

30 July 2014

Dame Susan Devoy  
Office of the Race Relations Conciliator  
PO Box 12 411  
Wellington

Dear Dame Susan,

**Complaint against Proposed Auckland Unitary Plan**

1. We are writing on behalf of Mr Lee Short to lodge a complaint that Chapter H5.2.3.3 (2.d.iv and 2.d.v; see appendix 1) of the Proposed Auckland Unitary Plan (PAUP) breaches New Zealand's domestic and international human rights and anti-racial discrimination obligations.
2. Chapter H5.2.3.3 (2.d.iv and 2.d.v) of the PAUP gives one ethnic or cultural group (those exercising mana whenua) the ability to interfere with the enjoyment of private property of others to carry out a cultural activity (cultural harvesting). This subjugates the rights of Aucklanders to the cultural rights of one particular racial or ethnic group.

**Background**

**New Zealand human rights legislation**

3. The preamble to the Human Rights Act 1993 states that it is:  
*An Act to ... provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights*
4. The preamble to the New Zealand Bill of Rights Act 1990 states that it is an Act:
  - (a) *to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and*
  - (b) *to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights*

## **The Proposed Auckland Unitary Plan**

5. Under the guise of complying with the principles of the Treaty the PAUP permits council to set as a control over a new subdivision the right of mana whenua to access private land for cultural harvesting.

### **Treaty obligations on local government and resource consent applicants**

6. Neither local government nor private citizens are parties to the Treaty. They have no obligations under the Treaty except where those are defined in specific functional areas of legislation. In the case of local government these are primarily found in the Local Government Act 2002 (the LGA) and the Resource Management Act 1991 (the RMA).

### **The Local Government Act 2002**

7. The LGA contains a number of provisions that relate specifically to Maori. The LGA does not impose obligations on private ratepayers or citizens. The LGA requires that, in order to recognise the Crown's responsibilities, councils must take appropriate account of the principles of the Treaty of Waitangi.

### **The Resource Management Act 1991**

8. Section 8 of the RMA sets out local government's obligation as a consent authority to Treaty principles. Consent authorities must take into account iwi as an "affected party".
9. The High Court interpreted s. 8 in *Worldwide Leisure Ltd v Northland RC* (22/11/94) as placing "an obligation to consult Maori upon local governments, consistent with the Crown". However, this duty was interpreted as an obligation only to consult regarding the preparation of a plan or policy statement, *Greensill v Waikato RC* (11/17/95).
10. The responsibilities of applicants for resource consents and of local authorities are:
  - Applicants have a duty to report on consultation when constructing an assessment of environmental effects, but this does not amount to a legal duty to consult.
  - Despite this, it is recognised good practice that applicants for resource consents should engage in consultation with Maori where their proposals may affect the matters referred to in sections 6(e) and (f), section 7(a) and section 8 of the RMA.
  - Local authorities must consult when preparing planning documents and where proposals are likely to affect Maori interests recognised in sections 6(e), 7(a) and 8.
  - There may be a higher obligation on consent authorities to consult with Maori when they know Maori have a special relationship with the area affected by a proposal.

11. Chapter H5.2.3.3 (2.d.iv & 2.d.v) of the PAUP goes much further than requiring consultation or codifying best practice. It purports to create groups exercising mana whenua. They are identified as if mana whenua (the power) defines the group rather than correctly (in customary terms) the power exercised as a consequence of being tangata whenua. The purpose is to enable them to seek rights to enter private property to carry out a cultural activity.

### **The access provision in PAUP amounts to racial discrimination**

12. Part 1, Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin *which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms* in the political, economic, social, cultural or any other field of public life.” (Emphasis added)
13. PAUP gives one group within the wider community an expectation that they will be entitled to impinge upon the enjoyment of private property by others in the community on the basis of their being mana whenua or ahi kā. In order to be mana whenua or ahi kā a person must be Maori. No other ethnicity can be mana whenua or ahi kā.
14. Local government exercises delegated powers on behalf of central government at a local level. Article 2(1) of the International Convention on the Elimination of All Forms of Racial Discrimination states:
  - (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
  - (e) Each State Party undertakes to ... discourage anything which tends to strengthen racial division.
15. It is therefore arguable that Auckland Council and the PAUP are in breach of the International Convention on the Elimination of All Forms of Racial Discrimination.

