



Peace Movement Aotearoa

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23 November 2005

Professor Rodolfo Stavenhagen,
Special Rapporteur on the Situation of Human Rights
and Fundamental Freedoms of Indigenous Peoples.

Your Excellency,

Peace Movement Aotearoa is the national networking peace organisation in Aotearoa New Zealand. As the realisation of human rights and fundamental freedoms is integral to the creation and maintenance of peaceful societies, promoting respect for them is a particular focus of our work.

We are a Pakeha (non-indigenous) organisation, and our membership and networks mainly comprise Pakeha organisations and individuals.

It is our submission that in policies affecting Maori, the government does not reflect the view of Pakeha who support the full and effective enjoyment by Maori of their human rights and fundamental freedoms.

Sadly, in our efforts to support those rights and freedoms, we have often found ourselves in conflict with government policies and practices that clearly discriminate against Maori and are in breach of the Treaty of Waitangi as well as domestic and international human rights law and norms.

The passage of the foreshore and seabed legislation was just one recent example in a persistent pattern of government actions that have denied Maori the inherent and inalienable right of self-determination - the self-determination that they exercised for hundreds of years prior to the arrival of non-Maori; which was proclaimed in the 1835 Declaration of Independence; the continuance of which was guaranteed to them in the 1840 Treaty of Waitangi; and which, in more recent years, was confirmed as a right for all peoples in the international human rights covenants.

Regrettably, the right of self-determination was not the only human right denied to Maori by the foreshore and seabed legislation, as outlined in the enclosed paper. The paper also provides information about the discourse that contributed to the current climate of racial disharmony and diminished respect for Maori and their rights, in part by creating a misleading impression that there was united Pakeha support for the legislation which, even if accurate, would not have justified the denial of Maori rights and freedoms; and on the future prospects of Maori human rights and fundamental freedoms being protected under the existing constitutional arrangements.

We thank you for your attention to our submission.

Yours sincerely,

Edwina Hughes,
Coordinator, Peace Movement Aotearoa.

Paper submitted to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples Peace Movement Aotearoa¹, November 2005

This paper has two main sections. The first section focuses on the foreshore and seabed legislation because it is a contemporary issue that illustrates how readily Maori human rights and fundamental freedoms have been, and are, set aside in Aotearoa New Zealand. In that section there is comment on, and examples of:

- the human rights and fundamental freedoms denied to Maori by the enactment of the foreshore and seabed legislation;
- how the government's response to the Court of Appeal ruling on the foreshore and seabed created a climate that encouraged racial disharmony and diminished respect for Maori and for their rights and freedoms;
- the creation of an impression that there was united Pakeha support for the legislation which even if accurate (which it was not, as we illustrate) would not have justified the government's denial of Maori rights and freedoms; and
- the lack of an effective remedy for human rights violations, including the recent decision by the Office of Human Rights Proceedings not to provide legal representation for a complaint about the Foreshore and Seabed Act.

The second section covers the future prospects of Maori human rights and fundamental freedoms being protected under the existing constitutional arrangements; and concludes that the full and effective enjoyment of those rights and freedoms will only be realised when Maori can freely determine their political status and freely pursue their economic, social and cultural development.

1. The Foreshore and Seabed Legislation

From the time of the Court of Appeal ruling in June 2003, until the passing of the foreshore and seabed legislation in November 2004, the primary focus of our work was public education and the provision of information and resources to help increase Pakeha understanding of the historical background to, and the Treaty of Waitangi and human rights implications of, the government's proposals. Our work was within the context of the wider Pakeha Treaty educators' network² which we are part of, and our comments that follow are based on our own experience and that of other organisations and individuals involved in this network.

¹ Peace Movement Aotearoa is the national networking peace organisation in Aotearoa New Zealand with membership and networks mainly comprising Pakeha (non-indigenous) organisations and individuals.

