

**NGO 'ALTERNATIVE REPORT' TO THE COMMITTEE ON THE
ELIMINATION OF RACIAL DISCRIMINATION**

**Submission in response to the consolidated fifteenth, sixteenth and seventeenth
periodic report of NEW ZEALAND**

To be considered at the 71st Session August 2007

Submitted by the Treaty Tribes Coalition*

* This document is intended to assist the Committee in the examination of New Zealand's consolidated fifteenth, sixteenth and seventeenth periodic report. Accordingly, we invite the Committee to refer to this document during the examination of New Zealand's consolidated report and consent to this document being released publicly by the Secretariat of the Committee.

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Glossary of Terms and Abbreviations

Māori Terms

<i>Hapū</i>	sub-tribe
<i>Iwi</i>	tribe
<i>Kaitiakitanga</i>	customary guardianship
<i>Taonga</i>	treasure/ highly valued thing (tangible and intangible)
<i>Tikanga Māori</i>	Maori law
<i>Urupa</i>	cemetery

Abbreviations

AFL	Aotearoa Fisheries Ltd
Committee	Committee on the Elimination of Racial Discrimination
DRIP	Declaration on the Rights of Indigenous Peoples
HRA	Human Rights Act 1993
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
International Bill of Rights	Universal Declaration on Human Rights, International Covenant on Civil and Political Rights and International Covenant on Social, Economic and Cultural Rights
MLC	Māori Land Court
New Zealand Report	New Zealand's fifteenth, sixteenth and seventeenth consolidated periodic report to the Committee on the Elimination of Racial Discrimination
NZBORA	New Zealand Bill of Rights Act 1990
Special Rapporteur	Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples
TOKM	Te Ohu Kaimoana Ltd
TTC	Treaty Tribes Coalition

Introduction

1. This report is submitted by the Treaty Tribes Coalition (TTC) in response to New Zealand's fifteenth, sixteenth and seventeenth consolidated periodic report (the New Zealand Report) to the Committee on the Elimination of Racial Discrimination (the Committee).
2. The TTC is an Indigenous Non-Governmental Organisation formed in 1994 to represent its four constituent members: the Hauraki Māori Trust Board (representing the 12 iwi of Hauraki); Ngati Kahungunu Iwi Incorporated; Ngāi Tamanuhiri; and Te Rūnanga o Ngāi Tahu. The TTC iwi represent 15-20 percent of the Māori Population; comprising of over 110,000 members according to the 2001 census. The TTC petitioned the Committee in 2004 under the early warning procedure in respect of the New Zealand Foreshore and Seabed Bill (as it was then).
3. TTC respectfully requests that the Committee consider this report during the examination of the New Zealand report at the 71st Session in August 2007. TTC has reviewed the New Zealand report, and considers that it does not contain a complete and accurate summation of the measures adopted during the review period that give effect to, and in particular areas of concern detract from, the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).
4. This report addresses the legislative, judicial, administrative and other measures covered in the New Zealand report, and for the convenience of the Committee, is structured largely in the same manner as the New Zealand report. However, this report departs from the New Zealand report in three respects: (1) as a preliminary matter, TTC expresses concern at the Government's apparent lack of substantive commitment to give effect to the recommendations of the Committee; (2) this report considers significant developments occurring outside of the review period, as we understand that the New Zealand diplomatic representative will provide an update to the Committee during the examination process; and (3) this report is confined to the consideration of the situation of Māori, and does not comment on the situation of other ethnic communities within Aotearoa New Zealand.
5. A lack of substantive commitment to implementing the Committee's recommendations is apparent in two principal areas; the Government's response to the Committee's previous concluding observations and more specifically, the Government's dismissive response to the Committee's decision in 2005 in respect of the Foreshore and Seabed Act.¹
 - *Government response to concluding observations and recommendations:* TTC notes with appreciation the Committee's General Recommendations and Guidelines which provide guidance on follow up activities to the Committee's concluding observations and recommendations.² In brief, TTC understands

that the common purpose of these instruments is to enhance the; dissemination of the Committee's findings; coordination of implementation efforts; and participation of domestic human rights institutions and non-governmental organisations in the process of implementation. TTC is concerned that the Government has adopted an *ad hoc* approach to implementation, which significantly impairs the efficacy of implementation efforts, even where done in good faith, as the approach lacks coordination, transparency and accountability. Moreover, the Government does not appear to have sought engagement with Māori organisations and tribal collectives in the follow-up activities to the previous concluding observations.³ We consider that the Committee's recommendation that States parties consider establishing a national monitoring and evaluation mechanism is particularly salient for New Zealand, and would significantly improve the success of implementation efforts. Accordingly, we consider that New Zealand should adopt a 'best practice' approach to implementation, consisting of a national coordinating body responsible for the dissemination of the Committee's findings and engaging with appropriate sectors of civil society, including Māori organisations and tribal collectives.

- *Government response to Decision I (66)*: TTC is particularly concerned that the Government rejected the veracity and relevance of the Committee's findings under the early warning procedure. In response to the Committee's findings, the Prime Minister was quoted as stating that:

[The CERD] is a committee on the outer edges of the UN system. ... It did not follow any rigorous process as we would understand one. In fact, the process itself would not withstand scrutiny at all."⁴

TTC is mindful of New Zealand's enduring commitment to human rights advancement, and international presence as a "principled defender of human rights".⁵ However, we are also concerned that the Government response may represent an emerging and potentially persistent belligerence in respect of the Committee's findings, should they be contrary to the political direction and climate of the government of the day. Accordingly, we urge the Committee to caution the Government against impeaching the integrity of the Committee and encourage New Zealand to adopt a more constructive approach to the implementation of all Committee observations and recommendations.

I. GENERAL

6. TTC does not have further comment on paragraph 4 of the New Zealand report. However, TTC does comment on the conduct of politicians during the electoral campaigning process below.

II. INFORMATION RELATING TO ARTICLES 2 TO 7 OF THE CONVENTION

Government policy and general legal framework

(paragraphs 5- 10 New Zealand report)

7. TTC does not consider this section of the New Zealand report to accurately reflect the current situation in Aotearoa New Zealand. Specifically, we identify three areas of concern misrepresented in the New Zealand report, which cumulatively impair the ability of Māori to enjoy the rights provided for in the ICERD. These thematic areas are: (1) a discernible retreat from recognising the Treaty of Waitangi (2); a reversal in approach to ‘special measures’ as recognised under Article 1 (4) ICERD; and (3) a continuation of an adverse political climate previously criticised by the Committee.
8. TTC is concerned that the New Zealand report does not accurately reflect the enduring legal and political fragility of the Treaty of Waitangi, which is particularly acute at present due to the compounding effect of changes in legislative, educational and resource management policy (discussed further under Article 2 measures). TTC considers that the Treaty of Waitangi is an international treaty which has inherent relevance to the implementation of the ICERD, and also recalls the findings and recommendations of the Special Rapporteur on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples, specifically the:

[p]otential utility of treaties...between indigenous peoples and governments for ensuring the promotion and protection of human rights and fundamental freedoms of indigenous populations.⁶

9. TTC is also concerned that the New Zealand report does not accurately characterise the current approach to ‘special measures’, as provided for under Article 1(4) ICERD. Specifically, TTC considers that the Government has adopted an inappropriately narrow interpretation of ‘special measures’ and, on that basis, is reducing the nature and scope of targeted programmes, which TTC considers to derogate from ICERD. TTC recalls with appreciation the conclusions and recommendations of the Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples (the Special Rapporteur) in respect of his country visit to New Zealand in November 2005. The Special Rapporteur expressed concern that a “return to the assimilationist model appears increasingly in public discourse”⁷, and found that:

There appears to be a need for the continuation of specific measures based on ethnicity in order to strengthen the social, economic and cultural rights of Māori as is consistent with the International Convention on the Elimination of All Forms of Racial Discrimination.⁸

The Special Rapporteur also recommended that:

Social delivery services, particularly health and housing, should continue to be specifically targeted and tailored to the needs of Māori, requiring more targeted research, evaluation and statistical data bases.⁹

10. The final thematic issue concerns the present political climate in Aotearoa New Zealand. The Committee has previously encouraged elected officials to “refrain from exploiting racial tensions for their own political advantage”.¹⁰ Similarly, the Special Rapporteur recommended that:

Representatives and leaders of political parties and public organizations should refrain from using language that may incite racial or ethnic intolerance.¹¹

TTC remains concerned that there has not been an appreciable difference in the conduct of elected officials, and that some officials may not have taken full cognisance of these recommendations.

Ethnic characteristics of the New Zealand population

(paragraphs 11-12 New Zealand report)

11. TTC does not dispute this information as contained in the New Zealand Report, however, we do consider the population growth projections may be conservative estimates.
12. We also acknowledge that, as stated in the New Zealand report, the different age profiles of ethnic populations are a factor in explaining the differences in some of the political and socio-economic statistics presented. However, we consider that there are many more significant contributing factors, and are cautious of a reductive quantitative approach to understanding complex social situations.

Durban Declaration and Programme of Action *(paragraph 13 New Zealand report)*

13. We welcome the Government’s support of the recommendations contained in the Durban Declaration Programme of Action. However, we note particular concern with the implementation of four of the 10 areas of action identified by the Human Rights Commission. At this point, we note the following areas of concern which are elaborated upon further below (under Article 2 (1) measures):

1. Efforts to increase public understanding of the Treaty, indigenous and human rights of Māori are presently inadequate, particularly in light of recent changes to educational curriculum and the dominant political rhetoric of elected officials, criticised by the Committee and the Special Rapporteur.
2. We are concerned that efforts to address equity in education, health, housing, justice, and employment are impaired by the review and

reduction of targeted services, representing a retreat from ‘special measures’

3. Effective consultation with and participation in decision making by Māori remains inadequate, and is of particular concern in relation to lands and natural resources. We consider that the Government has not yet complied with paragraph 5 of General Recommendation XXIII
4. Māori remain under-represented in mainstream media, and the approach of the public media to Māori issues remains an area of significant concern. We note that the Special Rapporteur expressed concern at the conduct of the public media and recommended that:

Public media should be encouraged to provide a balanced, unbiased and non-racist picture of Māori in New Zealand society, and an independent commission should be established to monitor their performance and suggest remedial action.¹²

Progression through the New Zealand Action Plan for Human Rights (*paragraph 14 New Zealand report*)

14. TTC welcomes the efforts of the New Zealand Human Rights Commission, including the New Zealand Diversity Action Programme and the New Zealand Action Plan for Human Rights (NZAPHR). However, we note two particular concerns. Firstly, the NZAPHR appears to provide lesser protections for Māori that exist under international human rights jurisprudence pertaining to indigenous peoples. Additionally, we note that the NZAPHR has not been formally adopted by Government and as such, these efforts should not be construed as manifesting a substantive governmental commitment to the advancement of race relations and human rights more broadly.

