



**International Convention
on the Elimination
of all Forms of
Racial Discrimination**

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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION

**REPORTS SUBMITTED BY STATES PARTIES UNDER
ARTICLE 9 OF THE CONVENTION**

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

[23 September 2008]

**Reply to the request for further information on the recommendations
contained in paragraphs 14, 19, 20 and 23 of the fifteenth to seventeenth
periodic reports of New Zealand**

1. On 15 August 2007 the Committee on the Elimination of Racial Discrimination (CERD) adopted its concluding observations on New Zealand's fifteenth to seventeenth periodic reports (CERD/C/NZL/CO/17). The Committee requested further information within a year on four of its recommendations related to: the principles of the Treaty of Waitangi Deletion Bill (recommendation contained in paragraph 14); dialogue with Māori on the Foreshore and Seabed Act (para. 19); the place of the Treaty of Waitangi in the school curriculum (para. 20); and access to education for undocumented children (para. 23). This paper provides further information and outlines recent developments on these issues over the past 12 months.

New Zealand response to the Committee recommendation contained in paragraph 14

2. The recommendation contained in paragraph 14 arises out of New Zealand's August 2007 response to one of the Committee Rapporteur's written questions. Question 6 concerned the extent to which the removal of references to the Treaty of Waitangi (through the Principles of the Treaty of Waitangi Deletion Bill) would impact on the status of the treaty and the ability of the courts to adjudicate on treaty matters. The Committee, in its concluding observations, welcomed New Zealand's undertaking that the Government would not support the progress of that non-government Bill. In November 2007, the Principles of the Treaty of Waitangi Deletion Bill was defeated at its second reading in the New Zealand House of Representatives.

3. The Treaty of Waitangi remains a document of significant constitutional and historical importance for New Zealand and it is the basis for an ongoing relationship between the Crown and Māori. Given the treaty's central importance to New Zealand, treaty references have been incorporated in more than 30 pieces of legislation and will continue to be included in relevant legislation that goes before the New Zealand Parliament

4. New Zealand's legislative approach is characterized by a move away from general treaty references to specific articulation of the responsibilities of Government or local government in the relevant context. Relevant to those responsibilities are the Principles for Crown Action on the Treaty of Waitangi. Those five principles are:

- The principle of Government - the Government has the right to govern and make laws;
- The principle of self-management – Māori *iwi* have the right to organize as *iwi* (tribes) and, under the law, to control the resources they own;
- The principle of equality - all New Zealanders are equal under the law;
- The principle of reasonable cooperation - both the Government and *iwi* are obliged to accord each other reasonable cooperation on major issues of common concern;
- The principle of redress - the Government is responsible for providing effective processes for the resolution of grievances, in the expectation that reconciliation can occur.

New Zealand response to the recommendation contained in paragraph 19

5. Since the Committee's report in August 2007, the Government of New Zealand has continued to engage in dialogue with certain Māori groups concerning the implementation of the Foreshore and Seabed Act 2004.

6. As outlined in New Zealand's seventeenth periodic report (CERD/C/NZL/17), the Government of New Zealand has been engaged in dialogue with Te Rūnanga o Ngāti Porou (negotiating on behalf of certain hapū of Ngāti Porou) and Te Rūnanga o Te Whānau (negotiating on behalf of the hapū of Te Whānau a Apanui) since 2003. This dialogue resulted in the parties signing Terms of Negotiation in 2004 and Statements of Position and Intent in 2005. The dialogue has concerned how the Crown's recognition of the ongoing and enduring *mana* (authority) of the *hapū* (sub-tribe or large extended family grouping) over the public foreshore and seabed can be given legal expression, protection, and recognition in a manner consistent with of the object of the Foreshore and Seabed Act.

East Coast negotiations - Heads of Agreement Reached

7. In February 2008, Heads of Agreements between the Government and two groups - Te Rūnanga o Ngāti Porou (on behalf of certain *hapū* of Ngāti Porou) and Te Rūnanga o Te Whānau (negotiating on behalf of the *hapū* of Te Whānau a Apanui) were made publicly available. These Heads of Agreements represent a significant milestone in the ongoing development of the Government's relationships with *whānau* (family/extended family), *hapū* and *iwi*. These Agreements also demonstrate the Government's efforts to recognize lesser rights where territorial customary rights might not be sustainable; going beyond the rights the Māori Land Court was considering in the Ngāti Apa decision (the definition of territorial customary rights can be found in section 32 of the Foreshore and Seabed Act and is explained further in the Government of New Zealand's February 2005 submission to the Committee).