² While there have been Pakeha individuals and in some cases organisations vocal in their support for the Treaty of Waitangi since 1840, to our knowledge the most concerted efforts by Pakeha to inform themselves and other Pakeha about the Treaty arose in the late 1970s out of existing church groups, unions, anti-racism and social justice networks, and the work of some academics and lawyers. This was in part a response to, and challenges from, increasingly vocal Maori rights groups. Since that time, some Pakeha organisations have established bicultural ways of working. The commitment to Pakeha Treaty education by Pakeha continues today in a variety

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A. Human rights and fundamental freedoms denied by the legislation

A brief overview of the human rights breached by the Foreshore and Seabed Act is provided below. It is based on our analysis³ of the initial foreshore and seabed policy and Peace Movement Aotearoa's submission⁴ to the Select Committee that considered the legislation.

It was obvious from the first government announcement on the foreshore and seabed that what was intended would involve substantive breaches of the Treaty of Waitangi. The Waitangi Tribunal⁵ described the proposals on which the legislation was based as breaching the Treaty of Waitangi in "*fundamental and serious*" ways that give rise to "*serious prejudice*" to Maori. They also found that "*the policy fails in terms of wider norms of domestic and international law that underpin good government in a modern, democratic state.*" The Tribunal did not seek to "*suggest changes to the details of the policy, as we think changes to details would not redeem it.*" Their *primary and strong* recommendation to the government was that they should "*go back to the drawing board and engage in proper negotiations [with Maori] about the way forward.*" The government responded with a statement⁶ by the Deputy Prime Minister which described the Report as "*disappointing*", the Tribunal's conclusions as depending "*upon dubious or incorrect assumptions by the Tribunal*"; and largely ignored the Tribunal's recommendations.

With regard to international human rights treaties and standards, the legislation denied to Maori the right of self-determination which is confirmed as a right for all peoples in the United Nations Charter, and which is linked to the right of all peoples to "*freely determine their political status and freely pursue their economic, social and cultural development*" in Article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights.

Our analysis of the legislation led to the conclusion that it also denied Maori other human rights specified in international treaties and domestic law including, but not limited to: the right of access to and the protection of the law⁷; the right to own property alone and in association with others and not be arbitrarily deprived of it⁸; the right to freedom from racial discrimination⁹; and the right to enjoy their own culture¹⁰.

of non-governmental groups and networks that provide resources and workshops, often on a volunteer unpaid basis. This is the Pakeha Treaty educators' network referred to in the text.

³ 'Government foreshore and seabed policy breaches basic human rights', Peace Movement Aotearoa, December 2003 at <http://www.converge.org.nz/pma/fs231203.htm>

⁴ Submission on the Foreshore and Seabed Bill 2004, Peace Movement Aotearoa, July 2004 at <http://www.converge.org.nz/pma/fspma.doc>

⁵ WAI 1071 Report on the Urgent Hearings into the Crown's Foreshore and Seabed Policy, Waitangi Tribunal, March 2004.

⁶ 'Waitangi Tribunal Report disappointing', Dr Michael Cullen, 8 March 2004.

⁷ Article 7 Universal Declaration of Human Rights (UDHR), Article 26 International Covenant on Civil and Political Rights (CCPR), and Article 5 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); right to justice, NZ Bill of Rights Act (BORA) 1990, Section 27.

⁸ Article 17 UDHR, and Article 5 ICERD; right to be secure against unreasonable seizure, BORA Section 21.

⁹ Article 2 UDHR, Article 2 CCPR, and Article 2 ICERD; BORA Section 19, and NZ Human Rights Act 1993.

¹⁰ Article 27 CCPR; BORA Section 20.

Furthermore, the obligations on state parties with regard to the particular measures required to ensure the human rights and fundamental freedoms of indigenous peoples are not denied, as articulated for example in General Recommendation No. 23 of the Committee on the Elimination of Racial Discrimination, were not met. The Foreshore and Seabed Act clearly does not "*protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources*"¹¹ .

Nor did the government in any sense meet the requirement of "*effective participation by indigenous communities*"¹² in the formulation of policies that are directly related to their rights and interests. There was no opportunity for effective participation by Maori because the consultation process followed by Ministers of the Crown was not the two-way dialogue that genuine consultation necessarily involves. Instead, the foreshore and seabed policy was presented to Maori after it had been formulated, and their responses to it were essentially ignored.