Elements of the New Zealand Action Plan for Human Rights relevant to the Convention and the Durban Declaration (*paragraph 15 New Zealand report*)

15. TTC agrees that sections 4 and 7 of the NZAPHR are particularly relevant to the situation of Māori, however, TTC reiterates that we are concerned that both sections are inappropriately reductive of the rights properly enjoyed by Māori under the Treaty of Waitangi and international human rights law.

Declaration on the Rights of Indigenous Peoples (*paragraph 16 New Zealand report*)

16. New Zealand’s stance on the Declaration on the Rights of Indigenous Peoples (DRIP) has been resolutely criticised by many Māori as a duplicitous effort to curtail the recognition of Māori rights under the Treaty of Waitangi and international human rights law.¹³ TTC notes that the Government has failed to consult with Māori

concerning the text of the draft DRIP (as it then was) for the previous five years. Additionally, TTC considers that New Zealand's stated position on the provisions of the text lacks legal and ethical merit, as the Government has repeatedly overstated the legal status and scope of the DRIP provisions. New Zealand has stated the provisions pertaining to self determination pose an unacceptable risk to territorial integrity and exceed domestic law and policy. However, TTC considers that the Government has wilfully ignored the implications of customary international law, contained in the UN Charter and the UN Declaration on Friendly Relations, which confines indigenous self determination to a level comparable with present domestic policy. New Zealand has also objected to provisions protecting land rights on the basis they exceed current Treaty Settlement policy. TTC considers these provisions do not expand the rights contained in the International Bill of Rights and the ICERD, and notably as stated by the Committee in General Recommendation XXIII. The final rationale asserted by the Government in rejecting the DRIP is that:

“[N]o government can accept the notion of creating different classes of citizenship. Nor can one group in society have rights that take precedence over the rights of others”¹⁴

TTC considers that this rationale ignores the legitimacy of 'special measures', the extant rights of Māori under the Treaty of Waitangi and international human rights law, and fails to duly recognise the rights of all New Zealanders protected under domestic and international human rights law.

17. TTC considers that the New Zealand position on the DRIP reflects the current domestic aversion to recognising Māori rights, and is concerned that New Zealand will pervert due adoption of the DRIP when it is next considered by the General Assembly.

Article 2

A. Information on the legislative, judicial, administrative or other measures which give effect to the provisions of article 2, paragraph 1 *(paragraph 17 New Zealand report)*

18. TTC considers that the domestic human rights framework in New Zealand is insufficiently robust to give full effect to article 2 (1) (a) and (c) of ICERD as it comprises of subservient sources of law and is confined to non-enforceable review measures. The absence of binding and enforceable human rights protection has been exploited by successive governments to encroach upon the rights of Māori, particularly in respect of rights over lands and natural resources. The persistent vulnerability of Māori rights is clearly evidenced in the passage of the Foreshore and Seabed Act, as considered by the Committee in Decision 1 (66).
19. The human rights framework consists of the New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993 (HRA). As identified in the New

Zealand report, the Acts provide for policy and proposed legislation to be assessed for consistency with the rights protections contained in the Acts. However, TTC considers that the review process lacks impartiality as it is typically conducted by an agent of the Crown; the Attorney General in respect of legislation and a government official in respect of policy papers. Additionally, as the Government is permitted a margin of appreciation in assessing whether rights infringement has occurred, and if so, whether it can be demonstrably justified, the 'national interest' justifying the reform typically supersedes any human rights concerns raised. The undue weight accorded to the 'national interest' as a means to justify the infringement of Māori rights is illustrated in the Attorney General's review of the Foreshore and Seabed Bill, which she found to be non-discriminatory, despite the Waitangi Tribunal and the Committee finding the Bill and subsequently Act, to clearly discriminate against Māori. TTC considers that the discrepancy between the findings of the Attorney General and the expert bodies is solely due to differing weight accorded to the national interest. Moreover, as the courts do not possess the jurisdiction to review consistency with human rights standards, no effective remedy is available for any rights breaches which occur. (The provisions under the Human Rights Amendment Act 2001 are discussed further below).

20. The lack of a robust human rights framework is of particular concern in New Zealand due to our unique constitutional structure, which grants the Executive branch of government almost untrammelled legislative power, immune from political and judicial scrutiny. New Zealand has a unicameral parliament; accordingly, the political party forming the government has the potential to pass any piece of legislation for which it can obtain a bare majority of votes. Political accountability is provided immediately by the media and subsequently at the following election, neither of which are capable of protecting Māori interests. As stated above, the public media fails to provide balanced and fair reporting of Māori issues, and while Māori are fully enfranchised, as a minority group Māori do not have a sufficient number of voters to meaningfully censure the government or effect repeal of prejudicial legislation. The non-enforceable nature of the human rights framework results in Parliament retaining the ability to override human rights through legislation and the courts are precluded from overturning any such enactment.
21. The human rights situation of all New Zealanders is therefore vulnerable, but only rarely of concern due to the generally strong political commitment to upholding core human rights values and standards. In respect of Māori however, it has frequently been expeditious to sacrifice rights protections to immediate electoral needs and other political objectives.
22. TTC shares the concerns of many constitutional commentators, that New Zealand's constitution is in a 'state of crisis', and necessitates urgent reform to provide a robust human rights framework.¹⁵ The Special Rapporteur specifically recommended that:

The New Zealand Bill of Rights should be entrenched to better protect the human rights of all citizens regardless of ethnicity or race.¹⁶

23. TTC considers that constitutional reform leading the entrenchment of human rights protections is long overdue, and emphasises that New Zealand is the only Commonwealth nation without supreme law containing human rights protections. Moreover, we emphasise that the NZBORA was intended to be entrenched law to cure the enduring failings of our constitutional structure:

A Bill of Rights for New Zealand is based on the idea that New Zealand's system of government is in need of improvement. We have no second House of Parliament. We have a small parliament. We are lacking in most of the safeguards which many other countries take for granted. A Bill of Rights will provide greater protection for the fundamental rights vital to the survival of New Zealand's democratic and multi-cultural society. The adoption of a Bill of Rights in New Zealand will place new limits on the powers of Government. It will guarantee the protection of fundamental values and freedoms. It will restrain the abuse of power by the Executive branch of Government and Parliament itself. It will provide ... a minimum set of standards to which decision making must conform. In that sense a Bill of Rights is a mechanism by which governments are made more accountable by being held to a set of standards.¹⁷

24. Accordingly, TTC invites the Committee to encourage New Zealand to consider constitutional reform so as to create a robust human rights framework capable of giving effect to ICERD, principally through the entrenchment of the NZBORA.

Human Rights Act 1993 (*paragraph 18 New Zealand report*)

25. TTC acknowledges that the Human Rights Amendment Act 2001 empowered the New Zealand Human Rights Tribunal to declare legislation inconsistent with the NZBORA, thereby enabling declarations of inconsistency where the legislation is found to be discriminatory. However, as the declaration of inconsistency is not enforceable against the government, and does not have the effect of invalidating the offending legislation, we consider that it is an ineffective remedy which does not provide for a robust culture or framework of human rights.

Human Rights Commission (*paragraph 19 -21 New Zealand report*)

26. TTC appreciates the work conducted by the Human Rights Commission, and recognises that the Commission performs a highly valuable, constructive role in respect of the human rights culture in New Zealand generally, and specifically in relation to the situation of Māori.
27. The Human Rights Commission was established in 1978, with an initial mandate to promote respect for human rights¹⁸ and to investigate complaints pertaining to discrimination.¹⁹ The core mandate of the Commission remains essentially unchanged; human rights promotion and complaints investigation. The incremental advances effected over the past thirty years are confined to form rather than

substance, and include: the expansion of educational activities; reformation of the complaints process; and centralisation of human rights activities. TTC supports the continuation of public education, however, we are concerned that the present efforts in relation to the Treaty of Waitangi and indigenous rights are insufficient in isolation (discussed further below). We support changes to the complaints review process, and are particularly appreciative of the legal support now available to potential complainants.²⁰ However, we do not consider the review process to be an effective remedy for prejudicial Crown conduct. We also support the centralisation of race relations, equal opportunities and human rights; however, we consider this to be a measure primarily directed to administrative efficiency.

28. Accordingly, TTC considers that the continued reliance on public education and formal and informal complaints procedures are valuable measures, but insufficient, in isolation, to create a robust human rights culture in Aotearoa New Zealand. Accordingly, whilst we welcome the Commission's efforts, we remain concerned that there has been little real advancement of human rights protection over the previous thirty years.

Human Rights Commission's New Zealand Action Plan for Human Rights
(*paragraph 22 New Zealand report*)

29. TTC welcomes the NZAPHR as a preliminary measure in reformulating human rights compliance in the present era. However, we are concerned that the two applicable sections (4 & 7) are unduly reductive of Māori rights under the Treaty of Waitangi and international human rights law.
30. Section 4 of the NZAPHR pertains to race relations, and specifies in section 4.3 indigenous rights, including as a goal that "The particular rights of Māori as the indigenous people of New Zealand are respected and valued alongside the rights of all New Zealanders."²¹ The accompanying commentary is as follows:

The recognition of indigenous rights has been the subject of considerable public debate both in New Zealand and internationally. There is developing jurisprudence both in New Zealand and in other countries in relation to self-determination, customary rights, culture, language and the relationship between individual and collective rights. The Human Rights Commission's programme of community dialogue on human rights and the Treaty of Waitangi has indicated the need for continued discussion of these issues, and of how the Treaty of Waitangi encompasses both the indigenous rights of Māori and the rights of all New Zealanders. Three particular challenges were identified:

- To recognise and respect the customary rights of tangata whenua in a way that is fair to all citizens and values the contribution that tikanga Māori makes to the New Zealand identity

- To ensure the rights of Māori to live as Māori and also to participate fully in New Zealand society and
- To affirm for all New Zealanders the right to belong.

