

NEW ZEALAND

**BRIEFING TO THE PRE-
SESSIONAL WORKING
GROUP OF THE UN
COMMITTEE ON
ECONOMIC, SOCIAL AND
CULTURAL RIGHTS, 46TH
SESSION MAY 2011**

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CONTENTS

I. Introduction.....	5
II. Enforceability of Economic, social and Cultural Rights.....	5
III. Rights of Indigenous Peoples'.....	9

I. INTRODUCTION

Amnesty International is submitting this briefing to the United Nations Committee on Economic, Social and Cultural Rights (the Committee) in light of the pre-sessional Working Group to draft the list of issues for the forthcoming examination of New Zealand's third periodic report on the implementation of the International Covenant on Economic, Social and Cultural Rights (the Covenant).

New Zealand has a strong and long standing reputation for promoting and protecting human rights and Amnesty International commends the Government's efforts to consult civil society and non-governmental organisations during the preparation of its third report. Amnesty International also takes this opportunity to acknowledge the Government on its comprehensive report to the Committee.

Amnesty International has provided information on the enforceability of economic, social and cultural (ESC) rights in New Zealand and on the effectiveness of the States' legislation in protecting the rights of indigenous peoples to non-discrimination and culture in relation to Articles 1, 2 and 15 of the Covenant.

II. ENFORCEABILITY OF ECONOMIC SOCIAL AND CULTURAL RIGHTS:

In General Comment No.9,¹ the Committee stated that the obligation on States to give effect to the Covenant within their domestic legal framework has a degree of flexibility that coexists with their obligation to use all means at their disposal to progressively realise these rights.

New Zealand has recognised that the dualist nature of its legal system means that the Covenant rights do not have direct domestic effect unless explicitly enacted through legislation. New Zealand notes three ways that ESC rights can be enforced in New Zealand. These are through: general legislative incorporation; judicial review; and the direct enforcement of 'general' rights in New Zealand's human rights framework,² namely the

¹ General Comment No.9 (E/C.12/1998/24).

² New Zealand's human rights framework is a part of its constitutional framework. "New Zealand is one of only three countries in the world without a full and entrenched written constitution. The sources of the New Zealand constitution include the prerogative powers of the Queen, various statutes with constitutional significance (e.g. the Constitution Act, the Electoral Act, the New Zealand Bill of Rights Act), relevant English and United Kingdom statutes that have been incorporated into New Zealand law (such as the Magna Carta), the decisions of the courts and, ... the Treaty of Waitangi. These formal,

Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 (BORA). Notwithstanding these avenues of enforcement, Amnesty International believes that New Zealand must take further steps to ensure Covenant rights are given full effect.

INCORPORATION IN GENERAL LEGISLATION

In its report, New Zealand notes that it has worked to give effect to the Covenant in selected legislation, providing a number of examples such as the Education Act 1989, the Energy Efficiency and Conservation Act 2000, the Local Government Act 2002 and the Resource Management Act 1991; each of which includes objectives that relate to economic, social and cultural well-being.³ The report indicates that this approach allows for the principles in the Covenant to be used when interpreting and implementing these statutes.

While these measures show New Zealand's willingness to bring the Covenant into force through legislation and its implementation, they only cover a limited range of Covenant rights. Amnesty International is concerned with the significant gap that remains in the recognition, protection and availability of redress for those Covenant rights that are not explicitly mentioned in existing domestic legislation. As a result, New Zealand's commitment to give effect to Covenant rights remains limited.

JUDICIAL REVIEW

New Zealand asserts that an application for judicial review provides an opportunity for the courts to consider whether Covenant rights covered in legislation have been given appropriate legal effect and, in certain circumstances, whether a decision maker has given appropriate consideration to the Covenant. However, as the Covenant is only partially and inconsistently domesticated, the ability to seek redress through judicial review for breaches of Covenant rights is of marginal practical effect.

INCORPORATION IN THE HUMAN RIGHTS FRAMEWORK

Through New Zealand's human rights framework, including the Human Rights Act 1993 and the BORA, the Government has explicitly provided for a very limited range of 'general'

legal aspects of the constitution are complemented by unwritten conventions, which dictate how the institutions and relationships actually work." See <http://www.beehive.govt.nz/Documents/Files/NZ%20Constitution%20Cabinet%20Office%20background.pdf> for further explanation of New Zealand's constitutional framework.

³ See New Zealand's 3rd Periodic Report to the Covenant page 8.

Covenant rights,⁴ including the right to be free from discrimination and the rights of minorities to enjoy their culture,⁵ which are able to be directly enforced through the Courts and specialist tribunals. However, both the Human Rights Act 1993 and the BORA focus on the protection of civil and political rights and exclude most other Covenant rights.

In General Comment No. 9, the Committee indicated that where the means used to give effect to the Covenant differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this.⁶ New Zealand has not provided a compelling justification for its limited approach to domesticating Covenant rights in selected general legislation vis-à-vis its approach to incorporating civil and political rights into New Zealand's human rights framework.