One journalist aptly described this process thus: ... "*after nine tortuous months, full of sound and fury, it [the government] has really done just one thing - that which it said it would do within days of the release of the Court of Appeal's decision. It has vested the foreshore and seabed in Crown ownership, thus preventing Maori from realising claims to it. Everything else is and has been largely smoke and mirrors, aimed at suggesting Maori will get something in exchange for losing that opportunity. They won't, under the legislation unveiled last week. Iwi representatives could not be blamed for concluding the endless negotiations were about nothing more than satisfying the Crown's obligation to consult.*"¹³

Similarly, the government did not in any sense meet the requirement "*that no decisions directly relating to [indigenous peoples] rights and interests are taken without their informed consent.*"¹⁴

There was an overwhelming and unambiguous rejection by Maori of the foreshore and seabed framework and policy on which the legislation was based, and of the legislation itself - at each of the government's 'consultation' meetings, in the statements from the national meetings organised by Maori, in petitions and submissions, in the foreshore and seabed hikoī when more than 30,000 Maori traveled to parliament from all over the country to protest about the denial of their rights, and in their submissions to the Select Committee considering the Foreshore and Seabed Bill.

With regard to the latter, the fact that hapu and iwi representatives were lumped together with other New Zealanders in the Select Committee process was demeaning and diminishing of their status as parties to the Treaty of Waitangi. From our observation of the Select Committee hearings in Wellington and Auckland, Maori submitters were treated with particular disrespect by government (and other) members of the Committee, at times being

¹¹ Committee on the Elimination of Racial Discrimination General Recommendation No. 23: Indigenous Peoples, 5.

¹² See for example Committee on the Elimination of Racial Discrimination; Decision 2(54) on Australia, 18 March. CERD A/54/18.

¹³ 'Foreshore campaign mainly smoke and mirrors', New Zealand Herald, 12 April 2004.

¹⁴ Committee on the Elimination of Racial Discrimination GRXXIII, 5.

interrupted while speaking and not being permitted to finish what they had to say, and being subjected to derogatory remarks.¹⁵

The alternatives put forward by Maori at the government's 'consultation' meetings in 2003, the Waitangi Tribunal hearings in January 2004, and in their submissions were ignored by the government. Among those alternatives were examples of models of existing examples of Maori land under Maori / Crown co-management; and the repeated statements¹⁶ by hapu and iwi representatives that covenants of access and non-saleability, consistent with tikanga, could be negotiated in their respective areas if, as stated, the government's primary concerns were the protection of public access and the need to prevent sale of the foreshore and seabed areas. The government simply was not prepared to engage in negotiation with Maori that might have lead to a fair and just outcome and the recognition of their rights and freedoms.

By way of contrast, and to further illustrate the discriminatory aspects of the government's response to the Court of Appeal ruling on the foreshore and seabed, proposals to legislate to turn 5m-wide strips of farmland into publicly accessible river walkways were dropped in June 2005 following the launch of a campaign by the farmer's lobby group Federated Farmers and a protest of several hundred farmers at parliament.

The proposals were dropped because *"there is "too much conflict" to introduce the legislation now" ... "Associate Rural Affairs Minister Jim Sutton is promising compromises are on the table in exchange for good-faith negotiations. He has revealed that the Government has agreed in principle to pay compensation for "demonstrable loss of value" for any private land used to open up access to the coast, rivers and lakes - a key sticking point."*¹⁷

Compromise, negotiation and compensation are to be offered to farmers, but they were not options offered to Maori.

