

# TREATY BODY MONITOR

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## COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 71<sup>ST</sup> SESSION, NEW ZEALAND, 17<sup>TH</sup> REPORT 31 JULY & 2 AUGUST 2007

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Information submitted to the Committee

### State report

On 18 July 2006 New Zealand submitted its combined 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> periodic report to the Committee on the Elimination of Racial Discrimination (the Committee)<sup>1</sup>. The report detailed the legislative, judicial and administrative measures adopted by the State during the review period of 1 January 2000- 22 December 2005. The report addressed recommendations and suggestions made by the Committee in its previous concluding

<sup>1</sup> CERD/C/NZL/17 18 July 2006

observations<sup>23</sup> and explained how the prevention and remedy of racial discrimination is dealt with in the country. Issues covered in the report include social and economic development of the Maori and Pacific peoples; the over-representation of Maori and Pacific peoples in the criminal justice system; the status Treaty of Waitangi under domestic law; the powers of the Waitangi Tribunal; special measures including a Governmental review of targeted policies and programs; the consequences of the *Foreshore and Seabed Act* and Governmental review of the Act; domestic violence; the empowerment of minority women; and the preservation of ethnic languages.

The State report cites several new and updated national policies, institutions and legislative changes as evidence of its ongoing effort towards the elimination of racial discrimination. Developments discussed include the work of the National Human Rights Commission's New Zealand Diversity Action Programme and New Zealand Action Plan for Human Rights; the establishment of a full time Race Relations Commissioner; the establishment of the Office of Ethnic Affairs; the New Zealand Settlement Strategy; the Connecting Diverse Communities Program; the Pacific Prosperity Strategy; the Maori Education Strategy; He Korowai (Maori Health Strategy); the Youth Offending Strategy; the Treaty of Waitangi Information Program; and the *Human Rights Amendment Act* 2001.

### **The list of issues**

Country Rapporteur Mr Linos-Alexander Sicilianos submitted a list of issues to the State prior to its review before the Committee. A major theme in the list of issues was the status and application of the Treaty of Waitangi, including historical treaty claims and settlements. Concerns regarding special measures were also raised in the list, as was the *Immigration Act*; the detention of asylum seekers; complaints, arrests for and prosecutions of racially motivated crimes; possible racial bias in arrests, prosecutions and sentencing; the *Foreshore and Seabed Act* 2004 and the role of the New Zealand Human Rights Commission.

The State later provided a thorough response to the list of issues supported by statistical data and concrete examples of policy and legislation aimed at eliminating all forms of racial discrimination. The document placed particular emphasis on clarifying issues surrounding the Treaty of Waitangi.<sup>4</sup> It also commented on actions taken by the New Zealand Human Rights Commission and Governmental responses to the Commission's recommendations.

Prosecution of hate related crimes and avenues of redress for discrimination were outlined in the response and the State elaborated on the offence entitled 'inciting racial disharmony' in section 131 of the *Human Rights Act* 1993. Measures taken to address over-representation by Maori and Pacific peoples in the criminal justice system were also covered in the response.<sup>5</sup> Issues of immigration legislation and the rights of refugees and asylum seekers were addressed. The document outlined the Government's rationale behind section 149D of the *Immigration Act*.<sup>6</sup> In addition the State elaborated on its current review of the *Immigration Act* including provisions for the rights of undocumented children and State policies regarding the detention of asylum-seekers.

### **NGO parallel reports**

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<sup>2</sup> A/57/18, paras. 412-434

<sup>3</sup> CERD/C/362/Add.10

<sup>4</sup> The response outlined public and political discussions about the Treaty, the results of such discussions, including proposed constitutional change; dissemination of information about the Treaty, incorporation of the Treaty into domestic legislation; and the removal of statutory references to the Treaty of Waitangi through the *Principles of the Treaty of Waitangi Deletion Bill* 2006.

<sup>5</sup> This included a discussion of section 17 of the *Sentencing Act* 2002; racial bias in arrest, prosecution and sentencing; training of police and Pacific and Maori patterns of offending.

<sup>6</sup> This provision bars potential migrants and asylum seekers from pursuing redress through the Human Rights Commission regarding immigration matters

The shadow reports of NGOs were heavily focused on the situation of the Maori People. In particular the reports elaborated concerns relating to Governmental policy, legislation and the Treaty of Waitangi. Legislation and legislative reform was critiqued by the Aotearoa Indigenous Rights Trust, the Maori Party, the Tribal Collective in Tai Tokerau and Peace Movement Aotearoa. Discussion on this topic mainly centred on the *Foreshore and Seabed Act 2004* and the Government's response to CERD's Foreshore and Seabed Decision in 2005.<sup>7</sup> The Aotearoa Indigenous Rights Trust report highlighted that the Treaty of Waitangi is not legally enforceable and that the Waitangi Tribunals recommendations are not binding on the Executive or Legislature. The document of the Treaty Tribes Coalition noted that rights under the Treaty are 'legally and politically fragile' and that this fragility has been 'exacerbated by the continuation of acrimonious public discourse and...reforms'.<sup>8</sup>

The majority of NGOs who wrote on Maori issues also critiqued the Government's broad interpretation of the term 'special measures' and its review of target policies and programs. The Maori Party and Peace Movement Aotearoa examined inequalities present in the criminal justice system, Maori over-representation and Maori offending. The Treaty Tribes Coalition covered similar issues in their report and expressed concern at the Government's 'apparent lack of substantive commitment' to follow up on recommendations made by the Committee.