31. TTC supports this objective, but is concerned that the commentary favours the ‘national interest’ as opposed to Māori rights. TTC notes the emphasis conveyed in the phrases “alongside all New Zealanders”; “how the Treaty of Waitangi encompasses both the indigenous rights of Māori and the rights of all New Zealanders”; and “To affirm for all New Zealanders the right to belong”. This emphasis is confined to the section pertaining to indigenous rights. Other sections, in contrast, emphasise that particular outcomes are: protected by international conventions;²² ‘necessary’,²³; legitimate²⁴; and critical.²⁵
32. TTC considers that the weaker language used in respect of the indigenous rights section is indicative of a lesser commitment to protecting Māori rights, and that the emphasis on the ‘national interest’ is primarily intended to placate the wider New Zealand public, as a consequence of the racial intolerance engineered by elected officials during the Foreshore and Seabed reform. TTC is particularly concerned that the NZAPHR therefore detracts from the crystallised rights enjoyed by Māori under the International Bill of Rights, the ICERD and emergent customary law lead by Convention 169, and the DRIP.
33. Section 7 concentrates on addressing the human rights framework in Aotearoa New Zealand. Section 7.2 provides for the place of the Treaty of Waitangi, and identifies three areas of priority action:
- Promote and support increased public discussion of the place of the Treaty of Waitangi today and in the future
 - Ensure that all New Zealanders have the opportunity to participate in public discussion on the place of the Treaty of Waitangi and in any public consideration of issues relevant to the constitutional framework for human rights in New Zealand
 - Ensure that the status of the Treaty of Waitangi is part of any consideration of New Zealand’s constitutional arrangements.
34. TTC is concerned that the former two priority actions suggest that within the NZAPHR, the appropriate path forward is to renegotiate the place of the Treaty with the wider public of Aotearoa New Zealand. TTC supports broad public involvement in processes related to constitutional reform. However, TTC is deeply concerned that the legal, moral and spiritual character and significance of the Treaty could be undermined by such a process, unless sufficient safeguards are established. Moreover, TTC considers that if the Government wishes to reconsider the place of the Treaty of Waitangi, it must first comprehensively consult with the Māori signatories.

35. Accordingly, TTC supports the development of the NZAPHR but remains concerned that the approach to Māori rights is unfairly reductive of our rights.

New Zealand Bill of Rights Act 1990 (*paragraphs 23-24 New Zealand report*)

36. The NZBORA, as stated above, is a subservient source of law which merely requires statutes to be construed in such a way as is consistent with the BORA. Should a statute be found to breach the NZBORA, the judiciary must uphold the offending statute. Accordingly, the NZBORA is in many respects an aspirational reference document and is more hortatory than formally binding.
37. The remedies referred to in paragraph 23 of the New Zealand report are primarily confined to breaches in respect of criminal justice matters, and to date have concentrated on the award of damages and striking out evidence obtained in breach of the NZBORA. TTC emphasises that remedies for breach of the NZBORA are not provided for in the statute, and as such have been crafted by the judiciary. The judiciary do not possess jurisdiction over discriminatory policy and proposed legislation, accordingly, there is no recourse to remedies for breaches of the NZBORA for the principal acts which affect the collective rights of Māori.
38. Therefore, whilst the NZBORA contains two provisions which operate to enact the ICERD (sections 19 and 20); the provisions are not effective due to the status of the NZBORA and lack of available remedies.

Employment Relations Act 2000 (*paragraphs 25-26 New Zealand report*)

39. TTC does not consider it necessary to comment further on the Employment Relations Act 2000.

Treaty of Waitangi (*paragraphs 27-28 New Zealand report*)

40. The Treaty of Waitangi was signed in 1840 by representatives of the British Crown and Māori. Historically, the Treaty was disregarded as it was perceived to impose moral rather than legal obligations.²⁶ The Treaty has since been judicially recognised as a ‘founding document’ possessing constitutional significance. It is not however a formal part of New Zealand law and so remains unenforceable unless expressly incorporated into statute²⁷. Contemporary interpretation of the Treaty is contested due to marked textual differences between the English and Māori language versions, and an enduring controversy as to its legal status at domestic and international law. At a minimum, the Treaty guaranteed the protection of pre-existing property rights to lands, resources and cultural heritage, and respect for *tino rangatiratanga*, loosely translated as self governance. The formal legal status of the Treaty remains vulnerable, and Māori rights under the Treaty are therefore both legally and politically fragile. This enduring vulnerability and fragility has recently been exacerbated by the continuation of acrimonious public discourse and number of reforms which further erode the legal status and political relevance of the Treaty

41. As stated in the New Zealand report (*para 28*), the Treaty of Waitangi has recently been the subject of much public and political discussion. The omission in the New Zealand report is, however, that this debate has occurred within an enduring political climate the Committee has previously found to be contrary to the spirit of the ICERD, we recall with appreciation the comment that:

The Committee remains concerned about the political atmosphere that developed in New Zealand following the Court of Appeal's decision in the *Ngati Apa* case which provided the backdrop to the drafting and enactment of the legislation. Recalling the State party's obligations under article 2(1)(d) and article 4 of the Convention, it hopes that all actors in New Zealand will refrain from exploiting racial tensions for their own political advantage.²⁸

42. TTC considers that the political atmosphere retains the elements the Committee considered to provide an unacceptable backdrop, and consider the responses of elected officials to the findings of the Committee and the Special Rapporteur as indicative of the perpetuation of this climate:

"His raft of recommendations is an attempt to tell us how to manage our political system. This may be fine in countries without a proud democratic tradition, but not in New Zealand where we prefer to debate and find solutions to these issues ourselves."²⁹

43. TTC also considers that three significant reforms provide a compelling indication that the status and relevance of the Treaty is presently at risk; the Treaty of Waitangi Amendment Act 2006; Principles of the Treaty of Waitangi Deletion Bill 2006; and Draft Ministry of Education Curriculum Document. We note that these reforms have occurred outside the formal reporting period, but understand that the Committee will request an update from the New Zealand diplomatic representative during the examination of the New Zealand report and consider these reforms to be axiomatic to the current situation of Māori.
44. The Treaty of Waitangi Amendment Act imposed a closing date on lodging historical Treaty claims to the Waitangi Tribunal. Historical claims, defined as any act or omission of the Crown which occurred before 21 September 1992³⁰, must be lodged with the Tribunal on or before 1 September 2008. The Tribunal will not be able to hear historical claims submitted after the closing date, but will continue to inquire into contemporary breaches of the Treaty that occur after 21 September 1992, for example future statutory or policy reforms that prejudice Treaty guaranteed rights.
45. The Act has both symbolic and practical significance. The Tribunal was established in 1975, but only obtained retrospective jurisdiction in 1985, enabling it to hear claims relating to historical actions dating from 1840, when the Treaty was signed. Extending the Tribunal's jurisdiction was largely a result of sustained Māori protest and an evolving recognition, by the wider New Zealand public, of the moral

legitimacy of Māori claims for justice. The 2006 Amendment symbolises the reversal of popular sentiment and a corresponding weakening of political commitment to a meaningful process of reconciliation. It may also indicate that the Tribunal has an imminent expiry date.

46. In a practical sense, the closing date lacks meritorious justification and jeopardises the integrity of the settlement process. The unilateral imposition of the closing date was rationalised as serving the national interest of greater certainty and efficiency in respect of the Treaty settlement process.”³¹ The principal delays in the process are, however, due to the Tribunal’s lack of resources and the prolonged nature of negotiations with the Government; it is difficult to identify how the closing date will remedy either of these difficulties. Lodging a Tribunal claim is a complex and arduous process; necessitating prospective claimants identify, with reasonable precision, the nature of prejudicial historical Crown conduct. The short period until the termination of the Tribunal’s historical jurisdiction requires hasty action by prospective claimants, which may be contrary to customary tribal processes and improperly bar legitimate claims. Accordingly, TTC considers that the closing date is far more likely to amount to a further example of, rather than a means to resolve, Treaty grievances.
47. The Principles of the Treaty of Waitangi Deletion Bill 2006 is a Private Members Bill, introduced by New Zealand First, a coalition partner in the current Government, as part of a confidence and supply agreement. The Bill seeks to remove all statutory references to the Treaty of Waitangi on the basis that such references are “an anomaly which has harmed race relations in New Zealand.”³² As the Treaty is not directly enforceable, the courts are only able to adjudicate on Treaty matters where an express or implied statutory provision directs that the Treaty is to be considered when interpreting and applying that particular statute. Removing such references effectively extinguishes the narrow jurisdiction of the courts in respect of the Treaty, and will result in only the Waitangi Tribunal possessing the jurisdiction to consider breaches of the Treaty, subject to the caveat that findings will not be legally binding. The judiciary has been instrumental in recognising and legitimating Māori rights affirmed under the Treaty; progressing the ‘constitutionalisation’ of the Treaty; and serving in part as the contemporary conscience of the nation. Should this Bill become law (the probability of which is uncertain) the legal and constitutional status afforded to the Treaty will be nullified, in effect returning to the early colonial positioning of the Treaty as merely a moral covenant.³³ TTC considers that the Government’s support of this Bill indicative of the motives of political expediency which drive Treaty policy. We are also concerned that even if the Bill does not become law, it will further aggravate the adverse political climate and prejudice public understanding of the issues involved.
48. The Draft Ministry of Education Curriculum, released in July 2006, serves as a national educational policy statement, directing the teaching and learning content throughout New Zealand schools and establishing learning objectives for school students. The current curriculum “recognises the significance of the Treaty of

Waitangi” as a guiding principle and directs that “the school curriculum will recognise and value the unique position of Māori in New Zealand society...[and] will acknowledge the importance to all New Zealanders of both Māori and Pakeha traditions, histories, and values.”³⁴ The draft curriculum has removed these references. TTC considers that the 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. TTC is particularly concerned that reducing Treaty education within the education system significantly undermines the good faith and efficacy of wider public education efforts.

49. In respect of the specific developments cited in the New Zealand report, TTC has the following commentary:

- TTC welcomes the Te Puni Kokiri publication *He Tirohanga o Kawa ki te Tiriti o Waitangi* and agrees that it is a significant and valuable resource. TTC hopes that the Government will encourage this resource to be updated as our jurisprudence continues to evolve, particularly in respect of aboriginal title and human rights standards.
- TTC acknowledges the funds set aside for the Treaty of Waitangi Information Programme. However, TTC is concerned that the Information Programme lacks an appropriate level and balance of information. Moreover, TTC considers that the adverse political commentary and media reporting are far more pervasive in effect than advances brought about by the Information Programme. We reiterate our concerns pertaining to the Draft Education Curriculum as impairing the efficacy of this initiative.
- TTC welcomes the community dialogue and seminar sessions convened by the Human Rights Commission. However, we are concerned that these sessions tend to engage persons who are already sympathetic to Māori rights under the Treaty of Waitangi, rather than those with limited or adverse perspectives.
- TTC is concerned that references to the Treaty (should they survive the Deletion Bill) are not being enacted in an appropriate form, nor in all pieces of legislation which impact upon Treaty rights. TTC considers that the move from general Treaty references to specific clauses, results in a reductive approach to giving effect to the Treaty relationship. We note our concerns with cited examples below: New Zealand Public Health and Disability Act 2000; and the Local Government Act 2002. TTC notes as representative examples, the following pieces of legislation affecting significant cultural traditions pertaining to family; lands and resources ; and/or property rights, which were enacted without reference to the Treaty of Waitangi: the Human Assisted Reproductive Technology Act 2004; Care of Children Act 2004; Foreshore and Seabed Act 2004; Trade Marks Act 2002; and the Parole Act 2002.