B. A climate of racial disharmony and diminished respect for Maori and their rights

In addition to the government's denial of Maori human rights and fundamental freedoms by enacting the foreshore and seabed legislation, public statements by government politicians following the handing down of the Court of Appeal ruling were a cause for considerable concern as they created a climate which encouraged racial disharmony and prejudice against Maori. While politicians of opposition parties and the mainstream media certainly played a role in generating that climate, our comments are focused on Ministers of the Crown because the government, as the state party to the international human rights instruments, has the primary responsibility to set the tone of public discourse. That tone should ensure that public discussion is conducted in a manner which emphasises the importance of, rather than diminishing respect for, human rights and fundamental freedoms.

¹⁵ In addition to our observations, some of these incidents are recorded in 'Diary of a Debacle' by Meteria Turei, Green Party Member of Parliament, who was a member of the Select Committee; the Diary is at <http://www.greens.org.nz/searchdocs/other7802.html>

¹⁶ See for example: 'Statement by Ngati Kahungunu on the government proposals on the foreshore and seabed', 12 September 2003 at <http://www.converge.org.nz/pma/in120903.htm> Letter to the Editor, Te Runanga o Te Rarawa, 19 April 2004 at http://www.terarawa.co.nz/mahi/rm/seabed/seabed_9t.htm Media Release, Te Runanga-Iwi o Ngati Kahu, 21 April 2004 at <http://www.converge.org.nz/pma/fs210404a.doc>

¹⁷ 'Retreat on public access to farmland', New Zealand Herald 29 June 2005.

The Court of Appeal ruling was in some respects a minor legal victory that would take some time to have practical effect. It did however have some significance as the first time the Pakeha legal system had permitted any potential recognition of Maori interests in the foreshore and seabed since those areas were removed from the jurisdiction of the Native Land Court in the nineteenth century. It was thus a first step towards correcting, albeit in a limited way, an historical injustice.

Unfortunately, the government did not take the opportunity to provide balanced information as to the historical circumstances that led to the Court ruling nor to provide a reasonable assessment of its effects. From our experience, it does not take much for Pakeha to move from a position of monocultural superiority towards an understanding that there are other perspectives which are equally valid. Education based on balanced information about the Treaty of Waitangi and what it says, about our history, about the legislation which has been designed and used to dispossess Maori, and an outline of the ways in which domestic human rights legislation and international human rights conventions reinforce the guarantees of the Treaty, has a remarkable effect on those who have not previously had access to such information. With some knowledge of the extent of past injustice, present day injustices are more readily perceived, as is the need to resolve them fairly.

Instead, the government chose to continue the sad and sorry tradition of denial and dispossession that has been the key characteristic of the historical and ongoing processes of colonisation in this country. By announcing within days of the Court of Appeal ruling that legislation would be introduced to 'confirm' Crown ownership of the foreshore and seabed and by issuing statements with assurances that no one would be prevented from having a barbeque on the beach in the coming summer, they started down a path of misinforming the public. Even those initial viewpoints contained flaws - that the then highest court in the land had just ruled that customary title to the foreshore and seabed could, and should, be investigated surely leads to the conclusion that Crown ownership was not in a position to be 'confirmed'. Furthermore, there was never an issue of anyone being prevented from having a barbeque on the beach, and indeed the subject of the Court's ruling was the foreshore and seabed, land respectively partly or wholly covered by water, not an area commonly used for barbeques.

As they had begun, so Ministers of the Crown continued, with public statements that were at best misleading, always it seemed with the purpose of diminishing Maori and respect for their human rights and fundamental freedoms.

Perhaps the clearest example of the types of public utterances which encouraged a climate of racial disharmony were the comments made by Prime Minister Helen Clark as the foreshore and seabed hikoi approached Wellington. *"Asked why she met Shrek but not those she called the "haters and wreckers" of the foreshore hikoi, Helen Clark said: "Shrek was good company".*"¹⁸ (Shrek was a sheep that was receiving a certain amount of media attention at the time.)

That the Prime Minister was prepared to thus diminish and insult the tens of thousands of Maori who had traveled to parliament to peacefully protest about the denial of their human rights and fundamental freedoms was indicative of the political climate created by the government following the Court of Appeal foreshore and seabed ruling.

¹⁸ 'Now for the wether', The Press, 4 May 2004.

