if you have any queries about this letter.

Yours faithfully, Susan Freeman-Greene, Chief Mediator

Complaint to Director on Human Rights breaches in the Seabed and Foreshore legislation.

14 March 2005

The Director of Human Rights Proceedings,
The Human Rights Commissioners Office,
10th Floor, Tower Centre, Corner Queen and Custom Streets
PO Box 6751, Wellesley Street,
Auckland

Dear Director,

I write to you as a citizen who on 11 Feb 2005 made an official complaint to the Human Rights Commissioner about what I regard as fundamental human rights breaches associated with and brought to a head by the Seabed and Foreshore Act. My understanding then was that with her title the Commissioner was the person whose role it was to represent public concerns of this type.

The reply that I received from Susan Freeman-Greene of the HR Commissioners office dated 10th March 2005 indicates that the Act under which the Commissioner's office operates, renders it impotent to address the broader range of Human Rights issues I raised in my complaint. I contend that official consideration of such infringements is an ethical and human rights issue that cannot be sidestepped or excused just because my complaint has implications that fall outside the narrow provisions and remedies for unlawful discrimination contained within of the Human Rights Act or any other legislation.

That being the case, I now ask you as Director, to please take this case and represent the interests of the disadvantaged minority Maori group (supported by many concerned pakeha) in proceedings before the Human Rights Tribunal. I reinforce my complaint with the following observations that may help you.

- What I am observing and clearly draw to your attention in my complaint including the attached submission is racially discriminatory behaviour at parliamentary, governmental, institutional and cultural levels that leverage on deep colonising assumptions. We continue to re-use these practices now well beyond their "use by da te" to secure majority political support for actions that clearly disadvantage a minority indigenous group and their basic Human Rights. This is not limited to the current government, or specifically the Foreshore and Seabed Act. These behaviours are often so ingrained that almost all political parties, we the majority population in general and the media are unconsciously accomplices in it. The result could be seen as a national *omerta*, or pact of silence that attempts to overlook or divert attention from the real issues.
- The Seabed and Foreshore Act raises many ethical issues that were clearly brought to attention by minority groups and many pakeha supporters in select committee submissions, by demonstrators on the Hikoi to Wellington, and are the subject of many other complaints to Government, United Nations, (reflected in the recent UN statements) and other international bodies. If we continue to put them under the table, we bring into question the integrity of our nation and its law.
- All Common sense would defy the Human Rights Act's requirement that the complainant must be the victim or nominated as an advocate of the group subject to detriment. That is like saying that it is not appropriate for the police to action anything reported by someone witnessing a crime on or by other persons or groups. My understanding is that our country's Whistleblower provisions are in place to try to prevent exactly that kind of situation occurring.

I trust that the Human Rights Review Tribunal will ensure that the nation considers the ethical issues raised by this complaint using the same Human Rights principles, Waitangi Treaty obligations, United Nations and other international conventions that parliament tries to enshrine in legislation for the rest of us to comply with. As supporting information for my complaint, I attach a document trail including all my previous submissions and the responses they got.

I repeat that my interest as a New Zealander is that this issue be resolved by local processes rather than by resorting to other international agencies that would only serve to damage our country's international reputation for courage and integrity.

This complaint is in the public domain and will shortly be accessible by anyone on the Peace Movement Aotearoa Website <http://www.converge.org.nz/pma/fspghrc.pdf> so you are free to distribute it to any person you wish.

I look forward to your urgent processing of this complaint please. I would appreciate an acknowledgement of receipt from your office (and from all other parties copied) please.

Peter Goldsbury

cc Helen Clark, being Prime Minister and Leader of the Party that was responsible for the bill
cc Michael Cullen, being Attorney General and Presenter of the Seabed and Foreshore Act,
cc Parekura Horomia, being Minister of Maori Affairs
cc John Tamahere, being a now displaced cabinet minister with a previous interest in this act.
cc Margaret Wilson, now being Leader of the House of Parliament and now responsible for select committee processes,
cc Winston Peters, being leader of New Zealand First whose party supported the passage of the bill
cc Peter Dunne, being leader of the United Future Party who supported the legislation

cc Dame Sian Elias, being the Chief Justice and head of the Judiciary responsible for administrations of law
cc Joe Williams, being Chief Judge on the Waitangi Tribunal.
cc Dame Sian Elias, who presides over the Supreme Court – now the last NZ call for human rights enforcement in New Zealand

cc The Privy Council, assumed to be the supreme court of appeal for issues incurred during the time of the Waitangi Treaty.
cc Her Majesty the Queen, representing the Crown who signed the Treaty of Waitangi in 1840
cc Dame Silvia Cartwright, being Governor General and NZ representative of the Queen.
cc Louise Arbour being UN High Commissioner for Human Rights - international watchdog on world human right standards, including protection of minority and indigenous people's.

