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HUMAN RIGHTS FOUNDATION OF NEW ZEALAND
TUĀPAPA TIKA TANGATA O AOTEAROA

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Shadow Report to the

18th, 19th and 20th consolidated report of the New Zealand Government under the International Convention on the Elimination of All Forms of Racial Discrimination

being considered by the

United Nations Committee on the Elimination of All Forms of Racial Discrimination

January 2013

1. Introduction

1.1 This report by the Human Rights Foundation of Aotearoa New Zealand is a shadow report to the New Zealand Government's 18th, 19th and 20th consolidated periodic report ("the government report" or "the periodic report") to the United Nations Committee on the Elimination of All Forms of Racial Discrimination.

1.2 The Human Rights Foundation is a non-governmental organisation, established in December 2001, to promote and defend human rights through research based education and advocacy. We have made submissions on new laws with human rights implications. We also monitor compliance and implementation of New Zealand's international obligations in accordance with the requirements of the international conventions New Zealand has signed, and have prepared shadow reports for relevant United Nations treaty bodies to be considered alongside official reports. Though the primary focus of the Foundation is on human rights in New Zealand, we recognise the universality of human rights and have an interest in human rights in the Pacific and beyond.

1.3 We appreciate this valuable opportunity to present our views to the Committee.

1.4 The Government provided an opportunity to civil society to provide comments on a draft of its report and the HRF provided comments on several matters. Some of these comments are now reflected in the report, but we continue to have significant concerns regarding certain issues, including the use of Tasers; the deep sea oil exploration that has ignored the situation of, and the Government's duties to, the Maori community; and high suicide rates amongst Maori.

2. Executive Summary

2.1 This report seeks to provide the Committee with information which will assist its consideration of New Zealand's periodic report. The government report covers many issues and we do not seek to address them all. Instead we focus on a number of particular issues of concern.

2.2 To facilitate comparison of this shadow report with the government report, we have addressed issues in the same order as they appear in the government report.

2.3 We comment on three issues we consider insufficiently dealt with in the government report: 'Operation 8' and its excessive use of police powers against Maori community during and after "anti-terror" raids in 2007 (paragraph 113 - 114 in the periodic report); disproportionate use of Tasers against the Maori and Pacific communities (paragraph 114 - 116 in the periodic report); and education for children unlawfully in New Zealand (paragraph 152 - 153 in the periodic report).

2.4. We also comment on two other issues not addressed in the periodic report: the deep soil exploration permit issued without consultation with affected indigenous

communities; and the disproportionate high suicide rate in Maori community. HRF recommendations are repeated in the final paragraph.

3. Ruatoki (paragraph 113 in the government report)

Operation 8 - excessive use of police power against Maori community - breaches of CERD Articles 2 and 5

3.1 In its periodic report, the Government briefly mentions (paragraph 113) the 'Operation 8' raids in Ruatoki and other areas in 2007. However, it fails to acknowledge or explain the circumstances surrounding, and the effects of, the violence and severity of the raids and subsequent events.

3.2 'Operation 8' has been linked with Maori political activism and is therefore perceived as having a racial element. As such, 'Operation 8' harmed community race relations and the trust between police and Maori, especially the Tuhoe iwi (tribe).

3.3 In the lead up to the raids, police also violated section 21 of the New Zealand Bill of Rights Act governing the right to be free of unreasonable search and seizure. In the judgment of the court in *Hamed v R SC 125/2010 [2 September 2011]*, Elias CJ states that "the evidence was improperly obtained not only by reason of the trespass but because it constituted unreasonable search and seizure, contrary to s 21 of the New Zealand Bill of Rights Act."¹

3.4 'Operation 8' must be viewed in its social and historical context to understand its impact. The raids worsened the "uneasy relationship"² that Tuhoe historically had with the Crown, and were given added potency by their similarity to certain historical events such as those that occurred at Parihaka in the 1870s and 1880s when there was passive resistance to European occupation of lands confiscated from Maori. Too many people have been put through years of stress and expense³. Dr Pita Sharples, co-leader of the Parliamentary Maori Party, said that the raids "set race relations back 100 years".⁴