Unfortunately, the derogatory remarks did not stop there. When the Committee on the Elimination of All Forms of Racial Discrimination (CERD) released their decision¹⁹ on the Foreshore and Seabed Act, Helen Clark derided both the Committee itself and those who had utilised its Early Warning Procedure. She described CERD as *"a committee that sits on the outer edge of the UN"*, and said, *"This isn't a statement that NZ is a terrible country in breach of international conventions that those who went trotting off to it wanted to hear"*.²⁰

Extraordinary statements from the Prime Minister of a government that describes itself as *"a principled defender of human rights"*.²¹ There is an implication in Ms Clark's remarks that those who went to CERD were a few disgruntled people. On the contrary, those who communicated with the Committee included the Treaty Tribes Coalition, the single largest and longest-standing voluntary association of iwi in the country, and Te Runanga o Ngai Tahu - together they represent hapu and iwi with traditional authority over more than half of the coastline of Aotearoa New Zealand.

C. Creating an impression of united Pakeha support

Less inflammatory, but nevertheless contributing to the climate which diminished respect for Maori and their human rights, was the way Ministers of the Crown created the impression that there was united Pakeha pressure on the government to act the way they did.

One example of this comes from a recent speech by the Deputy Prime Minister: *"The Government could not have left foreshore and seabed issues to the Maori Land Court because of "the depth of Pakeha anger and alarm", Deputy Prime Minister Dr Michael Cullen said yesterday."*²²

We have included this quote here for three reasons. Firstly, as was common during the period when the government's foreshore and seabed proposals were subject to public discussion, there is silence around the profound distress and justified anger of Maori. This acted to invisibilise and minimise what was being done to them.

Secondly, the implication of united Pakeha support for the way the government responded to the Court of Appeal ruling is simply not an accurate portrayal of the situation. This can be demonstrated by reference to the government's own publication analysing the submissions on the initial foreshore and seabed proposals which includes statements such as: *"Almost all Maori and many non-Maori considered that the principles and related proposals constituted a major breach of the Treaty of Waitangi, and would give rise to a new round of Treaty grievances if implemented"; "Many respondents were strongly opposed to the four principles, including almost all Maori and many non-Maori"; and "Many were concerned that the principles and related proposals had been developed without the participation of Maori and*

¹⁹ Decision 1(66): New Zealand Foreshore and Seabed Act 2004, 11 March 2005. CERD/C/66/NZL/Dec.1.

²⁰ Breakfast programme, TV1, 14 March 2005.

²¹ Phil Goff, Minister of Foreign Affairs and Trade, in a statement announcing NZ would be seeking election to the UN Commission on Human Rights, 28 January 2004.

²² 'Foreshore to forefront of Cullen talk', Otago Daily Times, 13 October 2005 The text of the speech is at <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=24246>

accordingly represented a very mono-cultural perspective on the issues and possible solutions."²³

Furthermore, from the first government announcement in response to the Court of Appeal ruling, prominent Pakeha lawyers, historians, academics and church leaders, as well as human rights, social justice and peace groups, were vocal in their opposition to the government's proposals²⁴. The government cannot have been unaware of this, as open letters²⁵ and private letters were sent to Ministers of the Crown and other government politicians, and a substantial number of the submissions on the foreshore and seabed proposals, and later on the Foreshore and Seabed Bill, were made by Pakeha who objected to the inherent breaches of the Treaty of Waitangi, and of domestic and international human rights law, in the legislation. Pakeha supported and joined the foreshore and seabed hikoi; and organised and supported other peaceful protest against the legislation.

Thirdly, even if there had been united Pakeha support for the legislation, which there was not, that would not in any way have justified the government's denial to Maori of their human rights and fundamental freedoms.