cc Tariana Turia being the leader of the Maori Party who resigned from Govt in opposition to the Act
cc Jeanette Fitzsimons being Co Leader of the Green party who opposed on it on environmental and other grounds
cc Don Brash, being leader of the National Party who did not support the Act
cc Rodney Hide, being Leader of the ACT party who did not support the Act.

cc Morgan Williams, being Commissioner for the Environment, interested in sustainability issues

cc Peace Movement Aotearoa, who publish the issue and this complaint on their website <http://www.converge.org.nz/pma>

attachments (in reverse order)

1. Reply from the Human Rights Commission dated 10 March 005
2. Official Complaint to Rosalyn Noonan Human Rights Commissioner dated 11th Feb 2005
3. Reply letter from The Human Right Commission dated 8th Feb 2005
4. Reply Letter from Michael Cullen dated 21 Dec 2004
5. My question to the Human Rights Commissioner dated 1 Dec 2004 cc'd to Michael Cullen
6. My Letter of complaint to the Chairman of the Select Committee sent 28th Sept 2004 requesting a hearing.
7. My submission to the select committee, sent before closing date and recorded as number 280 which is attached
 - The Treaty of Waitangi <http://www.govt.nz/en/aboutnz/?id=77737fd3275e394a8ed9d416a72591d0>
 - The UN Draft Declaration on the rights of Indigenous Peoples <http://www.cwis.org/draft9329.html> or [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.81.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.81.En?Opendocument)
 - A research paper on Kaitiakitanga concepts <http://www.kaitiakitanga.net/stories/origins%20research.htm>

D5117

Human Rights Commission

10 March 2005

Dear Peter Goldsbury

Your complaint about the Foreshore and Seabed Act 2004

We write in response to your letter of complaint dated 11 February 2005. In that you refer to Sylvia Bell's letter of 7 February 2005 and indicate that your *interest is in first exhausting all local avenues* in an attempt to resolve your complaint.

Your complaint

In identifying three aspects to your complaint, you contend:

1. that the Select Committee deliberately ignored major submissions from individuals questioning the constitutional validity of the [then] proposed Foreshore and Seabed Act 2004, thereby giving grounds for declaring it legally invalid;
2. that the Crown has assumed ownership of the foreshore and seabed and all its resource and that this is a breach of the Treaty of Waitangi 1840;
3. that given 1 and 2 above, and the fact that Maori have outstanding interests relating to the foreshore and seabed under the Treaty of Waitangi, the government can have no legal mandate to be unilaterally negotiating resource rights and licensing with any other party prior to human, constitutional and contractual rights outlined in this complaint being resolved.

In support of your complaint, you refer to a Canadian Supreme Court decision relating to indigenous peoples' rights [*Haida Nation v. British Columbia (Minister of Forests)*] referring particularly to:

'27... The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.'

You write that you are concerned 'about a government process and an act that has resurrected colonising assumptions and resultant behaviours that override Maori indigenous rights and responsibilities.'

You write that you are Pakeha and not a member of any official Maori organisation.

The unlawful discrimination jurisdiction of the Human Rights Act 1993 (the Act)

The Commission is authorised by law to accept complaints about laws that are alleged to be discriminatory in that they *disadvantage one group of people when compared with another* by reason of one of the identified grounds of unlawful discrimination, one of which is race. For such a complaint to be pursued by the Commission, the complainant or a particular person or people for whom the complainant is nominated as advocate, needs to have been subjected to detriment because of the application of the legislation identified in the complaint.

Addressing the separate elements of your complaint:

The Select Committee process itself

In your earlier letter, you asked whether it is possible to make an official complaint about the committee's approach and, as you consider it to be, its bias in assuming Crown ownership of a property right that traditionally belongs to Maori. In her letter of 7 February 2005, Sylvia Bell advised that the appropriate person to complain to is the Speaker of the House. This matter is beyond the unlawful discrimination jurisdiction of the Act and is not able to be pursued by the Commission.

The alleged assumption of ownership of the foreshore and seabed and that this amounts to a breach of the Treaty of Waitangi 1840

Taking account of the requirement to demonstrate what detriment is caused the complainant by a particular piece of legislation leads the Commission to consider this element of your complaint beyond the unlawful discrimination jurisdiction of the Act and not a matter able to be pursued by the Commission. That is, in the absence of you being able to demonstrate particularly how the application of the Foreshore and Seabed Act 2004 has significantly disadvantaged you, there is no indication of detriment.