3.5 The raids also added to the perception that the criminal justice system "systematically discriminates against Maori".⁵ Much of the illegal evidence was

¹ *Hamed v R SC 125/2010 [2 September 2011]*, Judgment of the Court, paragraph 16. Text online at www.courtsofnz.govt.nz/cases/hamed-v-r-sc/at_download/fileDecision

² NZ Herald Staff 'Secret Justice no justice at all' Herald on Sunday (New Zealand, 11 September 2011) http://www.nzherald.co.nz/anti-terror-raids/news/article.cfm?c_id=1501470&objectid=10750877 (accessed on 30.1.2013)

³ *Idem*

⁴ NZ Herald Staff "Raids set Maori-Pakeha relations back 100 years – Sharples" NZ Herald (New Zealand, 18 October 2007) http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10470629 (accessed on 30.1.2013)

⁵ NZ Herald Staff "Justice system discriminates against Maori – Sharples" NZ Herald (New Zealand, 1 October 2011) http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10755915 (accessed on 30.1.2013)

gathered by trespass on Tuhoe-owned land. Ruatoki has a predominantly Maori population and many of those arrested were activists for Maori sovereignty. The police tactics used were heavy handed and said to have “traumatised” the mostly Maori population.⁶ For example, there were claims that a school bus was boarded and the children confronted by armed police. The “effective mass detention” of Ruatoki citizens was a breach of the right to liberty of the person.⁷

3.6 Excessive violence was used during the raids under the pretext of being anti-terror raids⁸. Essentially, the raids were an attempt by the State to link Maori sovereignty with terrorism. However, initial charges pursued by the Government under the Suppression of Terrorism Act had to be withdrawn through lack of evidence and no terrorist activities were ever established⁹.

3.7 In national media and the public’s perception, the raids were linked to Maori and Maori political activism. MP Te Ururoa Flavell believes that ‘Operation 8’ was a breach of the Treaty of Waitangi, that the Tuhoe people were “stigmatised” and that it appeared that Maori had been targeted.¹⁰ ‘Operation 8’ “seriously strained relations between Tuhoe and the Police.”¹¹

3.8 For 13 of the 17 people eventually charged, the breach of section 21 was held to be so serious that the evidence was ruled inadmissible and the charges dismissed. The Court held that there was a “serious breach” of the “fundamental values” in section 21¹². Several Supreme Court judges found that police acted deliberately or recklessly.¹³ Further issues arose with the Government subsequently attempting to legislate to suspend the effect of the Court’s decision on other surveillance operations.

⁶ Such as MP Jeanette Fitzsimons, co-leader of the Green Party, Peter Lewis “NZ Police under fire over ‘racist’ raids” ABC News (Australia, 19 October 2007) <http://www.abc.net.au/news/2007-10-19/nz-police-under-fire-over-racist-raids/703668> (accessed on 30.1.2013)

⁷ S 21, New Zealand Bill of Rights Act 1990. Andrew Geddis “Once upon a time in Te Urewera” (2011) Pundit <http://pundit.co.nz/content/once-upon-a-time-in-te-urewera> (accessed on 30.1.2013)

⁸ NZ Herald Staff ‘Secret Justice no justice at all’ *Herald on Sunday* (New Zealand, 11 September 2011) http://www.nzherald.co.nz/anti-terror-raids/news/article.cfm?c_id=1501470&objectid=10750877 (accessed on 30.1.2013)

⁹ Paul Buchanan ‘Postscript on Operation 8’ (2007) *Scoop* on <http://www.scoop.co.nz/stories/HL0711/S00312.htm> (accessed on 30.1.2013)

¹⁰ NZPA ‘Siege leaves community in fear- Maori MP’ *Stuff.co.nz* (New Zealand, 15 October 2007) <http://www.stuff.co.nz/31721>.