The report from Action for Children and Youth Aotearoa (ACYA) focused on the status of young people in the country. The report highlighted the disadvantages faced by ethnic children, Maori and Pacific children, Asian children and children seeking asylum. The report stressed that this disadvantage constitutes a violation of New Zealand's obligations under the Convention, particularly Articles 2 and 5.

The report submitted by the Human Rights Foundation, Aotearoa New Zealand, focused predominantly on immigration issues and anti-terrorism legislation. The report criticised New Zealand's detention of asylum seekers and commented on the lack of progress in this area, highlighting that both CERD and the Committee against Torture have commented on this issue. The report made specific reference to section 149 D of the *Immigration Act*, claiming that it unfairly excludes complaints regarding immigration decisions from the jurisdiction of the National Human Rights Commission.

Recommendations made by NGOs included the prioritization of Maori self-determination in all economic, social and cultural legislation; the establishment of an independent commission to facilitate constitutional debate and change; the giving of discretionary power to the Waitangi Tribunal to make binding recommendations; the repealing of the *Foreshore and Seabed Act 2004*; the amending of the *Resource and Management Act 1991* and the *Local Government Act 2003*; and a review of immigration legislation, including incorporation of an explicit non-discrimination clause into legislation, a repeal of Section 149D of the *Immigration Act* and review of Immigration Profiling.

## Themes and issues

The New Zealand delegation included: Mr. Don Mackay (New Zealand Permanent Representative to the United Nations, Geneva); Dr. John Tamahori (Chief Advisor, Te Puni Kokiri); Mr. Sai Lealea, (Director, Monitoring and Governance, Ministry of Pacific Island Affairs); Mr. Mervin Singham (Chief Director, Office of Ethnic Affairs); Ms. Virginia Hardy (Treaty of Waitangi and International Law Team Leader, Crown Law Office); Ms. Benesia Smith (Policy Manager, Ministry of Justice); Mr. Ben Paki (Chief Analyst, Te Puni

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<sup>7</sup> Also critiqued was the *Human Rights Amendment Act 2001*; the *New Zealand Bill of Rights Act 1990*, the *Treat of Waitangi Amendment Act 2006*; the *Treaty of Waitangi Deletion Bill 2006* and the *Maori Commercial Aquaculture Claims Settlement Act 2004*.

<sup>8</sup> Shadow reports by the Aotearoa Indigenous Rights Trust, the Maori Party, the Tribal Collective in Tai Tokerau and the Peace Movement Aoteroa also discussed the Treaty.

Kokiri and Ms. Shilinka Smith (Senior Policy Analyst, Office of Ethnic Affairs). The delegation was supported by Amy Laurenson (Second Secretary in the New Zealand Permanent Mission to the UN in Geneva). Ambassador Mackay also introduced New Zealand's Race Relations Commissioner, Mr. Joris de Bres, and informed the Committee that he would be describing an intervention on the second day of the session.

In his opening statement, head of the delegation Ambassador Don MacKay expressed the State's commitment to a constructive and substantive dialogue about issues of racial discrimination in New Zealand. A sign of this commitment, he noted, was the strong delegation present at the Committee meeting. Ambassador Mackay introduced delegation members, welcomed Mr. Joris de Bres, New Zealand's Race Relation Commissioner and representative of New Zealand's Human Rights Commission and acknowledged representatives from New Zealand civil society who were present. The Ambassador outlined his opening statement which was given in writing to Committee members. The statement contained background information on the current review period and detailed the work done by the Government during this period to eliminate racial discrimination. He noted that the State report addressed issues raised by the Committee during the comprehensive dialogue of 2002 and that it 'sets the context' through which all forms of racial discrimination can be addressed. He stated that the report covers the cultural, economic and social standing of the Maori, Pacific peoples and other ethnic groups. In addition the report contains an update on the implementation of the *Foreshore and Seabed Act*, as was requested in 2005 under the Committee's Early Warning and Urgent Action procedure. Ambassador MacKay then briefly summarized recent positive developments in New Zealand, including new polices, legislation and programs. He commented that these initiatives have led to increased diversity, minority employment, female empowerment, education and Maori development.