Your contention that government has no mandate to negotiate resource rights while foreshore and seabed interests remain outstanding under the Treaty of Waitangi

Of its nature, this is not a matter which is able to be pursued as a complaint of unlawful discrimination under the Act, taking account of the jurisdictional requirements elaborated upon earlier in this letter.

Avenues you may now wish to pursue

For the reasons given above, the Commission intends to take no further action on your complaint under its unlawful discrimination provisions and the complaint file will now be closed.

Section 84(1) of the Act provides that you have the right to take your complaint to the Director of Human Rights Proceedings ('the Director'). The Director is tasked with the function of deciding whether to represent you in proceedings before the Human Rights Review Tribunal. Should the Director decide to represent you, then the costs of representation are paid by the Office of Human Rights Proceedings. We attach the Office of Human Rights Proceedings' Information Sheet for Complainants. The contact details for the Director are:

P0 Box 6751
Wellesley Street
Auckland
Telephone: (09) 375 8623 Fax: (09) 375 8641
Email address: pamr@ohrp.org.nz

Should you refer your complaint to the Director, it will be of assistance to him if you provide a copy of this letter.

Should you decide not to refer your complaint to the Director, section 92B of the Act provides that you have the right to bring proceedings before the Tribunal. If you choose to proceed to the Tribunal, you would initially be responsible for all the costs associated with bringing the proceedings before the Tribunal. If you were successful before the Tribunal you may well recover some of those costs. However, if you were unsuccessful before the Tribunal you may well be liable for some of the government's costs. The contact details for the Tribunal are:

Human Rights Review Tribunal
Tribunals Division
CI- Ministry of Justice
P O Box 5027
Lambton Quay
Wellington
Telephone (04) 918 8300 Fax (04) 918 8303

In her letter of 7 February 2005, Sylvia Bell outlined the process by which a complaint can be taken to the United Nations explaining that to do that, a person must have exhausted all the domestic judicial remedies to the point where a final adjudication has been reached. (A copy of that letter is attached, for your convenience, should you wish to include that with any application you may make for proceedings before the Human Rights Review Tribunal).

General

It will be of interest to you to know that the Commission has received another complaint about the Foreshore and Seabed Act 2004. On the face of it, it appears that the particular circumstances surrounding this other complaint may cause it to meet the consideration of *detriment* which would enable it to be pursued as a complaint. This is yet to be confirmed.

As you are aware, the Commission's dispute resolution process is focused on mediation whereas, up until 2001, its role was that of investigation to the point where an opinion was formed as to whether or not a breach of legislation has occurred. In the event that this other complaint does proceed to mediation, and with the agreement of the complainant, it could be that you may be considered *an interested party* and that your attendance at any mediation meeting could possibly be negotiated. This is clearly a tentative consideration at this stage and your name would not be made known to parties to the complaint without prior consultation with you. Should this tentative proposal develop further, we will contact you regarding that.

If you wish to contact me regarding the content of this letter, please do so on susanfQ@hrc.co.nz or by telephone at (04)4739981.

Yours faithfully

Susan Freeman-Green,
Chief Mediator

Level 10, lower Centre, Cnr Queen and Custom Sts, P0 Box 6751 Wellesley St, *Tamaki Makaurau* Auckland *Waea* Telephone 64-9-309 0874
Waea Whakahua Facsimile 64-9-377 3593
Human Rights Commission InfoLine Toll free 0800 4 YOUR RIGHTS (0800 496 877) infoline@hrc.co.nz www.hrc.co.nz TTY (teletypewriter)
0800 150 111

Official complaint re human rights breaches in enacting the Foreshore and Seabed legislation.

11 February 2004

Rosalind Noonan,
The Human Rights Commissioner,
10th Floor, Tower Centre, Corner Queen and Custom Streets
PO Box 6751, Wellesley Street,
Auckland

Dear Ms Noonan,

Thank you for your letter of 7th Feb answering my question of 1st December and outlining the process I as a citizen of NZ should follow to submit this official human rights complaint. The time it took you to answer my question is an indication of the seriousness and difficulty of the constitutional issues being raised. As a very proud citizen of Aotearoa, I have copied this complaint to many of the other parties involved, as my interest is in first exhausting all local avenues to see it resolved collaboratively within NZ without the need to draw undue international attention to it by an official Human Rights complaint to the United Nations or other means. This submission has an audit trail of previous supporting documents attached. I leave it to the Commission and Government to assess whether it has conformed with its own Human Rights guidelines. http://www.justice.govt.nz/pubs/reports/2000/hr_act/index.html

In the intervening time, I did get a letter from Michael Cullen (attached) which disclaimed any Government responsibility for the Select Committee process, reiterated the act's publicised 'basic purpose and direction' and talked of the need for 'goodwill on all sides to resolve a complex matter', whilst at the same time I suspect government was perusing its underlying real agenda - in negotiation with other international parties interested in the resources of the sea - including the mining of West Coast Sand.