8. Notwithstanding that the respective parties have different views on the ownership of the public foreshore and seabed, in good faith the parties have worked together towards developing agreements based on the interests and objectives of each particular party. The Government has taken a flexible and open-minded approach to the development of options that will contribute to the legal expression, protection and recognition of the *mana* of the groups over the public foreshore and seabed in a manner consistent with the object of the Foreshore and Seabed Act.

9. Each Head of Agreement included a draft Deed of Agreement, and a letter signed by both parties acknowledging the progress made and outlining the outstanding issues to be resolved.

10. The Heads of Agreements:

(a) Outline the nature and extent of the Crown's recognition of the unbroken, inalienable and enduring *mana* of the groups in relation to the public foreshore and seabed in their area; and

(b) Provide legal mechanisms that contribute to the Crown's recognition of the *mana* of the groups, both generally and in those specific areas where territorial customary rights recognition is confirmed by the High Court of New Zealand.

Progress with Te Whānau a Apanui since February 2008

11. The parties continue to discuss a range of matters that are still outstanding including, for example, the location of the territorial customary rights areas. Once the remaining outstanding matters have been agreed, a final version of the Deed of Agreement will be put before Cabinet and the *hapū* for ratification.

Progress with Ngāti Porou since February 2008

12. In August 2008, a Deed of Agreement was initialled by the parties. The initialled Deed of Agreement will be put before the *hapū* for ratification.

13. The initialled Deed of Agreement describes eight instruments that contribute to the legal expression, protection and recognition of the *mana* of the groups in a manner consistent with the object of the Foreshore and Seabed Act. These are:

- A Statutory Overlay that recognizes the special status of the public foreshore and seabed to the *iwi*. It also ensures that this status is recorded in key public documents such as district and regional plans and policy statements and is taken account of in consent processes under the resource management legislation.
- An Environmental Covenant, which will ensure that statutory plans prepared and administered by relevant local authority conform to a statement by *iwi* on the sustainable management of natural and physical resources for the public foreshore and seabed in their *rohe* (tribal territory).
- Relationship Instruments between the *iwi* and a number of Ministers, which will set out how each *hapū* and the Ministers (and their ministries) will interact.
- A Fisheries Mechanism that will allow Fisheries Management Committees to develop customary fisheries resource management plans and subsequent regulations (made by the Minister of Fisheries) to implement those plans and manage customary fisheries.
- A Conservation Mechanism, which provides for effective participation by *hapū* in a number of conservation proposals and applications, for example the establishment of marine reserves, conservation protected areas and marine mammal sanctuaries.
- A Wāhi Tapu (sacred site) protection mechanism that will give the supporting *hapū* the right to restrict or prohibit access to Wāhi tapu, and Wāhi tapu areas, within the public foreshore and seabed in their *rohe*.
- A Protected Customary Activities mechanism that will allow the supporting *hapū* the right to continue carrying out specified customary activities without resource consent in or on the public foreshore and seabed in their *rohe*.

- A *pouwhenua* (sign posts) instrument that will give the *hapū* of Ngāti Porou the right to erect *pouwhenua* at culturally significant sites.
- A place-names instrument that will officially recognize traditional names or alter names of culturally significant areas.

14. For areas where the High Court of New Zealand confirms that the *hapū* would have had territorial customary rights, the *hapū* signing the final agreements will also have the following additional protections within those territorial customary rights areas:

- A permission-right instrument will provide the right to approve or withhold approval for any resource consent for activity that will or is likely to have a significant adverse effect on the relationship of the *hapū* with the environment in the territorial customary rights area.
- An extended Fisheries Mechanism that provides the signatories with the ability to make by-laws under customary fishing regulations. The by-laws may place restrictions on fishing within territorial customary rights areas, either to preserve sustainability or for cultural reasons such as a death by drowning in the area.
- An extended Environmental Covenant, which gives the signatories the ability to ensure all statutory plans that cover a territorial customary rights area recognise and provide for the position of the *hapū* on the sustainable management of physical and natural resources in that areas; and
- An extended conservation mechanism, which will provide territorial customary rights *hapū* the right to give or refuse to give their consent to a number of conservation proposals and applications, for example the establishment of marine reserves.