### **Implementation of the Convention**

A predominant theme of the plenary session was the domestic implementation of the Convention. The Committee expressed concern at New Zealand's lack of a written constitution enshrining indigenous and other human rights. Country Rapporteur, Mr. Sicilianos noted that New Zealand is the only Commonwealth country without 'supreme law' containing human rights provisions. In addition Mr. Sicilianos questioned the compatibility of the *Human Rights Act 1993* and the *Bill of Rights Act 1990* and asked for clarification on what happens when there is conflict between legislation and the *Human Rights Act*.

Delegation member Ms. Smith elaborated on human rights legislation in New Zealand, noting that the *Human Rights Act* and the *Bill of Rights Act* provide the legal framework for the elimination of racial discrimination in New Zealand. She continued by explaining that whilst the Acts do not have 'supreme' status in the sense of the courts being able to strike down legislation that is inconsistent with them, the Acts are given 'special status'. In cases where a piece of legislation is inconsistent with the *Human Rights Act*, Parliament may enact it, but the legislation may be subject to a 'declaration of inconsistency' by the Human Rights Review Tribunal or the High Court. Such a declaration, however, does not invalidate the legislation.

Race Relations Commissioner Mr. Joseph de Bres alerted the Committee to new developments in New Zealand policy and legislation. He detailed the review of the *Police Act*, the introduction of a new *Immigration Act* and the launch of a new school curriculum. Mr. de Bres commented that these 'represent significant opportunities for strengthening the human rights and race relations framework in New Zealand'.

Ambassador MacKay elaborated on policy initiatives aimed at reducing social disparities in the country. This included the 'Opportunity for All New Zealanders', a document summarising the Government's vision for New Zealand and its strategies to improve social outcomes. In addition, he explained that there were a number of new policies and programs designed to improve the situation of Maori and Pacific peoples, who

tend to be disproportionately represented on a range of health, education and well-being measures.<sup>9</sup>. In addition to this, Ambassador MacKay outlined the Connecting Diverse Communities Program,<sup>10</sup> the New Zealand Settlement Strategy<sup>11</sup> and the current reform of social assistance under the Ministry of Social Development's Future Directions Project. Ambassador MacKay added that as Maori and Pacific peoples are over-represented in the population of working-age benefit recipients and have lower annual median incomes than other New Zealanders, the Future Directions Project and sustainable employment initiatives should have a significant positive impact on these communities.

In its concluding observations<sup>12</sup> the Committee welcomed the adoption of the 2004 New Zealand Settlement Strategy and the New Zealand Diversity Action Programme. However, it expressed concern that the *New Zealand Bill of Rights Act* did not have protected status and that enactment of conflicting legislation is possible. The Committee recommended that the State seek ways of ensuring that provisions of the convention are fully respected in domestic law.

### **Mechanisms to eliminate racial discrimination**

The two chief mechanisms discussed during the plenary session were the New Zealand Human Rights Committee (NZHRC) and the Office of Ethnic Affairs. Country Rapporteur Mr. Sicilianos acknowledged the important work of the NZHRC in the promotion of human rights and complaints investigation. During discussions the Committee asked for additional information on the Commission and for details of how commissioners are appointed. According to delegation member Ms. Benicia Smith the mandate of the NZHRC is to 'to advocate and promote respect for all human rights in New Zealand society, and to encourage the maintenance and development of harmonious relations between individuals and among diverse groups in society'. She advised the Committee that Commissioners are appointed upon recommendation from the Minister of Justice and Governor General and that the positions are advertised and applicants are interviewed. She also elaborated on the Commission's dispute resolution services, one of the most important functions served by the institution. Ms. Smith advised the Committee that 24% of complaints in 2006 were in relation to racial harassment. She noted that this service is a 'very significant milestone in the development of the human rights environment in New Zealand'. Two policy initiatives of the NZHRC were elaborated on during the session: the New Zealand Action Plan for Human Rights (NAPHR) and the New Zealand Action Diversity Programme. Mr. Sicilianos expressed his appreciation for the NZHRC and the two initiatives. However, he asked the delegation to comment on why the Government has not formally adopted the NZPAHR.

Mr. de Bres, in his statement, outlined the Government's response to the NZAPHR. He informed the Committee that the Minister of Justice has formally referred the plan to chief executives of Government departments directing them to consider the priorities outlined in the plan in their annual planning process. Another area of concern for the Committee was the Government's response to Commission recommendations. The delegation cited the example of the current Governmental review of immigration legislation, which was suggested by the NZHRC. However, they did not address the query further.

The creation of the Office of Ethnic Affairs was labelled an 'important development' by Country Rapporteur Mr. Sicilianos. Delegation member Mr. Singham elaborated on the work of the Office, stating that it aims to prevent racial discrimination from occurring by promoting the benefits of ethnic diversity, empowering communities to participate in 'all aspects of New Zealand' and by facilitating strong and sustainable

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<sup>9</sup> These included "Whakatakaka Tuarua: the Maori Health Action Plan", the "Pacific Health and Disability Action Plan", the "Maori Education strategy"; the "Pacifica Education Plan"; the Pacific Prosperity Strategy; the Pacific Economic Action plan and the Pacific Women's Economic Development Plan

<sup>10</sup> This policy coordinates new and existing initiatives aimed at strengthening intercultural relationships, addressing discrimination and promoting respect.