My Human Rights complaint covers three aspects:

1. The Select committee deliberately ignored major submissions from individuals that questioned the constitutional validity of the proposed act, thereby giving grounds for declaring it legally invalid.
2. The Crown has assumed ownership of the foreshore and seabed and all its resources. That is unproven and a breach of the signed contractual arrangement established between the Crown and Tangata Whenua in the Treaty of Waitangi 1840. This act is a case of majority political and strong economic interests overriding the clearly established and agreed treaty and human rights of a minority (in this case indigenous Maori people who have never relinquished their traditional role and responsibilities as kaitiaki of the foreshore and seabed and all its resources.)
3. In consideration of 1 and 2, and the fact that Maori have outstanding interests relating to the Foreshore and Seabed under the Treaty, the Government can have no legal mandate to be unilaterally negotiating resource rights and licensing with any other party prior to the human, constitutional and contractual rights outlined in this complaint being resolved. Under internationally accepted contract law, the government would be unwise to enter into any contract with new parties unless the outstanding contract (The Treaty) is legally and bilaterally terminated, and I see no breach by Maori that would support that action.

I refer you to a Canadian Supreme Court decision in a case of Indigenous rights, which offers an international precedent for your honourable consideration. A press release quotes:

"The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests... it must respect these potential, but yet unproven, interests... To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable." Source <http://www.eaglelaw.org/supremecourt.html> The full determination is on line at <http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2004scc073.wpd.html> You will note that under "authors cited" they include New Zealand. Ministry of Justice. *A Guide for Consultation with Māori*. Wellington: The Ministry, 1998.

This complaint is one made by me as an individual and a very positive citizen of Aotearoa / New Zealand, concerned about a Government process and an act that has resurrected colonising assumptions and resultant behaviours that override Maori indigenous rights and responsibilities. I am apolitical, a pakeha and not a member of any official Maori organisation, so in no way can this submission to be interpreted as being made by me formally on their behalf.

I look forward to your urgent processing of this complaint please. I would appreciate an acknowledgement of receipt from your office (and from all other parties copied) please.

Peter Goldsbury

cc Helen Clark, being Prime Minister and Leader of the Party that was responsible for the bill
cc Michael Cullen, being Attorney General and Presenter of the Seabed and Foreshore Act,
cc Parekura Horomia, being Minister of Maori Affairs
cc John Tamahere, being a now displaced cabinet minister with a previous interest in this act.
cc Margaret Wilson, now being Leader of the House of Parliament and now responsible for select committee processes,
cc Winston Peters, being leader of New Zealand First whose party supported the passage of the bill
cc Peter Dunne, being leader of the United Future Party who supported the legislation

cc Dame Sian Elias, being the Chief Justice and head of the Judiciary responsible for administrations of law
cc Joe Williams, being Chief Judge on the Waitangi Tribunal.
cc Dame Sian Elias, who presides over the Supreme Court – now the last NZ call for human rights enforcement in New Zealand

cc The Privy Council, assumed to be the supreme court of appeal for issues incurred during the time of the Waitangi Treaty.
cc Her Majesty the Queen, representing the Crown who signed the Treaty of Waitangi in 1840
cc Dame Silvia Cartwright, being Governor General and NZ representative of the Queen.
cc Louise Arbour being UN High Commissioner for Human Rights - international watchdog on world human right standards, including protection of minority and indigenous people's.

cc Tariana Turia being the leader of the Maori Party who resigned from Govt in opposition to the Act
cc Jeanette Fitzsimons being Co Leader of the Green party who opposed on it on environmental and other grounds
cc Don Brash, being leader of the National Party who did not support the Act
cc Rodney Hide, being Leader of the ACT party who did not support the Act.

cc Morgan Williams, being Commissioner for the Environment, interested in sustainability issues

attachments (in reverse order)