The deceptive statements implying widespread support for the foreshore and seabed legislation did not end with its enactment. Perhaps the most startling example of this came in a media release by the Deputy Prime Minister earlier this year: "*Deputy Prime Minister Michael Cullen today released polling data showing a clear majority of all New Zealanders and a plurality of Maori believe the Foreshore and Seabed Act is fair.*" ... "*The UMR Research result, based on a representative sample of 750 people, shows 56 per cent consider the legislation strikes a balance between the rights of Maori and those of the general population,*" Dr Cullen said. "*Among Maori this was also the most commonly held view with 45 percent support,*" he said although adding that the Maori sub-sample was very small comprising only 65 people."²⁶

It is difficult to comprehend how those figures could be interpreted as indicating either "*clear majority*" support, or any meaningful level of Maori support, for the Act.

D. Lack of effective remedies for human rights violations

International human rights instruments require state parties to provide an effective remedy for those whose human rights are violated²⁷. However, in Aotearoa New Zealand the notion that parliament is supreme has resulted in a situation where there is no effective way to prevent the enacting of legislation which breaches the Treaty of Waitangi, human rights legislation and international human rights treaties; nor is there an effective remedy for those who are denied their rights by an Act of Parliament as outlined below.

²³ 'Analysis of submissions on the proposals for the foreshore and seabed', NZ Government, December 2003, 17.

²⁴ A range of Pakeha statements, articles, letters and submissions are available on the foreshore and seabed information page at <http://www.converge.org.nz/pma/fsinfo.htm>

²⁵ See for example the Open Letter attached as Appendix One.

²⁶ 'Poll finds foreshore and seabed policy fair', Media Statement by Dr Michael Cullen, 6 February 2005 at <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=22125>

²⁷ Article 8 UDHR, Article 2(3) CCPR, and Article 6 ICERD.

The Waitangi Tribunal has the power to evaluate whether or not government policy complies with the principles of the Treaty of Waitangi, although not with the actual text of the Treaty. There is no requirement on the government to act on the Tribunal's recommendations to prevent legislation that breaches the Treaty of Waitangi, nor on their recommendations for remedies once such legislation has been enacted. As referred to previously, the Tribunal found that the foreshore and seabed policy breached the Treaty in "*fundamental and serious*" ways²⁸ but the legislation was enacted anyway.

The NZ Bill of Rights Act (BORA) 1990 incorporates most, but not all, of the rights and freedoms in the International Covenant on Civil and Political Rights. There is no independent body to evaluate whether or not proposed legislation is consistent with the provisions of the BORA. The Attorney General (a politician from the governing political party) is required to draw parliament's attention to any inconsistencies between proposed legislation and the BORA, but there is no mechanism to prevent the enactment of legislation that is not consistent with the BORA. The Attorney General's Report on the Foreshore and Seabed Bill²⁹ was less than robust, although she did find a prima facie breach of the right to freedom from discrimination. The legislation was enacted regardless of this.

The Human Rights Act 1993 incorporates the right to freedom from discrimination in the international human rights instruments. One of the functions of the Human Rights Commission is to report to the Prime Minister "*on the implications of any proposed legislation (including subordinate legislation) or proposed policy of the Government that the Commission considers may affect human rights*".³⁰ The Commission's concerns about the human rights implications of the foreshore and seabed policy were conveyed in a letter³¹ from the Chief Commissioner to the Prime Minister in November 2003, and in the Commission's submission in July 2004 to the Select Committee considering the legislation. The legislation did not take into account their advice and recommendations.

Civil proceedings may be taken with respect to legislation that breaches the Human Rights Act by the Commission or by a complainant whose complaint has not been resolved by the Commission. However, if it is found that the legislation breaches the Human Rights Act, the only remedy is a declaration that it is inconsistent with the right to freedom from discrimination. In response to such a declaration, the Minister of the Crown responsible for the administration of the legislation must present a report to parliament bringing the declaration to its attention and advise on the government's response to the declaration. There is no requirement for the government to modify or repeal discriminatory legislation.

The lack of an effective remedy for discriminatory legislation was highlighted earlier this year in a letter³² from the Director of Human Rights Proceedings who included it as one of the reasons for his decision not to provide legal representation in proceedings about the Foreshore and Seabed Act.

²⁸ WAI 1071 Report on the Urgent Hearings into the Crown's Foreshore and Seabed Policy, Waitangi Tribunal, March 2004.