<sup>11</sup> The New Zealand Settlement Strategy aims to provide a Government-wide framework within which policy and services may be developed to ensure that migrants and refugees successfully adapt to life in New Zealand.

<sup>12</sup> CERD/C/NZL/CO/17

relationships of trust and respect across all diverse communities. Mr. Singham explained that the Office is focused on promoting ‘strength and diversity’ through education and awareness-raising. In addition, the Office provides services to ethnic minorities, such as the ‘Language Line’, which offers settlement information to new migrants in their own language. Currently the Office has a strong focus on Muslim issues. Mr. Singham outlined the ‘Building Bridges’ project, which works to build capacity within the Muslim community and to create stronger connections with the host community. He noted that there have been ‘observable constructive differences’ in the community over the past few years as a result of the intervention.

In its concluding observations the Committee recommended that the State party provide more detailed information on measures adopted to follow-up on the National Human Rights Commission’s Action Plan for Human Rights. It encouraged the State to adopt, on the basis of the proposals made by the Human Rights Commission, its own Action Plan for Human Rights.

### **Criminal justice**

The Committee expressed concern at the overrepresentation of Maori and Pacific Islanders in New Zealand Prisons. The State report outlined a project to review the causes for the disproportionate representation of Maori in the criminal justice system and to identify the main issues and gaps in knowledge. Committee member, Mr. Kjaerum, while discussing this issue, made reference to a study by Peter Dune. This study noted that Maori are accused, apprehended, charged and prosecuted more than non-Maori and that Maori are sentenced more harshly. Mr. Kjaerum suggested that ethnic profiling by police might be occurring and asked the delegation if the issue was being addressed.

President of the Committee, Mr. de Gouttes, added to Mr. Kjaerum’s point, noting that racial profiling is an indicator of possible discrimination. He suggested that the best way to combat this phenomenon is through measures such as those outlined in section 16 of New Zealand’s *Criminal Justice Act*. This provision allows an offender to request that the court hear any person speaking on the ethnic or cultural background of the offender, the way in which that background may relate to the commission of the offence, and the positive effects that background may have in helping to avoid further offending. Mr. de Gouttes inquired as to why this provision was under-utilised and asked if alternatives to imprisonment were used, such as community service or mediation. Both Mr. de Gouttes and Mr. Rodriguez emphasised the importance of training police and judges in ethnic diversity and asked for figures on the representation of Maori and Pacific Island Peoples in the police force and the judicial system.

Committee member Mr. Tang also commented on the over-representation of Maori in the prison system, and suggested a deeply rooted social cause. He noted the economic poverty of the Maori people and the dissatisfaction of Maori youth. Mr. Tang suggested that the police force must maintain a good relationship with young people of Maori origin and he called into question the use of excessive force by police officers. Race Relations Commissioner Mr. de Bres acknowledged these difficulties and noted that the NZHRC fully shares the Committee’s concerns. He advised the Committee that the NZHRC has identified them as one of the ‘key challenges’ in their annual review of race relations.

In response to these concerns, the delegation noted that there is no ‘obvious or quick’ solution to the over-representation of Maori and Pacific peoples in the criminal justice system. However, he added that a new *Criminal Justice Reform Act* was passed by Parliament one week previously. The delegation elaborated on additional steps taken by the Government to address this issue, including crime reduction plans, reintegration of imprisoned people into the community; research into Maori offending and programs to recruit police officers from minority groups. Delegates noted that many services are designed, delivered and implemented by Maori people and they advised the Committee that the Ministry of Justice was developing a proposal to investigate the whole criminal justice system and identify any biases.

Delegation member Mr Lealea addressed some the concerns regarding the status Pacific Islanders in the New

Zealand criminal justice system. She noted that there are specific programs targeting Pacific Island offenders, including the funding of places for wardens of Pacific decent, the teaching of corrections officers, rehabilitation for Pacific peoples and specific services for Pacific inmates.

In its concluding observations, the Committee recommended that the State enhance its efforts to address the problem of Maori and Pacific over-representation in the criminal justice system.