8. Reply from the Human Rights Commission dated 10 March 005
9. Official Complaint to Rosalyn Noonan Human Rights Commissioner dated 11th Feb 2005
10. Reply letter from The Human Right Commission dated 8th Feb 2005
11. Reply Letter from Michael Cullen dated 21 Dec 2004
12. My question to the Human Rights Commissioner dated 1 Dec 2004 cc'd to Michael Cullen
13. My Letter of complaint to the Chairman of the Select Committee sent 28th Sept 2004 requesting a hearing.
14. My submission to the select committee, sent before closing date and recorded as number 280 which attached
 - The Treaty of Waitangi <http://www.govt.nz/en/aboutnz/?id=77737fd3275e394a8ed9d416a72591d0>
 - The UN Draft Declaration on the rights of Indigenous Peoples <http://www.cwis.org/drft9329.html> or [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.81.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.81.En?Opendocument)
 - A research paper on Kaitiakitanga concepts <http://www.kaitiakitanga.net/stories/origins%20research.htm>

Compressed copy of reply from NZ Human Rights Commission re questions and complaint process

07 February 2005 (COPY)

Dear Mr Goldsbury

COMPLAINT RELATING TO THE FORESHORE AND SEABED LEGISLATION

The Chief Human Rights Commissioner has asked me to respond on her behalf to your letters of the 28th September, 1st November and 1st December.

As I understand it, your concern relates to the Select Committee process and what you consider to be the selective way in which submissions on the Foreshore and Seabed legislation were addressed – an opinion that was reinforced when you found that the constitutional issues you raised in your submission appear not to be reflected in the report of the Select Committee. You complained to the Chairman of the Select Committee about this but received no response or opportunity to put your case. (I assume that you are complaining about the right to an oral hearing to put your submission, rather than not being able to complain orally about the Committee's actions). You ask whether it is possible to make an official complaint about the committee's approach and its apparent bias in assuming Crown ownership of a property right that traditionally belongs to Maori.

These are two distinct issues. With regard to the process, Select Committees have the right to set their own procedure. The Committee invites people to present submissions. It does not automatically follow that people will have the right to present their submission orally even if they request it. In the case of the Foreshore and Seabed legislation, I gather that the Committee decided not to hear all the oral submissions because the written submissions suggested that many covered the same ground. However, if you do wish to complain about the way in which the Select Committee managed the process of hearing submissions, the appropriate person to complain to is the Speaker of the House.

In relation to the second part of your complaint, that is, the assumption of Crown ownership of the foreshore and seabed, you could complain to the Human Rights Commission about the legislation as it is now enacted. The Commission can look at legislation which appears to discriminate under Part 1A of the Act but the only remedy that is available is a declaration of inconsistency by the Human Rights Review Tribunal. A declaration does not affect the validity of the enactment and if not overturned subsequently on appeal then the Minister responsible for the legislation is required to bring it to the attention of the House and present a report on the Government's response. Given how recently the legislation was passed such a report would be likely to reflect the advice of the select committee.

While making a complaint is likely to be mainly symbolic as a result, it would lay the ground for you to take your complaint to the UN, should you wish to do so. This is because to complain to the UN you must have exhausted all the available domestic (judicial) remedies to the point where a final adjudication has been reached and no further appeal is possible. While this may mean taking a case to the Supreme Court in some cases, it is not necessary to pursue or exhaust remedies which have no realistic prospect of success or which would be unreasonably prolonged.

The facts of a complaint must also fit within one of the relevant international human rights treaties. The treaty must have an individual complaints mechanism – called an optional protocol – which has been ratified by the State in which the alleged breach occurred. From the facts outlined in your letter, the International Covenant on Civil and Political Rights (ICCPR) might be relevant. As New Zealand has ratified the optional protocol to the ICCPR the complaints mechanism is available to you. Art.26 of the ICCPR, which relates to the right to freedom from discrimination, could be applicable. Information on the process to make a complaint, including a model complaint form and the address to which it should be sent to, can be found on the website of the Office of the High Commissioner for Human Rights in *Fact Sheet No.7/Rev.1, Complaints Procedures* accessible at <http://www.unhchr.ch/html>.

I hope that this information answers your concerns but should you wish to discuss this matter further please don't hesitate to contact the writer.