50. TTC considers that the combined implications of the recent reforms and failings in extant efforts concerning the Treaty are allowing, and in certain circumstances inciting, an ongoing, divisive polemic that jeopardises harmonious race relations in Aotearoa New Zealand. TTC recalls with appreciation the recommendation of the Special Rapporteur on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples to resolve such concerns through formal legal recognition of the applicable instrument:

In the event that the very existence (or present day validity) of a treaty becomes a matter of dispute, a formal recognition of that instrument as a legal point of reference in the State's relations with the peoples concerned would contribute greatly to a process of confidence-building that may bring substantial benefits.³⁵

51. We note that the Special Rapporteur during his country visit affirmed the need to entrench the Treaty as an important means to resolve “latent crisis” affecting Aotearoa New Zealand’s race relations:

The Treaty of Waitangi should be entrenched constitutionally in a form that respects the pluralism of New Zealand society, creating positive recognition and meaningful provision for Māori as a distinct people, possessing an alternative system of knowledge, philosophy and law.³⁶

52. Accordingly, TTC invites the Committee to consider the legal and political status of the Treaty of Waitangi, with a view to recommending that the Government formally recognise the legal and constitutional status of the Treaty of Waitangi as New Zealand’s founding document.

Historical Treaty Settlements (*paragraphs 29-34 New Zealand report*)

53. TTC acknowledges that the Government is continuing to progress Treaty settlements. However, TTC is deeply concerned that the process and final settlement packages are flawed in three principal respects: (1) the principles on which settlements are based; (2) the unequal bargaining power between the two parties; and (3) the nature of redress offered by the Crown.
54. The New Zealand report sets out five principles on which Treaty settlements are premised (para 29). TTC agrees that Treaty settlements should not create further grievances, that settlements should be durable, and equitable between claimants. TTC also acknowledges that the Crown is subject to a duty to act in the best interests of all New Zealanders and operates within fiscal constraints. However, TTC is concerned that the body of principles adopted by the Crown is utilitarian and reductive in approach. TTC notes that the principles merely seek “not to create further injustices”, and considers that the Government ought to seek to achieve meaningful reparation and reconciliation. We also note that the wider national interest is repeatedly emphasised, specifically in that settlements should not create

“further injustices [for] anyone else [other than iwi]”; and the express statement that the Crown is duty bound to act in the interests of all New Zealanders. TTC is concerned that the undue prioritisation of the national interest corrals the settlement process, which is particularly prejudicial to Māori interests given the significance of the settlement process to remedy previous egregious breaches of indigenous peoples rights during the colonial era. TTC considers that Treaty settlements ought to be expressly premised upon the principle of reparative justice with the objective of achieving reconciliation, and guided by the principles of the Treaty of Waitangi, judicially elucidated as including: good faith; respect; honourable conduct; and active protection of Māori interests.

55. TTC is also concerned that the settlement process lacks impartiality, transparency and accountability. The Government has been likened to being the “offender, judge and jury” within the Treaty settlement process, in that the Crown is responsible for historical injustices and is the sole arbiter of whether redress packages are fair and reasonable. Claimants are not equal negotiators; the Crown has the capacity to hold firm to predetermined ‘bottom lines’, whereas the claimant group is pressured by economic necessity and in many cases fatigue, to reach a compromise, even should that compromise be detrimental to the immediate and intergenerational interests of the tribal collective. Moreover, TTC is concerned that the settlement process is presently being conducted with inappropriate haste, primarily in the interests of political expediency rather than in furtherance of reconciliation and just resolution of historical injustices. TTC recalls with appreciation the recommendation of the Special Rapporteur that address these flaws in the the Treaty settlement process:

The Crown should engage in negotiations with Māori to reach agreement on a more fair and equitable settlement policy and process.³⁷

56. TTC is also deeply concerned that claimant groups must statutorily waive their right to access the courts or the Waitangi Tribunal in respect of the settlement package. The Special Rapporteur noted that:

Māori legal authorities told the Special Rapporteur that they consider it constitutionally improper to force claimants to waive their entitlement to the protection of the courts when they negotiate settlements, especially as it is achieved through coercion; until the claimants have waived their rights, the negotiations will not be finalized. They feel that the result is a largely imposed settlement package, which claimants cannot bring before an independent or judicial body for rigorous qualitative testing.³⁸

TTC shares these concerns, and considers it is inappropriate, and inconsistent with the right to a remedy to preclude the adequacy of the negotiated package being considered by an impartial body.

57. In respect of the redress contained in settlement packages, TTC acknowledges the various components on a typical settlement package set out at paragraph 31 of the

New Zealand report. TTC is particularly concerned that the two principal components of settlements, cultural redress and economic redress, are incapable of fulfilling their stated purpose.

58. Cultural redress typically consists of a range of statutory tools to facilitate the recognition of Māori values pertaining to particular sites of significance and provision for greater decision making capacity, either through statutory appointment to decision making bodies or the establishment of a range of joint management structures. It appears that cultural redress is intended to restore the cultural relationship with particular sites that was historically eroded or otherwise improperly interfered with through colonial expropriation of Māori property rights. TTC considers there are three principal flaws in the efficacy of the current cultural redress tools: (1) there is limited if any return of expropriated lands and resources; (2) the statutory tools are primarily symbolic in effect; and (3) there is insufficient provision for self governance.

- Treaty settlement packages rarely contain the fee simple transfer of lands and resources to claimant groups, and should a site be re-vested in the claimant group, it is typically heavily encumbered by statutory easements providing for public access and limited decision making capacity.³⁹ TTC is also concerned that the only lands available to re-vest in the claimant group are those retained in Crown ownership. Privately owned land obtained through historical misconduct is not available for inclusion in settlement packages on the basis that it would create a further injustice to the present owner, irrespective of the customary significance of the site. Accordingly, there are many significant sites, such as urupa (traditional cemeteries) which are on privately owned land to which claimants do not have access. Moreover, the Crown does not appear willing to act in good faith in respect of re-vesting Crown owned land. TTC considers that a salient example pertains to the Whenuakite Station. The Whenuakite Station is part of the traditional territory of Ngati Kahu, one of the constituent members of the Hauraki Māori Trust Board. The Hauraki Māori Trust Board is presently engaged in Treaty settlement negotiations and has sought the return of the Whenuakite Station as part of the settlement package. However, the Crown, through its responsible entity Landcorp, put the property on the open market, despite the settlement negotiations being presently incomplete. Hauraki Māori Trust Board has sought an injunction through the High Court, but the decision has been deferred until late March. As an interim measure, tribal members have occupied the site in a protest effort directed to challenging the ability of the Crown to sell sites subject to Treaty claims, particularly as once the land has entered into private ownership it is unlikely to ever be returned to claimant groups.⁴⁰
- The statutory tools which appear to substitute of the return of traditionally held lands and resources are largely of symbolic rather than practical benefit. The common purpose of the statutory mechanisms is to enhance the recognition of Māori values by decision making bodies. However TTC

supports the finding of the Special Rapporteur that the practical value cultural redress should be redesigned:

In the Special Rapporteur's view, it would be more practical to include management regimes according to customary precepts, as some of them do, acknowledging that Māori possess primary decision-making capacity over appropriate sites, thus enabling greater expression of Māori cultural and spiritual relationships.

TTC also recalls with appreciation his recommendation that:

In all Treaty settlements, the right of Māori to participate in the management of their cultural sites according to customary precepts should be specifically acknowledged, thereby enabling greater expression of Māori cultural and spiritual relationships.⁴¹

- In respect of the issue of self governance, TTC supports the finding of the Special Rapporteur that:

During his conversations with Māori organizations, the Special Rapporteur was told that Māori constantly have to renegotiate their collective self-governance rights through the Treaty settlement process, which does not restore actual decision-making capacity and does not recognize collective citizenship. Short of the recognition of self-determination or even selfgovernance, Treaty settlement packages could meet Māori aspirations halfway by awarding tribal collectives actual decision-making capacity over ancestral or culturally significant sites and resources through unencumbered fee simple title being transferred over such sites. The Crown could recognize in such settlements that it has legally enforceable obligations to tribal collectives as citizens who possess a distinct composite of inherent and inalienable rights. Existing settlement acts could be amended so as to enable iwi to self-determine an appropriate corporate structure for receipt of assets.⁴²

59. Economic redress consists of the transfer of an agreed quantum in cash and kind, typically comprising of the transfer of Crown owned lands to the claimant group. TTC is convinced that the value of economic redress packages is unfair and prejudices the intergenerational interests of tribal collectives. We support the finding of the Special Rapporteur that:

The overall land returned by way of redress through settlements is a small percentage of the land claims, and cash paid out is usually less than 1 per cent of the current value of the land. Total Crown expenditure on the settlement of Treaty breach claims over the last decade (approximately NZ\$ 800 million) is about 1.6 per cent of the government budget for a single year.⁴³

60. TTC is also concerned that the settlement process has been unduly and irresponsibly politicised, as noted by the Special Rapporteur:

The Special Rapporteur considers that the notion that Māori have received undue privileges from Treaty settlements, which has been floated in the media and by some politicians, lacks any substance whatsoever.⁴⁴

61. Accordingly, TTC considers that the Government's approach to conducting Treaty settlements is inconsistent with the provisions of the ICERD, particularly as interpreted in General Comment XXIII:

where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁴⁵

We also note that the Special Rapporteur similarly found that Treaty settlement packages do not comply with the terms of ICERD:

In the view of the Special Rapporteur, such redress as may be negotiated in the historical claims process seems, on the basis of experience so far, to fall short of "just and adequate reparation or satisfaction for any damage suffered" (within the meaning of article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination).⁴⁶

The Waitangi Tribunal (*paragraphs 35- 38 New Zealand report*)

62. TTC considers the Waitangi Tribunal to be an essential and highly valuable institution, as it is not confined by the Treaty's lack of formal legal status and possesses jurisdiction to consider complaints which are non-justiciable before the courts. However, TTC is deeply concerned that the Tribunal is constituted as a Commission of Inquiry, and as such possesses only non-binding recommendatory powers. TTC considers that the important role of the Tribunal and pervasive lack of governmental accountability in respect of Treaty issues warrants the Tribunal possessing legally binding powers, so that its findings and recommendations become enforceable against the Crown. We also recall with appreciation the finding of the Special Rapporteur that:

Recommendations made by the Waitangi Tribunal are not generally binding on the Crown. The process is not therefore adjudicative, in the judicial sense, and whether it results in any redress at all depends on both the Government's and the claimants' willingness to reach an agreement.⁴⁷

And recommendation that:

The Waitangi Tribunal should be granted legally binding and enforceable powers to adjudicate Treaty matters with the force of law.⁴⁸

63. TTC is also deeply concerned at the characterisation of the Waitangi Tribunal's contemporary jurisdiction as being primarily to serve as a "public forum" on the basis that the Government "has itself made an assessment of the relationship between the Treaty of Waitangi and the particular policy" (paragraphs 37- 38). TTC is concerned that this approach to the Tribunal's contemporary jurisdiction may be being employed so as to obscure the Government's increasing tendency to ignore the findings of the Tribunal in respect of contemporary breaches of the Treaty. Particular examples include the Foreshore and Seabed Report 2004 and the Petroleum Report 2003.
64. TTC also considers the New Zealand report has fundamentally mischaracterised the contemporary role of the Waitangi Tribunal. The jurisdiction of the Waitangi Tribunal is provided for under section 6 of the Treaty of Waitangi Act 1975. Section 6 does not distinguish between historical and contemporary claims; accordingly, contemporary inquiries retain the same quasi-judicial character and sanctity that is afforded to historical matters. We also emphasise the necessity of an impartial body to intervene in prejudicial contemporary conduct due to the vulnerability of Māori rights under the Treaty of Waitangi and NZBORA. In respect of the contemporary situation of Māori, the Special Rapporteur noted that:

the underlying legal and political fragility of Māori rights translates into a human rights protection gap that seems not to be sufficiently covered by existing legislation.⁴⁹

Accordingly, we consider the contemporary role of the Tribunal should be reaffirmed and enhanced through the provision of legally binding powers. We also consider that the wider contextual factors, such as the legal vulnerability of the Treaty, adverse political climate and New Zealand's stance on the DRIP, increase the urgency and necessity of doing so.