15. Once ratified, appointed representatives of *hapū* of Ngāti Porou will file applications in the High Court for confirmation that the requirements for a finding by the High Court under section 96 of the Foreshore and Seabed Act have been satisfied. The Foreshore and Seabed Act requires these applications to be supported by affidavits from the Attorney General and the Minister of Māori Affairs. The Deed of Agreement with Ngāti Porou also provides that representatives of the *hapū* of Ngāti Porou and the territorial customary rights areas, within two years of the High Court.

16. Legislation will also be required to give effect to the signed Deed of Agreement.

New negotiations

17. As previously advised, the Government's assessment has been that other Māori groups with an interest in foreshore and seabed issues were treating the Te Rūnanga o Ngāti Porou and Te Rūnanga o Te Whānau negotiations as test negotiations and awaiting the outcomes before deciding whether to enter into negotiations. Since the signing of the Heads of Agreement, the Government has signed Terms of Negotiations with two further groups that have indicated a

desire to work collaboratively and reach a mutually agreeable outcome. Terms of Negotiation were signed on:

- Thursday 8 May 2008 between the Government and Ngāti Pahauwera; and
- Thursday 12 June 2008 with Te Rūnanga o Te Rarawa (on behalf of participating hapū of Te Rarawa).

18. The Ngāti Pahauwera negotiations are a combined process negotiating both the settlement of historical claims under the Treaty of Waitangi, and foreshore and seabed matters. This new approach is another example of a flexible and open-minded application of the legislation by the Government.

19. Discussions with other groups interested in entering into negotiations have also commenced.

Customary rights orders

20. As outlined in New Zealand's seventeenth periodic report, a number of groups have applied to the Māori Land Court for Customary Rights Orders.

21. In the week beginning 18 February 2008, the Ngāti Pahauwera application for a Customary Rights Order was heard by the Māori Land Court at Mohaka marae. This was the first Customary Rights Order application to be heard in the Māori Land Court, and represents a significant milestone in the implementation of the Foreshore and Seabed Act.

22. In April 2008 the Ministers of the Crown met with Ngāti Pahauwera representatives and proposed a new pathway forward by setting out a joint process for resolving the foreshore and seabed interests and the historical treaty claims of Ngāti Pahauwera in a comprehensive way, as outlined above.

New Zealand response to the recommendation contained in paragraph 20

23. In consultation with the New Zealand public, including Māori, references to the Treaty of Waitangi were included in the final version of The New Zealand Curriculum, released in November 2007. A parallel document, *Te Marautanga o Aotearoa*, which sets the direction for student learning for Māori-medium schools, is also founded on the Treaty of Waitangi.

24. Together, the two documents will help New Zealand schools give effect to the partnership that is at core of the Treaty of Waitangi.

25. In April 2008, the New Zealand Government also launched Ka Hikitia – Managing for Success, which sets out the Ministry of Education's strategic approach to achieving educational success for and with Māori over the next five years. Ka Hikitia – Managing for Success acknowledges the Treaty of Waitangi as an important document that protects Māori learners' rights to gain a range of vital skills and knowledge, as well as protecting the Māori language as a national treasure.

New Zealand response to the recommendation contained in paragraph 23

26. A child who is unlawfully in New Zealand (that is, who does not hold a permit to be in New Zealand) is not a person who can legally access education under section 6 of the Immigration Act 1987. Section 40 makes it an offence for a school knowingly to enrol a child who is not entitled to access education. The Immigration Bill will remove this offence entirely. At present, interim measures have been put in place to ensure that undocumented children, whose immigration status is being considered, still have access to education in New Zealand. These measures place no obligation for the child's parents also to be in New Zealand. Undocumented children who have not come to the attention of the Department of Labour are not entitled to enrol in schools.