Yours sincerely

Sylvia Bell
Director of Research

Level 10, Tower Centre, Cnr Queen and Custom Sts, PO Box 6751 Wellesley St, *Tāmaki Makaurau* Auckland
Waea Telephone 64-9-309 0874 Waea *Whakāhua* Facsimile 64-9-377 355
Human Rights Commission Infoline Toll free 0800 4 YOUR RIGHTS (0800 496 877) infoline@hrc.co.nz
www.hrc.co.nz TTY (teletypewriter) 0800 150 11

OCR Scan and compression of letter of reply from Michael Cullen

Office of Hon Dr Michael Cullen

Deputy Prime Minister

Minister of Finance

Minister of Revenue

Leader of the House of Representatives

21 DEC 2004

Dear Mr Goldsbury

Thank you for sending me a copy of your letter of 1 November 2004 to the Human Rights Commission, and attachments, regarding the government's policy on the foreshore and seabed.

I note the points you have made about the process for consideration of submissions on the Foreshore and Seabed Bill by the Fisheries and Other Sea-related Legislation Committee. I cannot comment on your complaints, as the workings of select committees are part of the business of Parliament and not a matter for the government to determine. This includes the Committee's report.

The government's expectation, however, was that the Committee gave the Bill its full and thorough attention, including careful consideration of all submissions received and appropriate hearing of those submitters appearing personally before the Committee. The Committee received a very large number of written submissions on the Bill and a high proportion of submitters expressed a wish to appear personally before the Committee. Where it is not practical to hear all of them, it is common practice for a committee to select a representative sample of submissions for oral hearing.

The Foreshore and Seabed Act was enacted on 24 November 2004. It provides a clear and unified system for recognising and protecting rights in the foreshore and seabed.

The new Act provides that the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown. The object of the Act is to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all the people of New Zealand, including the protection of the association of whanau, hapu and iwi with areas of the public foreshore and seabed.

The government has been involved in an almost continuous process of consultation with the public in the formulation of this policy, and has moved to achieve a fair balance between competing interests and to address many of the issues raised by submitters.

There have been changes to some aspects of the earlier Foreshore and Seabed Bill. The changes strengthen and clarify, and take account of practical concerns. However, they do not affect the basic purpose and direction, which centre on the four principles set out by the government early in this process: access, regulation, protection and certainty. As a result of these improvements, the legislation better achieves its objectives of recognising the customary interests of Maori while maintaining public ownership and access for all New Zealanders.

Recognising and protecting rights in the foreshore and seabed is a complex matter and there are no simple solutions. With goodwill on all sides, I believe we have a solution that can take us forward as a country.

Yours sincerely

Hon Dr Michael Cullen
Deputy Prime Minister

1st ~~November~~ December 2004

The Human Rights Commissioner,
10th Floor, Tower Centre, Corner Queen and Custom Streets
PO Box 6751, Wellesley Street,
Auckland

cc Hon Michael Cullen, Presenter - Seabed and Foreshore Act, Parliament Buildings, Wellington.
cc Margaret Wilson, Attorney General, Parliament Buildings, Wellington.

Dear Commissioner,

On 28th September 2004 I copied you and Margaret Wilson, Attorney General, with a letter (copy attached which was wrongly dated 16th October sorry) addressed to the Chairman of the Seabed and Foreshore Bill Select Committee, complaining about the selective way in which the media suggested that submissions were being processed and people were denied a hearing they specifically requested. I received no response whatsoever to this, nor any opportunity to be heard.

The report of the select committee has been published and the act passed, but after carefully searching the whole document on the web for my submission (no 280 or any reference to its specific content eg the United Nations Declaration on the Rights of Indigenous Peoples) I could find nothing - not even in the section outlining the constitutional issues that were raised. This re-asserts my belief that the Committee deliberately put aside and ignored any submissions that questioned the validity of the Government's assumed claim of prior ownership of the seabed and foreshore or other fundamental constitutional matters.

My question to you as Human Rights Commissioner is do the following constitute violations that would warrant me submitting an official complaint:

1. Against a process that has discriminated against citizens like myself (and I believe many others) who made legal and valid submissions that questioned the constitutional validity of the Bill and the assumptions made in it, but have no evidence of it even being read, let alone reported on as an issue by the committee or being allowed the right to speak in its support as requested.
2. Against a Crown process that has assumed property rights over the traditional Maori owners, despite these being clearly protected by the Treaty of Waitangi and subject to fundamental UN Conventions on Human Rights and common law. These were the subject of my original submission.(attached). I suspect that in only a few circumstances will the government have documentation legally proving the transfer of the seabed and foreshore to it from it's Maori kaitiaki.

For some background information I also refer you to a report on a case of indigenous land rights in Canada where it was reported the Supreme Court on 18th November 2004 ruled that:

"The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests... it must respect these potential, but yet unproven, interests... To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable." Source <http://www.eaglelaw.org/supremecourt.html>

I look forward to you acknowledging this enquiry and giving me your advice on this matter please.