The Human Rights Act 1993 and the BORA are recognised by New Zealanders as critical components of New Zealand's human rights framework. The inclusion of Covenant rights in these statutes would make them accessible to the ordinary New Zealander, empowering the very individuals whose rights the Covenant seeks to protect.

If New Zealand already gives effect to the Covenant, incorporating the Covenant's rights into New Zealand's human rights framework through inclusion in the BORA, this will not alter New Zealand's obligations under the Covenant.

An incorporation of Covenant rights into the BORA and Human Rights Act 1993 would also ensure that they receive the same protection mechanisms as those currently afforded to civil and political rights.

This would include the BORA section 7 requirement that the Attorney-General advise Parliament of any provision in a Bill that appear to be inconsistent with any of the rights and freedoms contained in the BORA.⁷ This requirement does not, however, prevent a Bill from being passed by Parliament or allow a court to declare it ultra vires solely because it is inconsistent with the BORA.⁸ Furthermore, the Attorney-General's role vis-a-vis Parliament has meant that this requirement has been inadequate to ensure that legislation Parliament passes is consistent with the BORA. Changes made to a Bill later in the legislative process, such as during the select committee stage or through the introduction of supplementary order papers, are not subject to this vet. While the section 7 vet would not, therefore, guarantee that only legislation that is consistent with ESC (and civil and political) rights is passed by Parliament, it would at least ensure that Parliament was more aware of a Bill's potential consistencies with Covenant rights before it was passed.

⁴ See New Zealand's 3rd Periodic Report to the Covenant (2008) page 12.

⁵ Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, *The Situation of Maori Peoples in New Zealand* (2011) page 17 <<http://unsr.jamesanaya.org/country-reports/the-situation-of-maori-people-in-new-zealand-2011>>.

⁶ General Comment No.9, paragraph 7.

⁷ Section 7 New Zealand Bill of Rights Act 1990.

⁸ Section 4 New Zealand Bill of Rights Act 1990.

In order to ensure there is a guaranteed remedy for breaches of Covenant rights, Amnesty International believes New Zealand should ensure remedies clauses are included in statutes that domesticate the Covenant. This includes selected general legislation and the human rights framework, namely the BORA and Human Rights Act 1993.

The New Zealand Government announced in late 2010 that a constitutional review would be undertaken over the next three years, with a report submitted to Cabinet in 2013. This review provides a unique opportunity for New Zealand to consider the most effective way to ensure the protection of human rights, including the Covenant rights, in New Zealand. Amnesty International intends to provide a submission on the review when public consultation is sought.

RATIFICATION OF THE OPTIONAL PROTOCOL

Ratification of the optional protocol to the Covenant (the protocol) would complement and add strength to the measures New Zealand has already taken to ensure protection for Covenant rights.⁹ As the protocol allows individuals and groups to seek a remedy as a last resort should their Covenant rights be violated, ratifying it would be an effective way for New Zealand to show its commitment to the Covenant by guaranteeing access to redress for breaches of ESC rights. Again, if New Zealand already gives effect to the Covenant's rights, signing the protocol will not alter the State's liability for breaches of the Covenant.

RECOMMENDATIONS

Amnesty International has recommended that the Government of New Zealand:

- **incorporates ESC rights into the BORA and Human Rights Act 1993;**
- **ensures effective remedies are available for breaches of ESC rights, including by amending the BORA to include an explicit remedies section; and**
- **ratifies the Optional Protocol to the Covenant.**

⁹ Measures since the last periodic report was submitted include amending the Human Rights Amendment Act 2001 to create a new Human Rights Commission with a broader human rights mandate.

III. RIGHTS OF INDIGENOUS PEOPLES'

(ARTICLE 1 – RIGHT TO CULTURAL DEVELOPMENT, ARTICLE 2 – RIGHT TO NON DISCRIMINATION, AND ARTICLE 15 – RIGHT TO TAKE PART IN CULTURAL LIFE)

Non-discrimination and equality are fundamental components of international human rights law and a cross-cutting obligation under the Covenant.¹⁰ While the right to non-discrimination is one of the few Covenant rights contained in the BORA, the historic and ongoing breach of this and other Covenant rights of the Maori has led to their extreme socio-economic disadvantage¹¹ and has resulted in entrenched inequalities in health, education, employment, justice and housing in New Zealand – the main indicators of ESC rights.¹²

Amnesty International welcomes New Zealand's recent efforts to protect the right to non-discrimination, the right to culture and the right to cultural development through the significant decision to endorse the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Amnesty also welcomes the New Zealand Government's efforts to settle the historical claims of the Maori under the Treaty of Waitangi.

Nevertheless, progress in New Zealand towards the recognition of indigenous rights and in particular, the ESC rights of indigenous peoples, has not been consistent. In 2003 the Judiciary recognised the right to claim indigenous land rights in *Ngāti Apa v Attorney General*,¹³ whereby it was held that Maori could apply to the Maori Land Court to determine whether areas of the foreshore and seabed constituted Maori customary land. The Court of Appeal held, in a unanimous decision, that the Maori Land Court had jurisdiction under the Te Ture Whenua Maori Act 1993 to determine such claims.