²⁹ 'Foreshore and Seabed Bill', Attorney General, 6 May 2004.

³⁰ NZ Human Rights Act 1993, 5.2(k) (iii).

³¹ Rosslyn Noonan, Chief Commissioner, to Helen Clark, Prime Minister, 24 November 2003.

³² Robert Hesketh, Director of Human Rights Proceedings, to Peter Goldsbury, 19 August 2005, available at <http://www.converge.org.nz/pma/fspghrc.pdf> pp 3-16.

Indigenous peoples are particularly vulnerable to the denial of their human rights and fundamental freedoms where they are outnumbered by a majority non-indigenous population as in Aotearoa New Zealand. There is currently no way to prevent the enactment of legislation which discriminates against Maori, nor is there any effective remedy when their rights and freedoms are denied.

2. Future protection of Maori human rights and fundamental freedoms

Government legislation, policies and practices over the past 165 years have been designed to progressively dispossess Maori of their lands, their resources and culture. This was again illustrated by the government's response to the Court of Appeal ruling on the foreshore and seabed which made it clear that the human rights and fundamental freedoms of Maori are not, and indeed cannot, be fully realised while the existing constitutional arrangements continue.

The current climate of diminished respect for Maori and their human rights is likely to continue to deteriorate; particularly through attempts to weaken, rather than honour, the Treaty of Waitangi.

As but one example of this, the Confidence and Supply Agreement between the Labour Party and New Zealand First during the recent formation of the new government includes several worrying agreements relating to the Treaty of Waitangi. Among these are support for New Zealand First's Bill 'to remove references to the principles of the Treaty from legislation' to be sent for consideration by a Select Committee. The concept of 'principles' of the Treaty is analogous to a concept of 'principles' of human rights, that is to say, a weak substitute for the real thing.

This proposed legislation would not be a concern if the intent was to replace the inadequate Crown-defined principles with the actual text of the Treaty, but this is unlikely to be the case as demonstrated by an example of one of the frequent public statements from the Leader of New Zealand First regarding the Treaty: *"We in New Zealand First believe that we are one people and that we should live in one country under one set of rules. Our society cannot function if there is politically and legally sanctioned racial preferment for one group based on an outdated colonising document written by a naval officer in February 1840."*³³

The notion of 'one people' and 'one set of rules for all', which of itself is a denial of Maori human rights and fundamental freedoms, has recently gained an ascendancy in domestic government discourse in a way that has not perhaps been so explicit since the time when assimilation was stated government policy. It is now extending into government discourse at international fora as recently demonstrated by the statement³⁴ from the New Zealand Representative in a session of the UN General Assembly 60th Session, Third Committee. Having declared the text of the Draft Declaration on the Rights of Indigenous Peoples to be *"unworkable and unacceptable for many States, including New Zealand"*, he went on to say ... *"in elaborating the rights of one group of citizens, New Zealand cannot agree to a document that suggests there are two standards of citizenship or two classes of citizen."*

³³ 'Clark v Canute - the Foreshore and Seabed Case', Winston Peters, 10 August 2003.

³⁴ Statement by Mr. Andrew Begg, UN General Assembly 60th Session, Third Committee, Item 68: Indigenous Issues, 20 October 2005.

With regard to their social and economic rights, Maori have been seriously disadvantaged by Pakeha health, education, housing, social welfare, and justice systems that do not reflect their cultural values and practices; and which they do not control.

The substantial achievements of Maori have come about largely through their own efforts - despite, rather than supported by, government policies and practices. While the government has at times provided funding for Maori initiatives or for the provision of culturally appropriate delivery of education and health services, the basis for that funding is fragile and it can be withdrawn at any time. Recent examples of this include funding cuts to Maori health providers; the review of "race-based funding" and subsequent withdrawal of funds intended to increase Maori access to health and education; and the withholding of \$20 million owed to Te Wananga o Aotearoa, something that would not be done to an equivalent Pakeha tertiary education institution.