65. In respect of the termination of the Tribunal's historical jurisdiction, we reiterate our concerns raised above, and also note the Special Rapporteur's comment that:

the Special Rapporteur is concerned about statements disqualifying the work of the Tribunal and demanding its dissolution.

We also emphasise that the decision to terminate the historical jurisdiction is contrary to the Special Rapporteur's recommendation that the Tribunal be granted additional resources so as to enhance its work:

As it continues to play a significant role in the recovery of Māori human rights, the Tribunal should receive more funding to bring hundreds of outstanding claims to a satisfactory conclusion.⁵⁰

Te Puni Kōkiri (Ministry of Māori Development)

66. Te Puni Kōkiri serves a valuable function within Government, and we appreciate particular work efforts lead by Te Puni Kōkiri such as the many useful publications produced, commissioned research and guidance offered throughout most spheres of government. However, we note that elected officials have suggested that Te Puni Kōkiri should be abolished or at least reviewed on the basis that it provides “race based” services.⁵¹ We are deeply concerned that a Ministry serving the interests of Māori and wider national interest is subject to such attack, and considers that it is a further indication of the adverse political climate presently dominating Māori issues in Aotearoa New Zealand.

Māori Land Court (*paragraph 40 New Zealand report*)

67. TTC notes that the New Zealand report has omitted reference to the increased jurisdiction of the Māori Land Court under the Māori Fisheries Act 2004 and Māori Commercial Aquaculture Settlement Act 2004, which pertains primarily to the resolution of boundary and mandate disputes, discussed further below.

Ministry of Pacific Island Affairs (*paragraphs 41-43 New Zealand report*)

68. TTC does not offer comment on this section of the New Zealand report.

Office of Ethnic Affairs (*paragraphs 44-50 New Zealand report*)

69. TTC does not offer comment on this section of the New Zealand report.

B. Information on the special and concrete measures taken in the social, economic, cultural and other fields to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of fundamental freedoms, in accordance with article 2, paragraph 2, of the convention

Special and Concrete measures for the adequate development and protection of certain groups (*paragraphs 51- 53 New Zealand report*)

70. TTC acknowledges that the New Zealand report sets out the applicable legal framework pertaining to the legality of special measures under the HRA and NZBORA. However, TTC emphasises that no steps have been taken to remedy to narrow interpretation adopted in New Zealand, as identified in the Committee’s previous concluding observations on New Zealand’s last periodic report. Accordingly, TTC is concerned that special measures remain in an ambiguous and

contested legal position, which is of particular concern in the present political climate.

71. We are also concerned that a number of the matters referred to in this section of the New Zealand report have been mischaracterised as ‘special measures’, when they ought properly be considered under Article 2 (1) and/or Article 5. We consider that mischaracterising such matters as special measures increases their vulnerability to erosion and evidences an aversion to recognising the extant rights of Māori under the International Bill of Rights and the Treaty of Waitangi.

Review of targeted policies and programmes (*paragraphs 54-55 New Zealand report*)

72. TTC acknowledges that targeted policies and programmes ought to be monitored and reviewed for the purposes of accountability and transparency. However, the review of targeted policies and programmes emerged from the political machinations accompanying the passage of the Foreshore and Seabed Act, and appeared to be primarily designed to placate popular antipathy toward Māori issues. Accordingly, TTC considers that the review process referred to in the New Zealand report was conducted for improper purposes, and has had the effect of de-legitimising policies targeted toward Māori and other ethnic communities within Aotearoa New Zealand. We note that the New Zealand report implicitly records the “needs not race” approach to targeted service delivery, and reiterate that that Special Rapporteur considered this approach to be inappropriate specifically stated that ethnicity should remain a primary criterion for designing targeted policy and programmes.
73. We are concerned that wider New Zealand now equates ‘special measures’ with ‘Māori privilege’, and that without responsible political leadership, the continuation of ‘special measures’ to address the disparate situation of Māori in all social indices will lead to further racial division and disharmony.

Māori development (*paragraph 56 New Zealand report*)

74. We consider that the comments provided on Māori development are not properly classified as ‘special measures’ on the basis that the New Zealand report refers only to historical Treaty settlements which are measures intended to eliminate the racial discrimination resulting from historical misconduct, and therefore fall under Article 2 (1) of the ICERD.

Māori Fisheries (*paragraphs 57- 61 New Zealand report*)

75. The Māori Fisheries Settlement is an historical Treaty settlement; accordingly it ought to be considered under Article 2 (1) of the ICERD, and due to its reparatory nature, should not be classified as a ‘special measure’.
76. TTC formed in response to the Fisheries settlement, and maintained an active role throughout the debate in pursuit of a principled, tikanga (Māori law) based outcome. We remain concerned that the allocation model chosen unfairly prejudiced the

constituent iwi of TTC as it largely ignored the traditional possession of property rights in fisheries resources. Throughout the allocation debate, we maintained that the fisheries assets ought to be awarded according to property rights, which under tikanga Māori are determined according to the length of coastline held under customary authority. The contrary formula provided for allocation to be proportionate to the size of iwi membership. The final allocation model is a compromise which adopts the following formula

- Inshore quota- allocated according to coastline;
- Freshwater quota- allocated by agreement with neighbours or population;
- Deepwater quota; 25% allocated according to coastline, and 75% according to population;
- Income of shares from fishing company- 20% according to coastline and 80% according to population.

We consider that the restrictive provision for coastline entitlements unfairly reduces our property rights entitlements, and that the consequential economic loss is significant.

77. We are also concerned statutory regime pertaining to the management and administration of the fisheries assets is prejudicial to iwi interests. As stated in the New Zealand report, the management of the fisheries assets has been centralised in Aotearoa Fisheries Ltd (AFL). We consider this model to amount to a statutory retention of the fisheries assets and consider it inappropriate that iwi are reduced to shareholder status. Moreover, we express particular concern over the management structure pertaining to AFL. The two principal means of ensuring accountability and transparency in business affairs are through the Board of Directors and voting shareholders. Te Ohu Kaimoana Trustee Ltd (TOKM) is the sole voting shareholder of AFL and is also responsible for appointing AFL's Board of Directors. TOKM is governed by a Board of Directors who are appointed by an electoral college consisting of 10 Māori representatives. Accordingly, the affairs of AFL are three steps removed from the beneficiaries of the fisheries settlement. Furthermore, TOKM will not be reviewed for a period of 10 years from the passage of the Māori Fisheries Act 2004, and every five or more years thereafter.
78. A further implication of the heavy bureaucratic management structure pertaining to the fisheries settlement is that the costs of TOKM will be deducted from annual dividends, accordingly, iwi suffer a direct material loss.
79. We also note that New Zealand Institute of Economic Research estimated the decade long delay in allocation to cost between \$5.5 million- \$14 million per annum, which is irrecoverable.
80. In respect of customary fishing (discussed at paragraph 61 New Zealand report), we similarly consider this matter to be improperly classified as a special measure. As customary fishing is intrinsic to the perpetuation of Māori culture and identity, we

consider that it is more properly considered under Article 5, within the purview of the right to culture. We also note that the customary fisheries framework has continued to be problematic to implement and is not yet operating smoothly nationwide.

Māori Commercial Aquaculture Claims Settlement Act 2004 (*paragraphs 62-63 New Zealand report*)

81. We consider the Aquaculture settlement to be a further historical settlement package which also ought to be considered under Article 2 (1).
82. The Māori Commercial Aquaculture Claims Settlement Act 2004 has its origins in an urgent inquiry before the Waitangi Tribunal in 2002. The claim concerned proposed reforms to amend the allocation of coastal space and impose a moratorium on the grant of further consents to conduct marine farming. The Tribunal found the reforms to be in breach of the Treaty of Waitangi and recommended that the Crown investigate, in consultation with Māori, the nature and extent of Māori rights in marine farming and mechanisms to give effect to those rights.⁵²
83. The Government initially engaged in a constructive consultation process. However, that process was suspended once the foreshore and seabed issue became contentious. Consultation on aquaculture reform did not resume until late 2004, and the Act was developed and passed into law within a matter of months. Accordingly, there was limited and arguably insufficient consultation on the final form of the settlement.
84. We are also concerned that the unique nature of ‘coastal marine space’ will be difficult and potentially unworkable to allocate, primarily as an assessment of 20 percent of all new aquaculture space must be conducted without being able to ascertain the amount of space that will eventually be allocated. We are also concerned that there will be administrative difficulties in allocating the 20 percent of existing aquaculture space.
85. In respect to the assertion that the Foreshore and Seabed Act 2004 provides for non-commercial customary farming, we consider that the New Zealand report is misleading. The Foreshore and Seabed Act clearly removes customary fishing interests from the purview of the Act and do not consider that the provision for customary rights orders will be interpreted so as to allow for non-commercial customary farming.

Foreshore and Seabed Act 2004 (*paragraph 64 New Zealand report*)

86. We consider that the Foreshore and Seabed Act is not a ‘special measure’ within the meaning of the ICERD, as it, purportedly, is a means of recognising the pre-existing legal rights of Māori, and therefore should more properly be considered under Article 5, specifically in relation to the civil rights protected under sub paragraph (d) and right to culture protected under sub paragraph (e).

87. TTC recalls with appreciation Decision 1 (66), in which the Committee recommended that the Government:

resume dialogue with the Māori community with regard to the legislation, in order to seek ways of mitigating its discriminatory effects, including through legislative amendment, where necessary.