Yours faithfully,

Peter Goldsbury

COPY - incorrectly dated 13th October 2004 – was actually sent on 28th Sept 2004

The Chairman of the Seabed and Foreshore Select Committee
c/o Clerk of the Fisheries and Other Sea Related Legislation Committee,
Select Committee Office, Parliament Buildings, Wellington.
PO Box 55, Wellington;

To the Government of New Zealand
cc Margaret Wilson – Attorney General
cc NZ Human Rights Commissioner

Processing of submissions and assertion of citizen's rights to be heard. - ref No 280

(a) Democratic right to be heard:

In advertising the Bill, the government invited submissions from interested parties and gave them the option of being heard. I along with many other New Zealanders took up that option and to my knowledge most of us have not even had any official acknowledgement of our submissions, let alone an appointment to be heard. As a citizen I assert that basic democratic right; on behalf of all submitters so effected.

(b) Processing of submissions

I am led to understand (from a radio interview) that the committee's process is to sort submissions into piles:

1. Those that address constitutional issues – put aside and ignored as far as the bill is concerned
2. Those that are copies of original submissions or cover the same content – put aside and ignored
3. Those that are left - out of which I assume some are invited to speak, both for and against

(c) Constitutional Issues

I am particularly concerned with those in category 1, (where I assume mine would fit), that highlight constitutional issues and assumptions that question the very basis of what the bill is trying to achieve and the validity of the process it is proposing to progress it in the impossibly short time allowed. I assert that the committee has no right to put aside or ignore any serious and unique submission from any citizen. We expect a transparent process from a committee dealing in such a sensitive area, rife with fundamental treaty, human and indigenous peoples rights. Many believe that the process is a farce and that by ignoring important constitutional submissions, not responding to submitters and selectively choosing who it wishes to hear, the government is driving its own agenda and exposing itself to considerable risk.

I understand (again from the radio) that "The Government has taken advice from Constitutional Lawyers who advise that the bill can proceed" Statements like that do not fool many New Zealanders who can see beyond the selective interests of those who can afford the law to further their claims, and instead see these issues from the human rights, integrity, fairness and common sense perspective that seeks a well future for all New Zealanders. These are fundamental Kiwi values that many of our forefathers fought and died for.

I attach another copy of my submission in case it has been lost in a pile somewhere. I with many other concerned New Zealanders look forward to the opportunity to put our concerns to the committee please.

Yours faithfully,

Peter Goldsbury

COPY

Clerk of the Fisheries and Other Sea Related Legislation Committee,
Select Committee Office, Parliament Buildings, Wellington
Foreshore and Seabed Submission,
PO Box 55,
Wellington;

To the Government of New Zealand
and her Majesty the Queen of England.

cc Helen Clark – Prime Minister
cc United Nations Secretariat for Human Rights
cc NZ Human Rights Commission.
cc Peace Movement Aotearoa

Greetings to you who have the responsibility for protecting the values and future of our nation.

As a Pakeha aghast at the legality of what is going on, I write this submission to remind you that the Foreshore and Seabed Act you are attempting to draft is not to counter a claim by Maori for ownership, but rather another belated claim by government to confiscate something that was never relinquished by Maori.

1. One does not have to be a lawyer to know that the Treaty of Waitangi was a legally binding agreement made between the Crown and Maori in 1840, that was entered into and signed in good faith by both parties at the time. **Under British and New Zealand Common Law it is thus an enforceable contract.**
2. I refer to the English Version of the Treaty as signed, (attached as an appendix) which I have obtained from the NZ Government Website namely:
<http://www.govt.nz/en/aboutnz/?id=77737fd3275e394a8ed9d416a72591d0> Despite the wide variations between this and the Maori version which is also contained and translated on the above website, **I will use the English version to make my points so English readers and lawyers can protest no confusion with the language.**
3. Since the signing of the Treaty, the Government assumed a position of political power which was not representative of the interests of both signatories of the Treaty and passed many laws that were part of a colonising process that had the effect of depriving Maori of their land, mana and self esteem. One does not need to look closely at history to understand that this legislation and resultant NZ government action over that time **paid little respect for the basic human rights of the indigenous people** concerned, refer UN Draft Declaration on the rights of indigenous people <http://ods-dds-ny.un.org/doc/UNDOC/GEN/G94/125/10/PDF/G9412510.pdf?OpenElement> (or if you are blocked access to the official UN site documents you will find a copy of it at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.81.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.81.En?Opendocument) or <http://www.cwis.org/draft9329.html>) Many of the Crown's actions contravened the treaty terms and would in retrospect be considered illegal, so many subsequent contractual transactions could be ruled as nul and void. The re-researched official historical record of the Land wars and the effect of Maori Affairs legislation over the

years is substantiated by official apologies that the government has now made in connection with many treaty claims.