The Foreshore and Seabed Act 2004 (the 2004 Act) was supported by the New Zealand Government and passed by parliament in response to the decision in *Ngāti Apa v Attorney General*. The 2004 Act was deemed, on balance, to contain discriminatory aspects against the Maori by the Committee on the Elimination of Racial Discrimination, in particular by extinguishing the possibility of establishing customary Maori property rights to the foreshore

¹⁰ General Comment No.20 (E/C.12/GC/20).

¹¹ Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, *The Situation of Maori Peoples in New Zealand* (2011) page 2.

¹² New Zealand Human Rights Commission "Tūi Tūi Tuituiā Race Relations in 2010" (2010) <http://www.hrc.co.nz/wp-content/uploads/2011/03/RaceRelationsReport_2011_final.pdf>.

¹³ *Ngāti Apa v Attorney General* 3 NZLR 643.

and seabed and by its failure to provide a guaranteed right of redress.¹⁴ Many voiced their concerns about these breaches, including the Maori, the Special Rapporteur on the rights of indigenous peoples' and Amnesty International.¹⁵

The subsequent Government review, consultation and proposed repeal of the 2004 Act in 2009 was welcomed by Amnesty International. While Amnesty International acknowledges that this issue is a complex one and commends the Government's efforts to find an enduring solution to it, it remains concerned that the replacement for the 2004 Act, the Marine and Coastal Area (Takutai Moana) Act (the 2011 Act) does not adequately address the discriminatory effect of the 2004 Act and is not consistent with international human rights standards that seek to protect indigenous rights.¹⁶

The 2011 Act continues to discriminate against the Maori by virtue of the fact that customary interests cannot include the right to exclusive occupation, unlike specified freehold title which gives the title holder exclusive occupation rights.¹⁷

Amnesty International believes the 2011 Act's imposition of a time limit for customary interest applications is also discriminatory to the Maori, as justice for breaches of human rights should not be time-bound.¹⁸ These breaches have a knock-on effect, in that decisions made under the 2011 Act will violate Maori rights to non-discrimination and their customary land, which is fundamental to their cultural identity, as well as breaching their right to cultural development.¹⁹

Further, Amnesty International believes the tests for establishing protected customary rights and customary marine titles should not be codified in the 2011 Act, but instead left to the courts to develop in accordance with New Zealand's international obligations.²⁰

¹⁴ Committee on the Elimination of Racial Discrimination, Sixty-sixth session (2005) Decision 1 (66) New Zealand Foreshore and Seabed Act 2004 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/414/09/PDF/G0541409.pdf?OpenElement>>.

¹⁵ Amnesty International Aotearoa New Zealand's submission on the New Zealand Government's consultation document: Reviewing the Foreshore and Seabed Act 2004 (2010) <<http://www.amnesty.org.nz/files/100429-FSA-review-submission.pdf>>.

¹⁶ Including, but not limited to, Article 8 of the United Nations Declaration on the rights of Indigenous Peoples.

¹⁷ Amnesty International Aotearoa New Zealand's submission on the Marine and Coastal Area (Takuta - Moana) Bill <<http://www.amnesty.org.nz/files/101119-AIANZ-submission-Marine-and-Coastal-Area-Takutai-Moana-Bill.pdf>>pages 7-8.

¹⁸ Amnesty International Aotearoa New Zealand's submission on the Marine and Coastal Area (Takuta - Moana) Bill <<http://www.amnesty.org.nz/files/101119-AIANZ-submission-Marine-and-Coastal-Area-Takutai-Moana-Bill.pdf>>page 10.

¹⁹ Article 1(1) of the Covenant.

²⁰ Amnesty International Aotearoa New Zealand's submission on the Marine and Coastal Area (Takuta -

Amnesty International believes the 2011 Act should be amended to take better account of New Zealand's obligations under the Covenant, and other domestic and international human rights instruments,²¹ to ensure that Maori are not discriminated against and that their Covenant rights are upheld.

Discussion of how to give effect to indigenous rights within New Zealand's constitutional framework during the upcoming constitutional review is an opportune time to ensure that the Covenant rights of the Maori as indigenous people of New Zealand are adequately protected in the future and that New Zealand's obligations under the Covenant are met.

Aliquam erat volutpat. Class aptent taciti sociosqu ad litora torquent per conubia nostra, per inceptos hymenaeos. Curabitur mollis molestie enim. Sed magna quam, tempus quis, laoreet

RECOMMENDATIONS

Amnesty International recommends that the Government of New Zealand:

- **amend the Marine and Coastal Area (Takutai Moana) Act so that it upholds the rights of Maori to non-discrimination, culture and cultural development.**

Moana) Bill <<http://www.amnesty.org.nz/files/101119-AIANZ-submission-Marine-and-Coastal-Area-Takutai-Moana-Bill.pdf>>page 9.

²¹ **These instruments include the Treaty of Waitangi, the United Nations Declaration on the Rights of Indigenous Peoples and the International Convention on the Elimination of All Forms of Racial Discrimination.**

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