And:

monitor closely the implementation of the Foreshore and Seabed Act, its impact on the Māori population and the developing state of race relations in New Zealand, and to 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 Māori.

88. We consider that the Government has failed to implement these recommendations and that the information contained in the New Zealand report misrepresents actual Crown conduct. Specifically, we emphasise that:

- No further consultation pertaining to the legislation has been conducted with the Māori community. The consultation referred to in the New Zealand report between the Crown and Te Rūnanga o Ngati Porou and Te Rūnanga o Te Whānau was initiated before claim to the Waitangi Tribunal was heard, and therefore months before the Bill was drafted. Therefore, we consider that these negotiations are largely outside the purview of the Act. We also note that the negotiations are intended to result in a particularised form of territorial customary rights order, as provided for under the Act. Accordingly, these negotiations do not relate to the amending the Act in anyway, and are simply of localised significance to the two affected iwi.
- The Government has not considered any legislative amendment in response to enduring Māori concerns. Moreover, the Government has continued to deny that the Act discriminates against Māori, and there is a lingering contention that the Act grants Māori “special privileges”.
- The Government does not appear to have monitored the impact of the legislation on Māori and the wider race relations issue in Aotearoa New Zealand. TTC considers that close monitoring of applications before the MLC does not satisfy the Committee’s recommendation to monitor the deeper and broader implications of the Act.
- The Government has not amended the redress provision, and as result, any negotiated redress remains a matter of discretion on the part of the Crown and is immune from judicial scrutiny.

89. We remain deeply concerned that the Act is highly prejudicial to the interests of Māori, but do not repeat our concerns in depth as our previous communications with Committee contain detailed information on the nature and implications of the Act. For the Committee's convenience, we do however include the welcomed recommendation of the Special Rapporteur that:

The Foreshore and Seabed Act should be repealed or amended by Parliament and the Crown should engage in treaty settlement negotiation with Māori that would recognize the inherent rights of Māori in the foreshore and seabed and establish regulatory mechanisms allowing for the free and full access by the general public to the country's beaches and coastal area without discrimination of any kind.⁵³

90. We are also concerned that the prohibitive and reductive approach adopted in the Act may be transposed onto further resources considered in the future. We note that the Government remains confident that the Foreshore and Seabed Act is a fair and reasonable codification of Māori rights, despite this Committee, the Special Rapporteur and the Waitangi Tribunal findings that the approach is discriminatory and prejudicial.

Te Ture Whenua Māori Land Act 1993 (*paragraphs 65-66 New Zealand report*)

91. Te Ture Whenua Māori Land Act is premised upon two objectives; ensuring the retention of Māori land and facilitating the development of Māori land. TTC acknowledges that these two objectives are difficult to reconcile, and that achieving an appropriate balance requires concerted cooperative efforts on behalf of Māori and the Government.

92. TTC does not consider that an appropriate balance between retention and development has yet been attained; however we acknowledge the good faith efforts of the Government in respect of the 2001 Amendment Act and subsequent Māori Purposes Act 2006 which increased the number of MLC judges.

93. TTC is however concerned that many barriers to the development of Māori land are beyond the scope of Te Ture Whenua, and consider that the Government should increase, in consultation with Māori, research efforts directed to identifying potential development opportunities.

Māori reserved land (*paragraph 67 New Zealand report*)

94. The agreement reached in respect of Māori reserved land pertains to historical misconduct, and therefore ought to be considered under Article 1 (2).

95. The issue in respect of Māori reserved land pertained to the grant of perpetual peppercorn rentals which deprived Māori of fair market rates in return for leasing the land. The Government acknowledge the need to redress past rental losses, however,

there is some concern that the quantum is less than equitable and that the lessees retain a privileged position.

Māori commercial activity in land and forestry (*paragraphs 68-69 New Zealand report*)

96. We acknowledge that some iwi are continuing to benefit commercially from agribusiness and forestry activities. However, we reiterate that further research and support is required for the wider development of Māori land.

Resource Management Act 1991 (*paragraphs 70 – 74 New Zealand report*)

97. The Resource Management Act 1991 (RMA) pioneered an innovative form of statutory recognition of the Treaty of Waitangi and Māori customary relationships with lands and natural resources, consisting of three interrelated sections. The tripartite provisions intersect as follows; section 6 requires decision makers to recognise the relationship between Māori and their ancestral lands, waters, wahi tapu (sites of significance) and other taonga (treasures) as a matter of national importance; section 7 requires decision-makers to have particular regard to kaitiakitanga (customary stewardship), and section 8 requires decision-makers to take into account the principles of the Treaty of Waitangi.
98. TTC acknowledges that at the time of its' enactment, the RMA was a promising framework. Subsequently however, the implementation of the RMA has revealed the mitigation focus in the Act undermines the meaningful recognition of Māori values, and frequently results in Māori interests being treated as subservient to commercial and recreational interests.⁵⁴ The Waitangi Tribunal has specifically found that:

it appears that in promoting this legislation, the Crown has been at pains to ensure the decision-makers are not required to act in conformity with and apply Treaty principles. They may do so, but they are not obliged to do so. For this reason we believe the 1991 Act to be fatally flawed... We repeat here our finding that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.⁵⁵

And recommended that:

That an appropriate amendment be made to the Resource Management Act 1991 providing that ... all persons exercising functions and powers under it, in relation to management the use, development and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi.

99. TTC shares similar concerns that the RMA is inherently incapable of protecting Māori interests, as Māori values will continue to be treated as defeasible and/or subservient to the wider competing interests which are necessarily balanced within the RMA framework.
100. We acknowledge that the 2005 Amendment Act is a partial advancement in that it enables iwi to participate at a higher strategic level, however we do not consider that it remedies the pre-existing flaws in the Act.
101. In respect of the consequential amendments effected through the 2004 Amendment Act, pertaining to the foreshore and seabed reform, we consider that the insertion of a further matter to be recognised as of ‘national importance’ merely complicates the RMA, and is therefore more likely to detract from, rather than facilitate, the recognition of Māori rights, interests and values.

Women (*paragraphs 73 – 78 New Zealand report*)

102. TTC welcomes the specific inclusion of information pertaining to the situation of women under the ICERD. We do not contest the statistical information provided in the New Zealand report. However, we do remain concerned at the disproportionate disadvantage experienced by Māori women and consider that the programmes run ‘by Māori for Māori’ are more likely to produce desirable outcomes, as was recognised by the Special Rapporteur.⁵⁶

Disabled Persons (*paragraphs 79 – 80 New Zealand report*)

103. TTC does not offer comment on this section of the New Zealand report

Children, young Persons and their Families Act 1989 (*paragraph 81 New Zealand report*)

103. TTC welcomes the increased recognition of cultural values under the Children, Young Persons and their Families Act 1989. However, we consider that concerted efforts should continue so as to increase the comfort and capacity of persons working in this area to respond to Māori issues.

Social Services (*paragraphs 82 – 85 New Zealand report*)

104. The Future Directions programme is expressly based on a ‘needs not race’ approach to addressing receipt of benefits. TTC recalls the Special Rapporteur’s recommendation to continue targeted programmes on the basis of ethnicity and considers that such an approach has particular relevance in this context.

Opportunity for all New Zealanders (*paragraphs 86- 87 New Zealand report*)

105. The *Opportunity for All New Zealanders* programme expressly recognises the legitimacy of programmes targeted to Māori, which TTC welcomes. However, we note that this document is one of the few documents which presently defend the legitimacy of ‘special measures’ and targeted programmes.
106. We also support the disaggregation of data by ethnicity and consider that reliable and robust data is vital for appropriate intervention in the disproportionate disadvantaged experienced by Māori.

Reducing Inequalities (*paragraphs 88 New Zealand report*)

107. TTC is concerned that the approach to reducing inequality is premised upon promoting the “equality of opportunity” as opposed to ‘equality of outcome’, as we consider the embedded disadvantaged experienced by Māori necessitates a higher level of intervention.
108. We also consider that the increasingly pervasive ‘needs not race’ approach to reducing inequality is misguided and unlikely to be as successful as targeted programmes, as stated by the Special Rapporteur:

The Government has reviewed programmes and policies targeted by ethnicity and produced guidelines to ensure future targeting is clearly identified with need, not race. As a result, some programmes have been retargeted based on socio-economic need rather than ethnicity. The Special Rapporteur considers that such a “quantitative” approach might lead to neglecting the specific contextual factors that have impacted the persistent inequalities suffered by Māori and make the aim of “reducing inequalities” more difficult to attain, and he suggests that special measures to rapidly improve outcomes “by Māori for Māori” may still be called for.⁵⁷

109. We also note that services provided “by Māori for Māori” are not exclusively available to Māori, in that non-Māori are also welcome to access these services.

Employment

110. TTC emphasises that the Government measures described in the New Zealand report are ‘needs not race’ based, in that there is no Government initiative specifically targeted to Māori. Notably, the only initiative directed to remedying the disparate employment status of Māori is a Māori, not Government, initiative emerging from *Hui Taumata*.

Education (*paragraphs 101 – 112 New Zealand report*)

111. TTC welcomes the initiatives described in the New Zealand report, particularly in respect of Māori participation in the formation of high level strategic documents (paragraph 102); programmes promoting Māori educational achievement; and

mechanisms intended to address institutional racism within the education system, such as changing teacher expectations of Māori and enhancing the ability of teachers to work with Māori learners.

112. However, TTC is concerned that a range of educational initiatives premised upon or incorporating ethnicity as an indicator have now been removed as a result of the Ministerial Review Unit process, including that:

- Ethnicity is no longer a factor in determining a school's "decile" funding⁵⁸;
- Early childhood targeting of Māori and Pasifika groups has become a "secondary focus";
- Ethnicity is no longer a criterion for *Mapihi Pounamau* – a secondary boarding allowance for the "at risk" of which 64% of applicants attended Māori boarding schools;
- The "Parents as First teachers" previously used ethnic targets, but now has been reduced to "monitoring" ethnic participation⁵⁹. and
- The Māori Knowledge and Development Output Class, which was designed to consolidate and develop Māori knowledge and deepen the Māori research skill base, is now open to applicants of any ethnicity.

113. TTC is also aware that a number of tertiary scholarships previously targeted to Māori have now been made available to applicants of any ethnicity.

114. TTC considers that there is still a sufficient body of evidence justifying the necessity of special measures in respect of educational policy. We are also deeply concerned that the removal of these policies will significantly prejudice the disproportionate educational achievements of Māori, and will have intergenerational consequences.

Language (*paragraphs 122-129 New Zealand report*)

115. TTC welcomes the efforts directed toward the revitalisation and promotion of te reo Māori (the Māori language). TTC however, remains concerned that the use of te reo Māori within government institutions remains problematic due to onerous procedural requirements which must precede the use of te reo, for example within judicial proceedings and educational institutions.