### **‘Special measures’**

During the plenary session the Committee commented that the State was incorrectly using the term ‘special measures’. Special measures are positive actions by a Government to assist or protect disadvantaged groups. They are inherently temporary in nature and are only necessary until equality is established. Country Rapporteur Mr. Sicilianos highlighted that the State was using the term when referring to more permanent legislation and policy and he stressed that such a classification was incorrect. Committee member Mr. Thornberry noted that a distinction was not made between special measures and positive measures to put the Convention into practice. The Committee expressed its concern at what seemed to be confusion between minority and indigenous rights and special measures. Such an interpretation could possibly lead to a situation where minority rights could be considered temporary rather than inalienable. Mr. Sicilianos further commented that the *Maori Fisheries Settlement Act* and the *Aquaculture Settlement Act* are not affirmative action measures and therefore should not be considered a special measure. He advised the delegation that special measures should not be seen as positive discrimination or a privilege, as they are not discriminatory but rather constitute a difference of treatment which should be justified on a reasonable basis, mainly to set up ‘*de facto* equality’ in a society. Mr. Sicilianos then asked the Government to reconsider its interpretation of special measures. In response to these concerns, delegation member Ms Smith commented that although the State had considered treaty settlements a special measure it may in be better to reclassify them and discuss them under Article 6 of the Covenant, covering remedies provided by tribunals and State institutions.

Race Relations Commissioner Mr. de Bres shared the Committee’s concern. He stated that the NZCHR has made it clear that special measures should not be confused with the Government’s treaty obligations, indigenous rights, or general social and economic measures tailored to particular ethnic groups. He then requested the Committees affirmation of this point in their concluding observations. In addition, he informed the Committee that there is an ongoing need for public education about special measures, and what they do and do not constitute. He advised the Committee that the NZAPHR identifies as a priority public education about the importance of special measures and what precicely constitutes a special measure.

The Committee noted its concern regarding the review of ‘targeted policies and programs’ by the Government. Committee member Mr. Pillai commented that New Zealand's emphasis should be on further strengthening polices and programs rather than examining whether they should continue. He noted that a UN Special Rapporteur has already commented critically on this issue, and requested that these views be given ‘due regard’ by the State Party.

In its concluding observations, the Committee reiterated the distinction between special and temporary measures for the advancement of ethnic groups and the permanent rights of indigenous peoples. On the issue of targeted policies on programs, the Committee further recommended that when reviewing special measures concerned communities should participate and the general public should be informed about the nature and relevance of special measures.

### **Maori people**

The most prominent topic of discussion during the plenary session was the situation of New Zealand’s Maori people. The Committee stressed that a gap still exists between the level of Maori development and that of European New Zealanders. Committee member Mr. Avtonomov highlighted high levels of infant mortality

and the continuation of problems regarding Maori health and education. He asked the delegation why this has not been possible to overcome. Delegation member Mr. Tamahori commented on the effects of New Zealand's history on the Maori, including the loss of language and access to resources. He emphasised the lasting consequences to Maori health, social cohesion and tribal infrastructure. However, he advised the Committee that there has been a 'slowing in the downward spiral of social disparity'. This was due, in part, to Maori participation in programs and initiatives and an increase in the number of publicly funded programs from Maori providers. An example of this progress is the increased availability of education in the Maori language from Maori providers. Dr. Tamahori advised the Committee that it is now possible to be educated in Maori owned and run institutions in the Maori language from preschool to university.

The plenary discussions revealed a deep commitment in New Zealand to preserve and teach the Maori language. Dr. Tamahori informed the Committee that by the 1970's a severe loss of language had caused alienation and social decline in Maori communities. Now however, with Government support, the language is available to any person who wishes to learn it and it is now reaching sustainable levels. A recent survey confirms an increase in adult, young people and non-Maori speakers. Dr. Tamahori cited this as an example of how the New Zealand Government has attempted to redress the alienation and decline of the Maori. Committee member Mr. Thornberry acknowledged that there are 'lessons to be learned' from indigenous language programs. However, other aspects of indigenous cultural disintegration must be addressed, such as land rights. He emphasised that cultural protection must be examined holistically.

In addition to social development, delegation members discussed the economic development of the Maori. Dr. Tamahori advised the Committee that the Maori economy was beginning to recover and build momentum and that the value of Maori commercial entities has grown to seven billion dollars. Ambassador MacKay noted a similar trend, stating that a larger share of the Maori workforce is in high-skilled occupations and there has been an increase in specific interest in agribusiness, fisheries and forestry.

### ***The Foreshore and Seabed Act 2004***

Committee members and delegates discussed the consequences of the *Foreshore and Seabed Act 2004* during the session. This *Act* had been examined under the Committee's Early Warning and Urgent Action Procedure in 2005. It was explained in the decision<sup>13</sup> from this procedure that the legislation contained discriminatory aspects against the Maori, in particular its extinguished the possibility of establishing Maori customary title over the foreshore and seabed and failed to provide a guaranteed right of redress. In the decision the Government was asked to provide an update on the implementation of the *Act* in its fifteenth, sixteenth and seventeenth periodic reports submitted to the Committee.

Delegation member Ms. Hardy explained that the *Foreshore and Seabed Act* vests ownership of New Zealand's foreshore and seabed with the Crown to ensure public access and also provides a mechanism for allowing Maori access to the land. She advised the Committee of three negotiations currently underway and noted that they are being supported by Government funding. However, she stressed that the negotiations deal with complex issues and will take time to resolve. Ms. Hardy acknowledged that the Government is trying to find redress options that are practical to all sides?. In addition to the above mentioned remedies, the Government has adopted a flexible approach to the use of the legislation and is committed to monitoring the implementation of that legislation. She further commented that there appears to be a discrepancy between the civil society and Governmental account of the issue, but that it was 'premature' for the Government to consider amending the *Act*.