### **What Other international treaties or conventions PAUP transgresses**

16. Article 17 of the International Covenant on Civil and Political Rights states:
  1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.* (Emphasis added)
  2. Everyone has the right to the protection of the law against such interference or attacks.

17. Article 26 of the International Covenant on Civil and Political Rights states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, *the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.* (Emphasis added)

18. PAUP should not, therefore, seek to give one group within the community the ability to impinge on the rights and freedoms of the wider group on the basis of race.

### **Is access to the private property of others on the basis of race justifiable?**

19. It cannot be argued that the proposed access arrangement is justifiable in order to enable mana whenua to enjoy traditional cultural practises. Article 2(3) of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination states:

3. Special concrete measures shall be taken in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups with the object of ensuring the full enjoyment by such individuals of human rights and fundamental freedoms. *These measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups.* (Emphasis added)

20. The PAUP provision does not entail ensuring mana whenua have the full enjoyment of human rights and freedoms as per other groups in society. It gives rights no other group has – the unrestricted right to access the private property of others – and thereby falls within the prohibition that “measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups”.

### **Does Auckland Council have no other option to that outlined in the PAUP?**

21. If Auckland Council identified a wider community interest in mana whenua accessing sites of significance for the purposes of cultural harvesting as desirable, it does not have to impinge on the private property rights of others to do so.
22. The Council could retain or obtain ownership of access ways to sites of significance. This would enable mana whenua to exercise their cultural practices without giving mana whenua rights not enjoyed by any ethnicity except Maori.
23. Access rights could be purchased or there could be an assurance of compensation where the enjoyment of private property is adversely affected.
24. In this sense the PAUP provision for mana whenua access to private property for cultural harvesting is unnecessary as well as not justified.

## Summary

25. Our clients asks that, under section 5 of the Human Rights Act 1993 (the Act), you:
1. Under s. 5(1)(a) of the Act write to Auckland Council advocating for an understanding and appreciation of, human rights in New Zealand society; and
  2. Under s. 5(1)(b) of the Act encourage Auckland Council to maintain and develop harmonious relations between individuals and among diverse groups in New Zealand society; and
  3. Under s. 5(2) of the Act make a public statement to promote an understanding of, and compliance with, this Act, the New Zealand Bill of Rights Act 1990, and New Zealand's international obligations.
26. They ask that your advocacy explain that the mana whenua provisions as currently drafted unjustifiably impinge upon, or need amendment to protect, property rights. They ask that you draw attention to the damaging effect on race relations of schemes that are or appear to be racially discriminatory in effect and that you remind Auckland Council and the Government of the risks to racial harmony posed by such schemes. This would go some way to upholding human rights, including the right to property in article 17 of the Universal Declaration of Human Rights and the rights contained in other international instruments mentioned in this complaint.

Yours faithfully

Stephen Franks

Principal

[stephen.franks@franksogilvie.co.nz](mailto:stephen.franks@franksogilvie.co.nz)

**Proposed Auckland Unitary Plan – Chapter H5.2.3.3 (2)**

The following controls apply to all subdivision in the rural zones.

**2. Protection and enhancement of ecological values**

- a. All subdivision plans, excluding boundary adjustments, must show any of the following features that exist on, or on the boundary of, the land being subdivided:
  - i. any areas of indigenous vegetation within the significant ecological area overlay
  - ii. all wetlands
  - iii. all rivers, lakes and streams
  - iv. a minimum 10m-wide riparian strip around all rivers, lakes, streams, and wetlands.
- b. The applicant must provide an assessment of whether any of the features identified in 2(a) above exist. The assessment must be undertaken by a suitably qualified and experienced person.
- c. All subdivisions must give effect to objectives and policies that promote the protection of valuable natural features.
- d. The council may require the landowner to protect natural features by:
  - i. fencing off or otherwise permanently excluding livestock from the feature and any appropriate buffer around it
  - ii. monitoring the condition of the feature, and sending the monitoring results to the council
  - iii. effectively managing pests and weeds
  - iv. providing appropriate access to any sites and places of significance to Mana Whenua
  - v. providing for cultural harvest by Mana Whenua in accordance with tikanga Māori, if the site or place is significant to Mana Whenua, or if it is to be controlled by a public authority and may require an appropriate legal protection mechanism to be established to give effect to any or all of the above.
- e. Subdivision that does not comply with this control is a non-complying activity.