4. New Zealand's colonial history with its land and resource confiscation, forced relocation, spread of disease, destruction of infrastructure crops and villages, institutional manslaughter, wrongful imprisonment without trial etc, forced Maori into dependency mode and destroyed their once strong long term economic base. If they chose to take a litigious stance, then this would result in breach of contract settlements and loss of future earnings claims that would make the current treaty payments look like play money. Had the government been dealing not with Maori but instead a multinational company with the assets to purchase its own legal representation, then there is no way that it would even contemplate **this Act which amounts to confiscation of the few remaining Maori assets and legal rights**. Enough is enough - this Act contravenes the Treaty of Waitangi and many clauses of the UN Draft Declaration on the Rights of Indigenous Peoples.
5. I refer to article 2 in the Treaty that guarantees "... **the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.....**" It was land that the settlers desired, and this Treaty and subsequent actions resulted in almost all the most desirable acreage being alienated from Maori ownership. It is only now that the commercial assets of the foreshore and seabed are being seen as valuable and that private seafront land is at a premium that it has become an issue. **It is therefore for the Crown to now produce legal evidence that substantiates its claim for ownership of the seabed and foreshore over Maori rights, not vice versa.**
6. There is reasonable concern that all the **public of New Zealand should have free access to the foreshore**. This submission supports that argument, subject to that access not causing damage to the ecology and historical or sacred sites involved. In examples where control over land and/or access to the shore is in place, provided the resource is respected **the Maori stance is almost inevitably a generous one as far as public access is concerned**. This contrasts strongly with typical pakeha ownership behaviours.
7. The record of Government authorised and led exploitation, development and polluting of the nations resources land, forests, fisheries, waterways, sale to private and off-shore interests and short term polls driven policies, conveys **little confidence in Government's ability to assume the role as caretakers of the environment** that will support our grandchildren and beyond. By comparison there is much evidence that allowing Maori to practice and share their concept of **Kaitiakitanga is a much more reliable model for safe guarding the future and guaranteeing a rich environment for all future generations of New Zealanders**. See a Canadian researcher's study on Kaitiakitanga at <http://www.kaitiakitanga.net/stories/origins%20research.htm>
8. From Clauses 6 and 7 this submission concludes that Maori with their deep historical connection with the environment are likely to be **a more generous, long term focused and responsible guardian of the Foreshore and Seabed than is Government**, so the proposed legislation should be changed to allow their traditional wisdom to be used to everyone's advantage.

Conclusion and Recommendations:

1. That the government accept that the proposed Act is illegal as it contravenes both common law and internationally acknowledged principles of human rights.
2. The Government should redraft the Act to vest all foreshore and seabed that it cannot prove has been ethically and legally transferred to Government, in a specially negotiated form of ownership partnership where the Maori people will be Kaitiaki of it and all its resources, but with open public access to responsible users of it in perpetuity.
3. That the new legislation must ensure that no individual or organisation can ever obtain conventional legal title to any part of the foreshore and seabed or restrict access to it. Nor must it be possible for the government or anyone to sell it or have it taken from the nation in any way. In the case of any claims of existing private ownership, these should revert to the state on the death of the present owners or within 50 years. In the case of State Owned enterprises the government will need legislate to rescind any conventional ownership rights it may have illegally given them in past legislation.

I look forward to your earnest and ethical consideration of this important matter so that our country retains its reputation as a courageous world values leader, standing up for the rights and richness of all its minorities, safeguarding our future environment and ensuring that we as a nation find ways to retain our diversity, independence and self determination; despite the new global economic and political colonisation processes of our time.

Please, we want a Government with the courage to ensure that our “democracy is not the blind dictatorship of the majority”.

I would like the opportunity to be heard at a hearing in Auckland

Yours faithfully,

Peter Goldsbury

Appendix (These are not attached but I can send them if you can't access them on the web)

1. **Treaty of Waitangi** - from <http://www.govt.nz/en/aboutnz/?id=77737fd3275e394a8ed9d416a72591d0>
2. **UN Draft Declaration on the Rights of Indigenous Peoples** - from <http://www.cwis.org/draft9329.html>
3. **Kaitiakitanga; Safe Guarding our Future** - from <http://www.kaitiakitanga.net/stories/origins%20research.htm>