Health (*paragraphs 130 – 149 New Zealand report*)

116. The New Zealand Health and Disability Act 2000 (NZPHDA) incorporates the new approach to including reference to the Treaty of Waitangi in statutes. Section 23 (d)- (f) incorporates Māori perspectives into decision making by requiring health boards to obtain information and perspectives from Māori. Health boards must consider how to facilitate Māori contributions, establish processes to elicit Māori contributions, and provide relevant information to Māori to enable them to contribute. There is also a further requirement under section 29 (4) that Māori membership on

district health boards is ideally proportional to the percentage of Māori resident in the district, or at least reaches a minimum of two Māori members.

117. TTC welcomes statutory provision for Māori membership on decision making entities and increasing the obligation to obtain information from Māori. However, TTC is concerned that recognising the Treaty of Waitangi is confined to these two mechanisms, and considers that the Treaty should be considered throughout the scheme of the Act.
118. In respect of the specific Māori health initiatives, TTC notes that the initiatives were all established prior to the Ministerial Review Process, and appreciates that the initiatives survived the retargeting of targeted service delivery. As stated above in respect of education, TTC considers that special measures remain justified on a substantial body of evidence establishing the disproportionate disadvantage of Māori.
119. We also welcome the contextual approach to assessing and promoting health under the *Korowai Oranga* strategy.

Criminal Justice System (*paragraphs 150 – 172 New Zealand report*)

120. TTC notes that this section of the New Zealand report contains little statistical information on the situation of Māori within the criminal justice system. Accordingly, we set out information contained in the report of the Special Rapporteur:

Māori are three times more likely to be apprehended for an offence than non-Māori, and four times more likely to be apprehended for violent crime. Prosecution rates are considerably higher for Māori than for non-Māori (88 against 18 per 1,000). Conviction rates are 50 per 1,000 for Māori compared to 12 per 1,000 for non-Māori. Although they represent 13 per cent of the population over 14 years of age, in 1988 Māori accounted for 40 per cent of all arrests, 41 per cent of all prosecuted cases, and 44 per cent of all people convicted, Māori make up around 50 per cent of the prison population.⁶⁰

121. TTC welcomes the continuation of ethnically targeted programmes to address the situation of Māori within the criminal justice system. However, we also emphasise the Special Rapporteur's finding that:

This pattern arguably represents the underlying institutional and structural discrimination that Māori have long suffered.⁶¹

Accordingly, whilst the current initiatives are valuable remedial efforts, we consider continued cooperative efforts are needed to effect beneficial long term change.

122. TTC recalls with appreciation General Recommendation XXI, specifically paragraph 5, encouraging States party:

(e) To ensure respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law

(f) To make the necessary changes to the prison regime for prisoners belonging to the groups referred to in the last paragraph of the preamble, so as to take into account their cultural and religious practices;⁶²

123. TTC considers that there is limited recognition of traditional Māori systems of justice within the criminal justice system of Aotearoa New Zealand, and that the Government ought to consider substantive incorporation of Māori legal principles and processes within crime prevention, judicial processes and offender rehabilitation.

124. We also welcome the inclusion of hapū and iwi within the prison system and the establishment of the Māori Focus Units. We consider that these efforts should be expanded upon.

Article 3

Information on the legislative, judicial, administrative or other measures which give effect to the condemnation of racial segregation and apartheid and to the undertaking to prevent, prohibit and eradicate all practices of this nature in territories under the jurisdiction of the reporting State (*paragraph 173 New Zealand report*)

125. TTC acknowledges and appreciates that the Government is firmly opposed to racial segregation and apartheid.

Article 4

A. Information on the legislative, judicial, administrative or other measures which give effect to the provisions of article 4 of the Convention, in particular measures taken to give effect to the undertaking to adopt immediate and positive measures designed to eradicate all incitements to, or acts of, racial discrimination

1. Measures taken to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof (*paragraphs 174 – 178 New Zealand report*)

125. TTC considers that there has been a significant escalation in ethnic hostility and contempt in the reporting period, and that the legislative framework is largely

incapable of remedying this continuing pattern, largely due to the insidious nature of racism and the continued actions of some elected officials (as discussed above).

126. As stated in the New Zealand report, the conduct of the media is of particular concern in respect of the incitement of racial discrimination. We note the finding of the Special Rapporteur in respect of the public media in Aotearoa New Zealand:

A 2004 study on Māori and the media found that newspaper and television are fairly unbalanced in their treatment of Māori people and issues. A minority of newspapers as well as television programmes included themes relevant to Māori. Often programmes portray Māori as unfairly having benefits which are denied to others. Some of the most prominent media often highlight the potential or actual Māori control over significant resources as a threat to non-Māori. Another recurrent issue is the portrait of Māori as poor managers, either corrupt or financially incompetent. In general, the study reported that “bad” news about Māori predominated over “good” news. In some media denigrations and insulting comments about Māori were reported. These findings are of special concern to the Special Rapporteur and highlight a systematic negative description of Māori in media coverage, an issue that should be addressed through the anti-racism provisions of New Zealand’s Human Rights Act.⁶³

127. TTC considers that greater efforts to promote racial harmony are necessary in Aotearoa New Zealand (particularly in light of the limitations of present efforts, as discussed above), and should, as a priority action, concentrate on affirming the legal, ethical and moral legitimacy of the rights held by Māori under the Treaty of Waitangi and international human rights law.

2. Measures taken to give effect to the undertaking to declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and to recognize participation in such organisations or activities as an offence punishable by law (paragraph 179 New Zealand report)

128. TTC does not comment on this section of the New Zealand report.

3. Measures taken to give effect to the undertaking not to permit public authorities or public institutions, national or local, to promote or incite racial discrimination (paragraphs 180 – 182 New Zealand report)

128. TTC is concerned that there are no effective measures to constrain or censure the conduct of elected officials should they promote or incite racial discrimination. TTC considers that some elected officials have wilfully misrepresented Māori issues on for political expediency, and in doing so have incited racial hostility and potentially racial discrimination within Aotearoa New Zealand. We reiterate the concerns

expressed by the Committee and the Special Rapporteur in respect of the conduct of elected officials (discussed above). We also note that the successive

B. Information on appropriate measures taken to give effect to general recommendations I of 24 February 1971, VII of 1985 and XV of 1993, by which the committee recommended that the States parties whose legislation was deficient in respect of their implementation of article 4 should consider, in accordance with their national legislative procedures, the question of supplementing their legislation with provisions conforming to the requirements of article 4 (a) and (b) of the Convention (paragraphs 183 – 186 New Zealand report)

129. TTC considers that General Recommendations I and VII establish ‘best practice’ standards that New Zealand does yet, but ought to, comply with.

C. Information in response to decision 3 (VII) adopted by the Committee on 4 May 1973 (paragraph 187 New Zealand report)

130. TTC does not comment on this section of the New Zealand report.

Article 5

Information on the legislative, judicial, administrative or other measures which give effect to the provision of article 5 of the Convention, in particular, measures taken to prohibit racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law notably in the enjoyment of the rights enumerated in paragraphs (a) to (f) of article 5 of the Convention

131. TTC notes that the New Zealand report does not address all rights protections listed under Article 5 of the ICERD, as directed under General Recommendation XX:

The States Parties are recommended to report about the non-discriminatory implementation of each of the rights and freedoms referred to in article 5 of the Convention one by one.⁶⁴

132. We also considered that the rights enumerated under Article 5 should not be treated as an exhaustive list, and that further rights are discernible through reference to the General Recommendations of the Committee and wider international human rights framework. Accordingly, we provide comment on specific rights omitted in the New Zealand report.

Political Rights (paragraphs 189 – 197 New Zealand report)

Central Government

133. TTC acknowledges that Māori possess the formal opportunity to “vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service” as provided for under the ICERD. Furthermore, we recognise that the mixed member proportional (MMP) system has enhanced the number of Māori Members of Parliament.
134. TTC has concerns in two principal areas. Firstly, provision for separate Māori representation has recently been criticised as an unjustified ‘special privilege’.⁶⁵ Accordingly, TTC is concerned that future efforts may be directed to removing the Māori seats, which would fundamentally impair the nature and adequacy of Māori participation in central government.
135. TTC also considers that as a minority population, Māori interests remain perpetually vulnerable within a majoritarian system, and that MMP, while it has broadened the representative nature of Parliament, is incapable of curing the risks posed to minority group interests by the potential “tyranny of the majority”.

Local Government

136. TTC considers the New Zealand report provides a fair summation of the Local Government Act (LGA). However, it is commonly argued that local government is not subject to obligations to recognise and uphold the Treaty of Waitangi, on the basis that the exercise of delegated powers confines the Treaty relationship to central government. Accordingly, there is some concern that local government activities neglect the relevance of the Treaty of Waitangi.

Civil Rights (*paragraphs 198 – 207 New Zealand report*)

Employment

137. TTC does not comment further on matters pertaining to employment, as they have been addressed above.

Housing

138. TTC notes that the policies designed to enhance access to housing are targeted on the basis of socio-economic need and do not take account of ethnicity. TTC is concerned that such an approach neglects the particular situation of Māori, particularly those in rural areas. TTC is also concerned that a significant barrier to increasing the percentage of Māori homeowners are the obstacles encountered under Te Ture Whenua Māori Act, which requires that persons seeking to live on Māori land must first obtain an occupation order, which is subject to rigorous statutory constraints.

Rights not addressed in the New Zealand report

139. TTC is concerned that the New Zealand report does not address the full complement of rights listed and affirmed under Article 5 of the ICERD, and makes specific comment on the omissions of particular concern:

- *The right to own property alone as well as in association with others:* TTC remains deeply concerned that the Foreshore and Seabed Act expropriated Māori property rights without consent or the provision of guaranteed redress, and that the reform may prejudicially serve as a precedent for future reforms.
- *The right to participation in cultural activities:* TTC considers the prohibitive and reductive approach to recognising Māori legal and spiritual traditions in Treaty settlements, the Foreshore and Seabed Act and RMA unduly interfere with the ability of Māori to preserve and transmit matters essential to cultural survival, thereby breaching our right to culture protected by Article 27 of the International Covenant on Civil and Political Rights.
- *The right to social and economic development:* TTC considers that this right is affirmed and protected in General Comment XXIII. We are concerned that the Treaty settlements process confines our right to development in two principal respects. Firstly, in order to receive a settlement, the claimant group must incorporate into a formal legal entity, typically consisting of a trust or company structure. The Special Rapporteur considered that these structures were a poor ‘cultural fit’ and recommended that:

Existing settlement acts should be amended, and other such acts in the future should be framed, so as to enable iwi and hapū to self-determine an appropriate corporate structure for receipt and management of assets.⁶⁶

TTC also considers that rigid corporate structures improperly act to fossilise the evolution of patterns of social and cultural organisation. Secondly, the economic redress provided in Treaty settlements is unlikely to provide for intergenerational development.