Mr. de Bres, speaking on behalf on the NZHRC, commented on this issue. He stressed that the essence of the Committee's previous recommendation remains appropriate, namely that there should be renewed dialogue between the Government and the Maori on the issue, that the implementation of the *Act* should be closely

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<sup>13</sup> See CERD/C/66/NLZ/DEC.1 available at <http://www.ohchr.org/english/bodies/cerd/docs/CERD.C.66.NZL.Dec.1.pdf>

monitored and that negative effects of the *Act* should be minimised. He acknowledged that the legislation produced deep divisions and resentment in New Zealand society and that the responsibility to heal these divisions lies with all elected representatives. Mr. de Bres then gave support to the Committee in reiterating its earlier recommendation and emphasising the need to strengthen Crown-Maori relationships at all levels.

In its concluding observations the Committee reiterated its recommendation that a renewed dialogue between the State and the Maori community should take place with regard to the *Foreshore and Seabed Act*. This dialogue should investigate ways of mitigating the *Act's* discriminatory effects, including legislative amendment where necessary. The Committee recommended that the State continue monitoring closely the implementation of the *Act* and that it take steps to minimize any negative effects, especially by way of a flexible application of the legislation and by broadening the scope of redress available to the Maori.

### ***The Treaty of Waitangi and the Waitangi Tribunal***

The Committee highlighted the importance the Treaty of Waitangi, as it regulates the relationship between the Crown and the Maori. However, many Committee members were unsure about the status of the Treaty in domestic law and the powers of the Waitangi Tribunal. Country Rapporteur Mr. Sicilianos noted that NGOs have commented on the fragile status of the Treaty in domestic law and asked if the Government intended to make any reforms. Mr. Avtonomov also inquired about the status of Treaty. He drew attention to the apparent confusion surrounding the issue of whether the document is a legally binding instrument of 'constitutional significance' or simply a historical document. The Committee also noted that Rodolpho Stavenhagen, UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, recommended the entrenchment of the Treaty of Waitangi in constitutional law.

Country Rapporteur, Mr. Sicilianos assessed the content of the *Treaty of Waitangi Amendment Act 2006* (which institutes a 2008 cut-off date for the lodging of historical Treaty claims) and the *Principles of the Treaty of Waitangi Deletion Bill 2006* (which seeks to remove statutory references to the Treaty). Sicilianos noted that the deletion bill would extinguish the small jurisdiction of the Treaty. He also questioned the proposed Draft Ministry of Education Curriculum Document. This document would remove the Treaty of Waitangi from the school curriculum. The Rapporteur made reference to the Treaty Tribes Coalition's statement that 'removal of references to the Treaty signifies an intention to further obscure the political and popular relevance of the Treaty in contemporary New Zealand society.' Regarding the *Treaty of Waitangi Amendment Act*, the delegation assured the Committee that the cut-off date was not being implemented due to a lack of commitment from the Crown to achieve settlement; nor would it prejudice Maori claimants. Rather, the date was an attempt by the Government to settle all historical claims by 2020.

Delegation member Ms. Hardy advised the Committee that the Treaty was considered a founding constitutional document in New Zealand, although it is not directly enforceable in the courts. She explained, however, that when incorporated into statute the Treaty has legal force, such as in the *Conservation Act 1987*, the *Resource Management Act 1991* and the *Public Health and Disability Act 2000*. Regarding entrenchment of the Treaty, Ms. Hardy highlighted the work of New Zealand's Constitutional Arrangements Committee, which concluded in 2005. This Committee reported on a number of constitutional issues and spent some time investigating entrenchment of the Treaty. The group engaged in a substantial consultation process which included discussions with Maori. They recommended that further debate was needed on the issue.

This opinion was supported by Mr. de Bres, who informed the Committee that the NZHRC had just completed a three year community dialogue project on human rights and the Treaty of Waitangi. He stressed that issues of entrenchment were canvassed during that initiative; however more time is needed for further dialogue. The Commission, he explained, in its Action Plan for Human Rights, proposed a structured "constitutional conversation" as a means of developing public understanding of the issues. He emphasised that the Commission would welcome support for their recommendation that a constitutional conversation

continue on these important issues. He emphasised that at this stage dialogue would be preferable to specific prescriptions. Delegation member Ms Hardy highlighted that steps have been taken by the Government to engage with the issue, including public education programs. She noted that the entrenchment of the Treaty is a 'live issue' and is debated alongside other issues. However, it is clear that such a reform would 'need to take the public of New Zealand with it'.