¹¹ Paul Buchanan ‘Postscript on Operation 8’ (2007) *Scoop* <http://www.scoop.co.nz/stories/HL0711/S00312.htm> (access on 30.1.2013)

¹² Dean Knight “Covert video surveillance and the (c) overt erosion of the Rule of Law” (2011) *Elephants and the Law* <http://www.laws179.co.nz/2011/09/covert-video-surveillance-and-covert.html> (accessed on 30.1.2013)

¹³ *Hamed v R* [2011] NZSC 101 per Tipping J at [233]

3.9 The HRF recommends that the Committee condemns the 'Operation 8' raids in the strongest terms and that the Committee recommends to the Government that it implements fully the forthcoming recommendations of the Independent Police Conduct Authority.

4. Police use of Tasers (paragraph 114 - 116 in the government report)

Disproportionate use of Tasers against the Maori and Pacific communities - breach of CERD Articles 2 and 5

4.1 Following comments made by the HRF on the draft state report, the government has included three paragraphs on the use of Tasers. Unfortunately, these do not address the concerns we have in relation to the use of Tasers which the (UN) Human Rights Committee has addressed in calling on the Government to "relinquish" Tasers or, if they remained, to ensure they were only used when greater or lethal force was justified¹⁴.

4.2 Although the government claims that the Police have stringent guidelines in relation to the use of Tasers, these were developed only after vocal concerns were expressed by civil society, including the HRF.

4.3 There have been some positive developments. Following the controversy over the introduction of the Tasers, the Police formed a Use of Force Community Reference Group with a number of prominent community members. This Committee is working on issues wider than just Taser use, especially in relation to ensuring that changes in the availability of other tactical options, including firearms (NZ Police are not routinely armed) are evidence-based. The Group was recently invited by the Police to an Australasian conference on Tasers. The HRF appreciates this increased transparency, but remains concerned at several aspects of Taser use, including in relation to use on people with mental health issues and, relevant to the Convention, the statistic in the government report indicating that Tasers are used on the Pacific community at a rate twice that of Pakeha ("Europeans").

5. Education for children unlawfully in New Zealand (paragraph 152 - 153 in the government report)

Education for children of over-stayers and non-access to high education - breach of CERD Articles 2 and 5

5.1 In paragraph 152 and 153 of its official report, the government makes some incorrect and confusing statements regarding education for children unlawfully in New Zealand. In particular, it fails to make the distinction between children of refugee or protection status claimants, child victims of human trafficking and the children of over-stayers.

¹⁴ <http://www.3news.co.nz/Taser-use-in-NZ-condemned-by-UN/tabid/419/articleID/148525/Default.aspx#ixzz2JVyziORR>

5.2 In paragraph 152, the government states: “Although enrolment of a child unlawfully in New Zealand in compulsory education does not place any immigration obligations on that child or that child’s parents, the Immigration Act requires all foreign nationals unlawfully in New Zealand to leave”. The government appears to be saying that a child unlawfully in New Zealand can go to school but should at the same time leave the country. The two actions are mutually exclusive.

5.3 In the same paragraph, the government also states that “Immigration New Zealand encourages all foreign nationals unlawfully in New Zealand to come forward and discuss their situation”. In practice, according to some immigration practitioners, foreign nationals without visas are arrested and served with a deportation order when they turn up at an immigration office.

5.4 Under paragraph U10-special categories of the Immigration New Zealand Operation Manual, student visas can only be granted to children of refugee or protection status claimants and child victims of people trafficking. No visa can be granted to children of overstayers. As a consequence, although there are consistent reports documenting that in practice schools are enrolling children who do not have a visa, this is still at the discretion of the school principal.