Underlying all of the issues raised above is the fundamental fact that the government has denied, and continues to deny, the inherent and inalienable right of self-determination to Maori. As described in the covering letter with this paper, Maori exercised that self-determination for hundreds of years prior to the arrival of non-Maori, it was proclaimed in the Declaration of Independence, and the continuance of it was guaranteed to them in the Treaty of Waitangi.

In more recent years the right of self-determination was confirmed as a right for all peoples in the United Nations Charter, and the linked right of all peoples to *"freely determine their political status and freely pursue their economic, social and cultural development"* was confirmed in Article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights. It is further articulated in the Draft Declaration on the Rights of Indigenous Peoples.

It is our submission that Maori control of their political status and of their economic, social and cultural development is the only way to ensure the full and effective enjoyment by Maori of their human rights and fundamental freedoms. Furthermore, that will only be realised when the constitutional arrangements of Aotearoa New Zealand reflect the constitutional arrangements laid out in the Treaty of Waitangi.

For more than a century, Maori have expressed their desire and willingness to negotiate these arrangements, but sadly, this has been ignored by successive governments.

All that is required to begin the process of negotiation for constitutional change is the imagination to see the potential beyond the current constitutional arrangements, the ability to move beyond a monocultural understanding of the world, good will, and preparedness to recognise Maori power and control of resources. The realisation of this positive vision for our future would enhance the full and effective enjoyment of human rights and fundamental freedoms for everyone in Aotearoa New Zealand.

Whether the government can rise to this challenge remains to be seen; we respectfully urge the Special Rapporteur to do all he can to encourage them to do so.

Open letter on the foreshore and seabed legislation, May 2004

To all Labour, Progressive Coalition, and New Zealand First Members of Parliament *

As the foreshore and seabed hikoi moves towards Wellington, we the undersigned Pakeha / Tauwiwi [non-Maori] add our voices to those of Ngati Kahungunu and others who are opposed to the foreshore and seabed legislation.

We support the hikoi, and all peaceful protest by Maori acting to protect what is rightfully theirs.

The foreshore and seabed legislation is a confiscation, no different than the confiscations inflicted by colonial administrations in the nineteenth century. The harm caused by those past confiscations has been acknowledged in recent years, apologies have been made, and settlements have been negotiated in recognition of those historical injustices. Repeating the mistakes of the past cannot be a productive way forward.

Furthermore, the legislation violates basic human rights including the right of access to, and protection of, the law; the right to own property and not be arbitrarily deprived of it; the right to freedom from racial discrimination; the right to enjoy one's own culture; the right to development; and the right to self-determination.

The legislation is a serious breach of Articles II and III of the Treaty of Waitangi. It is a violation of domestic law including the Bill of Rights Act and Human Rights Act; and of international human rights standards and conventions including the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. It clearly goes against developing international human rights law with respect to the human rights and fundamental freedoms of Indigenous Peoples, as articulated for example in General Recommendation XXIII of the United Nations Committee on the Elimination of Racial Discrimination.

We do not agree with your claims that the legislation is in the best interest of all New Zealanders - clearly it is not in the best interests of Maori, nor do we consider it to be in our best interests. If passed, it will be a source of serious conflict and justified grievance into the future. As well, your readiness to violate the basic human rights of one group of New Zealanders is threatening to us all.

We endorse the stand taken by those few Labour Members of Parliament who are opposing the foreshore and seabed legislation.

We call on you to vote against this inherently unfair, unjust and unnecessary legislation. Its fundamental flaws are clearly outlined in the Waitangi Tribunal WAI 1071 Report. We urge you to read the Report and to follow the Tribunal's "primary and strong" recommendation - go back to the drawing board and engage in proper negotiations with Maori about the way forward.

If you follow this path, you will be remembered by future generations as someone who stood against this gross travesty of justice and who acted with integrity to ensure a peaceful future for us all.

* This letter, signed by 576 people, was delivered to every Member of Parliament in the parties supporting the legislation on the day before the foreshore and seabed hikoi arrived at parliament.