The limited powers of the Waitangi Tribunal were also called in to question by the Committee. Mr. Sicilanos was concerned that the Tribunal can only make recommendations and that only a small percentage are taken up by Government. He noted his agreement with Rodolpho Stavenhagen, UN Special Rapporteur on indigenous issues, that the Tribunal should be given binding power to deal with Treaty matters with the 'force of law'. Delegation member Ms. Hardy acknowledged that generally the Tribunal does only have recommendatory powers; although in relation to some categories of land it has binding powers. However, she explained, the power to make binding settlements has only been exercised on one occasion. Because of the breadth of the Tribunal's jurisdiction and the aim of reconciliation of the process, the Tribunal generally chooses to adopt a flexible approach in which negotiations are preferable to judicial settlements.

In its concluding observations, the Committee made many recommendations about the Treaty of Waitangi and the Waitangi Tribunal. The Committee encouraged the State to continue public discussion over the status of the Treaty, with the view to its possible entrenchment as a constitutional norm. The Committee recommended that the State consider granting the Waitangi Tribunal legally binding powers to adjudicate Treaty matters and that the State should provide the Tribunal with increased financial resources. Furthermore, the Committee recommended that the State ensure the 2008 cut-off date for lodging historical treaty claims will not unfairly bar legitimate claims and that assistance is given to claimant groups in their negotiations with the Crown. In reference to the *Principles of the Treaty of Waitangi Deletion Bill*, the Committee asked the State to ensure the incorporation of the treaty into domestic legislation where relevant and in a manner consistent with the letter and the spirit of the Treaty. In relation to the New Zealand draft curriculum the Committee encouraged the State to include references to the Treaty in the curriculum and to ensure that those references are adopted or modified in consultation with the Maori.

### **Pacific people**

Delegation member Mr Lealea spoke at length on Governmental policy targeting Pacific people. She stressed the realisation of economic potential as key to addressing the inequalities faced by Pacific peoples. This philosophy, she explained, underpins the initiatives set out in the Pacific Action Plan, the Pacific Prosperity Strategy and the Pacific Women's Economic and Development Plan. These three policy initiatives focus on fostering an 'enterprising' culture of partnership to realise Pacific potential and to raise their level of economic development and standard of living. Mr Lealea advised the Committee that there are other strategies in place, including 'processes for engagement' in many Government departments. She stressed these initiatives are yielding positive results, including increased participation in education, increased employment and 'social connectedness'. Mr Lealea noted that there are still many challenges including housing, health and criminal justice. However, she informed the Committee that these are the areas of focus for the Government.

Committee member Ms. Bardill asked to what extent the Government is actually dealing with the causes of problems and not just the symptoms. Mr Lealea stressed that the affirming of Pacific identity is integral to addressing some of the key issues faced by Pacific peoples. She explained that the continuation of Pacific languages is an essential component of preserving this identity. Mr Lealea advised the Committee that there are initiatives underway around language maintenance for Niue, Cook Islands and Tokelau communities. These initiatives are being supported by an increased interest and participation in Pacific language classes, early childhood services and Pacific language shows on national radio. In addition, efforts are being made to investigate a Pacific Island TV station. Furthermore, she emphasised that the use of traditional institutions and

structures in Pacific communities is being encouraged with the aim to increase the provision of services and social cohesion.

### **Immigration legislation and refugees**

During the plenary session the Committee enquired about a variety of issues relating to immigration and the rights of migrants and refugees. Country Rapporteur, Mr. Sicilianos drew particular attention to the NZHRC's recommendation that immigration legislation, policy and practice should be reviewed in order that they better meet the needs of migrants and their families.

The procedural exemption in section 149 D of the *Immigration Act* 1987 was raised as an issue of concern by the Committee. This provision bars access to the publicly funded complaints procedure available under the *Human Rights Act* for complaints relating to immigration. Ambassador Don MacKay noted that the provision recognises that 'immigration matters involve different treatment on the basis of personal characteristics'. He stressed that the Government considers it preferable for the appeal and review procedures in the *Immigration Act* to be the primary means of resolving disputes. He advised the Committee that a similar procedural bar operates in respect to employment disputes involving racial discrimination or harassment. Delegation member Ms. Smith further commented that without this procedural bar the complaints procedure could be used to delay immigration decisions. Ambassador MacKay informed the Committee of a submission by the NZHRC, which recommended repealing the *Act*. He further noted that the institution will get an additional opportunity to express its views when the *Immigration Bill* is being considered later this year.

Country Rapporteur Mr. Sicilianos critiqued the Government's policy regarding the detention of asylum seekers, particularly the use of penal institutions. Delegation member Ms. Smith advised the Committee that all asylum seekers who enter New Zealand without a visa are subject to mandatory detention. However, the detention centre is considered 'open' in nature, meaning that detainees may leave during the day. Only asylum seekers who are feared to be a security risk to New Zealand or are highly likely to abscond are detained in penal institutions. However, she informed the Committee of a planned review of immigration policy in which the Department of Labour will be investigating the establishment of a secure detention facility solely for refugees.