- *The right to exercise informed consent:* TTC considers that this right is similarly affirmed in General Recommendation XXIII and that the Government continues to conduct insufficient consultation with Māori on matters concerning proprietary and cultural interests, as evidenced in the Foreshore and Seabed Act and Aquaculture settlement. We are also concerned that the Government considers bare consultation sufficient to discharge this obligation, whereas TTC considers informed consent imposes a higher threshold than mere dialogue, which the Government consistently fails to satisfy.

Immigration (*paragraphs 208- 210 New Zealand report*)

140. TTC does not offer comment on this section of the New Zealand report.

Settlement policies (*paragraphs 211 – 213 New Zealand report*)

141. TTC does not offer comment on this section of the New Zealand report.

Refugees (*paragraph 214 New Zealand report*)

142. TTC does not offer comment on this section of the New Zealand report.

Article 6

A. Information on the legislative, judicial, administrative or other measures which give effect to the provisions of article 6 of the Convention, in particular, measures taken to assure to everyone within the jurisdiction of the reporting State effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to the Convention (*paragraphs 215 – 220 New Zealand report*)

143. TTC does not offer further substantive comment on this section of the report, as our concerns pertaining to the lack of effective domestic remedies is detailed above.

B. Measures taken to assure everyone the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination (*paragraphs 221- 222 New Zealand report*)

144. TTC does not offer further substantive comment on this section of the report, as our concerns pertaining to the lack of effective domestic remedies is detailed above.

C. Information on the practice and decisions of the courts and other judicial and administrative organs relating to cases of racial discrimination as defined as defined under article 1 of the Convention (*paragraph 223 New Zealand report*)

145. TTC does not offer comment on this section of the New Zealand report.

D. Information in connection with generation recommendation XXVI on article 6 of the convention (2000) (*paragraphs 224 – 229 New Zealand report*)

146. TTC does not offer further substantive comment on this section of the report, as our concerns pertaining to the lack of effective domestic remedies is detailed above.

Article 7

Information on the legislative, judicial, administrative or other measures which give effect to the provisions of article 7 of the Convention, to general recommendation V of 13 April 1977 and to decision 2 (XXV) of 17 March 1982, by which the Committee adopted its additional guidelines for the implementation of article 7

A. Education and teaching (*paragraph 230 New Zealand report*)

147. TTC does not offer further substantive comment on this section of the report, as our concerns pertaining to educational programmes are detailed above.

B. Culture (*paragraphs 231- 241 New Zealand report*)

148. TTC acknowledges that a number of institutions positively contribute to the preservation and advancement of New Zealand's cultures and traditions. As a general matter, we are concerned that increasing popular familiarity with Māori traditions has led to increasing appropriation of Māori cultural derivatives in commercial branding and related activities. We note recent examples including; the use of the name 'Māori' for a brand of cigarettes, traditional tattoo designs being incorporated in billboard advertising and the like. Whilst we support the promotion of Māori culture, we consider an appropriate balance must be reached so as to protect the cultural, spiritual and legal traditions pertaining to matters of cultural significance. We consider that the Government should enhance the activities of the Ministry of Economic Development in respect of the reform of our intellectual property statutes.

Promotion of tolerance and racial harmony (*paragraph 242 New Zealand report*)

149. TTC acknowledges, with appreciation, the various initiatives cited in the New Zealand report. However, we reiterate our concerns that such efforts are insufficient to remedy the weak human rights framework, bias of the public media and conduct of some elected officials.

C. Information (*paragraphs 243 – 244 New Zealand report*)

150. TTC does not offer further substantive comment on this section of the report, as our concerns pertaining to the public media are detailed above.

Māori broadcasting (*paragraphs 245 – 247 New Zealand report*)

151. TTC warmly welcomes recent initiatives in respect of Māori broadcasting, and considers that the increased Māori content, especially in te reo Māori, is a significant achievement of immense value.
152. We note however, that the responsible entities have attracted criticism from some elected officials and there is a certain level of tension concerning the legal and moral legitimacy of Māori broadcasting.

Tokelau

153. TTC does not offer comment on this section of the New Zealand report.

¹ CERD Decision 1 (66) *New Zealand* CERD/C/DEC/NZL/1

² CERD General Recommendation XXVIII The follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance A/57/18; CERD General Recommendation XVII on the establishment of national institutions to facilitate the implementation of the Convention A/49/18; CERD Guidelines to follow-up on concluding observations and recommendations CER/C/68/Misc.5/Rev.1

³ CERD Concluding Observations *New Zealand* A/57/18

⁴ Prime Minister Helen Clark, Newztel News: TRN 3ZB “Breakfast Show”, 14 March 2005

⁵ Hon Phil Goff Press Release: *NZ To Seek Place on UN Human Rights Body* 28 January 2004, see also representative statements in: General Assembly 60th Session, Third Committee, Item 71c: Human Rights Questions (Human Rights Situations). Statement by the New Zealand Representative, Jillian Dempster, Monday 31 October 2005. <http://www.mfat.govt.nz/speech/minispeeches/31oct05a.html> ; United Nations Commission On Human Rights 60th Session - Item 9: Question Of The Violation Of Human Rights And Fundamental Freedoms In Any Part Of The World Statement By The New Zealand Representative Tim Caughley March 2004 <http://www.mfat.govt.nz/speech/pastspeeches/speeches2004/mar04.html>

⁶ Special Rapporteur on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples *Final Report* E/CN.4/Sub.2/1999/20 para 9

⁷ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 81

⁸ Ibid at para 80

⁹ Ibid at para 101

¹⁰ CERD Decision 1 (66) *New Zealand* CERD/C/DEC/NZL/1 para 3

¹¹ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 101

¹² Ibid para 100

¹³ See for example the letter submitted by the Aotearoa Indigenous Rights Trust August 2006; Letter to Minister of Foreign Affairs 22 June 2006 from Moana Jackson, on behalf of over 60 participants at the DDRIP seminar during the International Conference on Traditional Knowledge, 17 June 2006; Mataatua Assembly of Tribes *Media Release Mataatua Assembly Calls on the Crown to Support the UN Indigenous Rights Declaration* 13/11/06

¹⁴ UNGA Third Committee 61st Session Item 64(a) The Declaration on the Rights of Indigenous Peoples, Statement on behalf of Australia, New Zealand and the United States

¹⁵ See for example the scholarly works of former Prime Minister Geoffrey Palmer including: *New Zealand's Constitution in Crisis (1992) Bridled power : New Zealand's constitution and government (2004) Constitutional conversations : Geoffrey Palmer talks to Kim Hill on National Radio 1994-2001 (2002)*; .

¹⁶ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 91

¹⁷ *White Paper* (1985)

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- ¹⁸ Human Rights Act 1977 section 5
- ¹⁹ Human Rights Act 1977 section 34
- ²⁰ Human Rights Amendment Act 2001; which established the Office of Human Rights Proceedings which possesses a mandate to assist and potentially represent complainants before the Human Rights Review Tribunal
- ²¹ Section 4.3 Rights of Indigenous Peoples
- ²² Section 4.5 Migrants, Asylum Seekers and Refugees NZAPHR
- ²³ Ibid
- ²⁴ Section 4.2 Social and Economic Equality NZAPHR
- ²⁵ Section 4.4 Language NZAPHR
- ²⁶ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72
- ²⁷ *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308; *New Zealand Māori Council v AG* [1987] 1 NZLR 641 (*Lands*)
- ²⁸ CERD Decision 1 (66) *New Zealand* CERD/C/DEC/NZL/1 para 3
- ²⁹ Deputy Prime Minister Michael Cullen, Press Release: Response to UN Special Rapporteur report 04/04/2006 available at <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=25366>
- ³⁰ 21 September 1992 has been used to define historical Treaty claims for over a decade; the rationale being that it is the date on which Cabinet agreed to the principles applying to the Treaty settlement process.
- ³¹ Māori Affairs Committee Report on the Māori Purposes Bill (2006)
- ³² Explanatory Note to the Principles of the Treaty of Waitangi Deletion Bill 2006
- ³³ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72
- ³⁴ New Zealand Curriculum Framework, 1993:
- ³⁵ Special Rapporteur on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples *Final Report* E/CN.4/Sub.2/1999/20 (22 June 1999) para 319
- ³⁶ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 85
- ³⁷ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 95
- ³⁸ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 34
- ³⁹ See for example the provisions pertaining to the vesting of Te Waihora in Te Rūnanga o Ngāi Tahu under the Ngāi Tahu Claims Settlement Act 1998
- ⁴⁰ Radio New Zealand News *Hauraki Iwi remain in occupation at Whenuakite Station* 1 March 2007
- ⁴¹ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 93
- ⁴² Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 42
- ⁴³ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 27
- ⁴⁴ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 27
- ⁴⁵ CERD General Recommendation XXIII *Indigenous Peoples* A/52/18, annex V para 5
- ⁴⁶ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 26
- ⁴⁷ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 26
- ⁴⁸ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 89
- ⁴⁹ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 13
- ⁵⁰ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 27
- ⁵¹ See for example the comments of Dr Don Brash, then leader of the Opposition available at http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10342927 ; see also the comments of the

Rt Hon Winston Peters, now leader of a coalition partner and Minister of Foreign Affairs available at: www.nzherald.co.nz/index.cfm?c_id=1&ObjectID=10332036

⁵² Waitangi Tribunal *Ahu Moana; the Aquaculture and Marine Farming Report* (2002)

⁵³ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 92

⁵⁴ See for example: Willaims, David V. *Purely Metaphysical Concerns* in Whenua: Managing our Resources ed Merata Kawharu; Waitangi Tribunal *Ngawha Geothermal Report* (1993) ; *Te Whangaunui o Orotu Report* (1995)

⁵⁵ Waitangi Tribunal *Ngawha Geothermal Report* (1993) para 8.4.7 – 8.4.8

⁵⁶ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 73

⁵⁷ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 74

⁵⁸ “First results of review of targeted programmes”, *Scoop* 16 December 2004, <http://www.scoop.co.nz/stories/PA0412/S00432.htm>.

⁵⁹ Ministry of Education, “Results of Review of Targeted Programmes - Parent Support and Development”, <http://www.minedu.govt.nz/index.cfm?layout=document&documentid=10543&indexid=1095&indexparentid=1000>.

⁶⁰ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 57

⁶¹ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 57

⁶² CERD General Recommendation XXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system A/60/18

⁶³ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 66

⁶⁴ CERD General Recommendation XX Non-discriminatory implementation of rights and freedoms (Art. 5) A/51/18

⁶⁵ See for example the comments of Dr Don Brash, formerly the leader of the Opposition available at tvnz.co.nz/view/page/423466/251436

⁶⁶ Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples *Final Report Mission to New Zealand* E/CN.4/2006/78/Add.3 para 94