5.5 According to the Operational Manual issued by Immigration New Zealand, children of asylum seekers (and those seeking complementary protection) have access to free primary and secondary school education.¹⁵ This ensures compliance with the ICESCR. However, unlike quota refugees, tertiary students who are asylum seekers (or protection applicants) do not have access to subsidised fees until they become residents. As a result, these asylum seekers are disadvantaged in their efforts to receive a higher level education, owing to these high tuition fees, while their cases are being determined (this can be a lengthy process). Moreover, even after the grant of the refugee status, tertiary education cannot be accessed until residence is granted. This process can take a year or more.

5.6 We believe that children of over-stayers should not be held responsible for their parents’ immigration situation and should be granted access to schools. We therefore suggest that the government includes children of over-stayers with a visa process on its way as a third category of children who could obtain a visa. We also consider that access to higher level education should be facilitated similarly.

Issues not mentioned in the government report:

6. Deep sea oil exploration- breach of CERD Articles 2 and 5

6.1 The 18th, 19th and 20th consolidated report of the New Zealand Government to the CERD fails to mention a significant area of concern which has been affecting indigenous rights in New Zealand: the Government’s decision to issue a permit to Brazilian oil giant Petrobras for deep sea oil exploration without consultation with the local affected indigenous tribe – Te Whanau-a-Apanui.

¹⁵ *Immigration New Zealand Operational Manual*, above n 16, at [U10.1.1]

6.2 The Government's decision to issue a permit to Brazilian oil giant Petrobras International to carry out offshore drilling in the Raukumara Basin in April/May 2011 breached indigenous rights and the Treaty of Waitangi/te Tiriti o Waitangi ("the Treaty"). It raised concerns of racial discrimination, both in relation to property rights and through Treaty breaches. It risked severe environmental damage, which would harm the spiritual, economic and cultural interests of tangata whenua (the indigenous people) on much of the North and East coasts of New Zealand.

6.3 The HRF is particularly concerned about the lack of consultation with local iwi. This breached Articles 19 and 32 of the UNDRIP which the Government agreed to support in 2010. It also ignores the recommendations made by the Special Rapporteur on the Rights of Indigenous People in 2011 that "New Zealand should also ensure that consultations with Māori on matters affecting them are applied consistently and in accordance with relevant international standards and traditional Māori decision-making procedures"¹⁶. Te Whanau-a-Apanui indicated that the tribe did not support the offshore drilling and took legal action against it.¹⁷

6.4 In issuing the permit, the Government breached important Treaty principles such as good faith and partnership between the Crown and Maori. Good faith requires consultation on major issues.¹⁸ The failure to consult had severe continuing implications for race relations in New Zealand. Treaty breaches discriminate against Maori. Legislation in New Zealand should aim to comply with the Treaty, or involve consultation with Maori and consideration of Treaty principles.¹⁹ Courts presume legislation is meant to comply with the Treaty and where relevant take the Treaty into account even where there is no statutory mention of it. The decision also breached legislative references to the Treaty of Waitangi, such as Article 4 of the Crown Minerals Act 1991. In this context, the lack of consultation with affected iwi was particularly grave.

6.5 Offshore drilling could seriously have harmed Maori customary and statutory fishing rights, such as those allocated to iwi in settlement of breaches of Treaty of Waitangi.²⁰ If an oil spill had occurred, it could have caused huge detriment to Maori spiritual, cultural, social and economic interests in a large area of the East and North

¹⁶ James Anya, Report of the Special Rapporteur on the Rights of Indigenous Peoples, The situation of Maori People in New Zealand at the Human Rights Council, Eighteenth session, 17.2.2011 on <http://www.converge.org.nz/pma/unsrnz11.pdf> (accessed on 31.1.2013)

¹⁷ "Why Petrobras has no right(s) to drill for deep sea oil off the East Cape" 19 September 2011. <http://www.greenpeace.org/new-zealand/en/news/blog/why-petrobras-has-no-rights-to-drill-for-deep/blog/36880/> (accessed 30.1.2013)

¹⁸ *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 at 152

¹⁹ Legislation Advisory Committee. *Guidelines on Process and Content of Legislation*. "Principles of the Treaty of Waitangi" http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_5.html (accessed on 30.1.2013)

²⁰ Maori Fisheries Act 2004

coasts and it would have harmed their statutorily-provided fishing quota allocations.²¹ This would also affect future potential interests such as the new species quota allocated automatically to Maori. The mana of local Maori groups would be adversely affected, as would the cultural obligation of kaitiakitanga²² Maori have for the area.²³ The decision put at risk many taonga ('treasures') which are protected by Article 2 of the Treaty.