Two other issues of concern to the Committee were the education and healthcare of undocumented children and the healthcare of migrants who have been in the country less than two years. Committee member Mr. Kjaerum was troubled by a statement in the New Zealand report which states that migrants who enter New Zealand as permanent residents and people on work permits allowing a stay of two years or more are eligible for publicly funded health and disability services. He asked the delegation to explain what was provided to those migrants who are on work permits *below* two years, illegal workers and undocumented children. Ms. Smith noted that doctors have a legal and professional obligation to provide 'acute services' irrespective of immigration status and ability to pay. Relating to the education of undocumented children, the delegation advised the Committee that the new Immigration Bill proposes to eliminate the offence of enrolling unlawful children and enables them to attend school conditional upon steps being taken to regularize their immigration status.

In its concluding observations the Committee asked the State to put an end to the practice of detaining asylum seekers in correctional facilities and to ensure that public education institutions are open to all undocumented children without restriction.

### **Women**

Committee member Mr. Kjaerum highlighted the 'double discrimination' that women of ethnic minorities face in New Zealand. He noted that the participation of Maori and Pacific women remains lower than that of European women, as does salary level, while unemployment rates and levels of domestic violence remains

markedly higher. Mr. Kjaerum asked the delegation to elaborate on initiatives taken to combat these inequities.

Race Relations Commissioner Mr. de Bres assured the Committee that the NZHRC fully shares these concerns and is aware of the damage that is being done to families, women and children through incidents of domestic violence. In response the Commission has identified domestic violence as one of the key challenges in their annual review of race relations. Mr. de Bres highlighted the Government's commitment to addressing the issue and noted that they have introduced a wide range of programmes and strategies to combat it. However, he requested that the Committee emphasise the urgent priority of achieving significant progress in this area. Ambassador Mackay outlined Governmental policy which addresses the disparities faced by women. He noted that there have already been positive changes in the number of Maori and Pacific women in paid employment.

## Conclusions and next steps

At the conclusion of the plenary session, the Country Rapporteur thanked the delegation for their analytical and detailed answers. He noted that nothing was overlooked and explained that the Committee now has a clear picture to prepare its concluding observations. The Rapporteur advised the delegation that he would be presenting his final comments at a later stage. Chairperson of the Committee, Mr. de Gouttes, highlighted the spirit of interactive dialogue which was established during the session. He congratulated the delegation on the richness and complexity of the information they provided but noted that he did not believe there was time to discuss all of the issues.

In the concluding observations of other human rights treaty bodies many recommendations relevant to racism and discrimination have been provided. The Committee against Torture (CAT) recommended that the Government immediately take steps to review legislation relating to security-risk certification in order to ensure that appeals can be made against decisions to detain and deport a person. CAT asked that New Zealand incorporate non-refoulement provisions into its immigration legislation and consider establishing a single refugee status determination procedure, which includes examination of complementary protection.<sup>14</sup> The Committee on Economic Social and Cultural Rights (CESCR) made a recommendation that the Government should intensify measures to combat domestic violence and adopt a national plan to fight poverty amongst disadvantaged and marginalized groups, indigenous Maori people and Pacific Islanders. Additionally, CESCR asked the State to ensure effective measures were adopted to improve the health and education of Maori people.<sup>15</sup> The Committee on the Elimination of All forms of Discrimination against Women (CEDAW) also requested that issues of domestic violence be addressed, particularly in relation to minority women and girls. CEDAW recommended the implementation of targeted measures to respond to the needs of Maori and Pacific women and girls and that effective measures be taken to eliminate discrimination against refugee, migrant and minority women and girls.<sup>16</sup> Recommendations by the Committee on the Rights of the Child (CRC) included ensuring that all necessary measures were taken to address suicide and alcohol consumption amongst young people, especially the Maori, and that mental health services were available to Maori youth. Furthermore, CRC asked that measures be taken to address disparities in health indicators between children in ethnic communities and that efforts be made to integrate refugee children into New Zealand society.<sup>17</sup>

In its concluding observations, CERD invited the State party to submit its eighteenth, nineteenth and twentieth periodic reports in a single report, on 22 December 2011.

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<sup>14</sup> CAT/C/CR/32/4 p6

<sup>15</sup> E/C.12/1/ADD.88 p30, 32, 33, 35

<sup>16</sup> A/58/38(SUPP)\_p424 bis and 426 bis

<sup>17</sup> CRC/C/ADD.216 p36, 38, 46

## **TREATY BODY MONITOR STAFF**

**Gareth Sweeney**, Deputy Manager, Geneva Program

**Eléonore Dziurzynski**, Communications Officer, Information Program, Geneva

**Michelle Evans**, Representative to the UN, New York

**Kobi-Renee Leins**, Human Rights Officer, New York

## **AUTHOR OF THE NEW ZEALAND REPORT**

**Johanna Somerville**, Intern

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