The Government failed to take these relevant issues into account when issuing the permit. Because of its effect on race relations and indigenous rights, the issue should have been addressed in the report.

6.6 On 19 September 2011, Greenpeace and Te Whānau-ā-Apanui filed a judicial review in the High Court in Auckland challenging the Government's decision to issue Petrobras with a permit for deep sea oil exploration off the East Cape. This is the first time an oil permit has been challenged in the New Zealand courts on both environmental and Treaty of Waitangi grounds. *Inter alia*, Greenpeace and Te Whānau-ā-Apanui argued that the Government acted unlawfully by failing to have proper regard to the principles of the Treaty of Waitangi, including consulting with Te Whānau-ā-Apanui, and failing to give consideration to the iwi's fishing rights and customary title claims to the area.

In a press release about the judicial review action, tribal leader Rikirangi Gage of Te Whānau-ā-Apanui stated²⁴:

"We have a sacred responsibility to protect and preserve our natural environment and the Government has a sacred duty under the Treaty of Waitangi to work alongside us to achieve this. The Government is continuing to fail both these obligations and is putting both the marine environment and our communities at risk." "Rather than pander to the interests of foreign oil companies, the Government must face up to the fact that the burning of fossil fuels is one of the major contributors to global climate change and that we must all join together as a nation to protect our children's future."

6.7 Petrobras has since decided to hand back its exploration licence claiming it was not commercially profitable²⁵. However, the HRF believes, as does Greenpeace²⁶,

²¹ Maori Fisheries Act 2004. Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Dr Pita Sharples said such an oil spill would 'kill the coastal economy' which iwi rely on. Auckland University Law School guest lecture, 7 October 2011.

²² See s 7(a), Resource Management Act 1991

²³ Waitangi Tribunal. Wai 262, 2.314. 6 July 2006. [http://www.waitangi-tribunal.govt.nz/doclibrary/public/wai262/SOI/Wai262SOI\(doc2.314\)small.pdf](http://www.waitangi-tribunal.govt.nz/doclibrary/public/wai262/SOI/Wai262SOI(doc2.314)small.pdf)

²⁴ Greenpeace to legally challenge deep sea oil permits, Monday, 19 September 2011, 11:29 am Press Release: Greenpeace New Zealand see <http://www.scoop.co.nz/stories/PO1109/S00260/greenpeace-to-legally-challenge-deep-sea-oil-permits.htm> (accessed 30.1.2013)

²⁵ The National Business Review, <http://www.nbr.co.nz/article/brazilian-oil-giant-petrobras-dumps-nz-exploration-permits-bd-133431> (accessed 30.1.2013)

that the court challenge from Greenpeace and Te Whānau-ā-Apanui and other resistance played a role in the decision of Petrobras to withdraw from Raukumara Basin.

6.8 Unfortunately, Prime Minister John Key recently said that Petrobras may return to New Zealand for exploration in the future and Finance Minister Bill English stated that other exploration companies will take an interest in New Zealand²⁷. It is therefore crucial that the Committee reviews the issue to ensure that the New Zealand government learns from the Petrobras experience and at the very least ensures adequate consultation with local Iwi and, where necessary, prevents oil exploitation in zones where Maori will be adversely affected.

7. Not mentioned in the periodic report: Maori disproportionate suicide rate and self-harm hospitalisation - breach of CERD Articles 2 and 5

7.1 The Government report fails, in its Maori health section, (paragraph 162-175), to address the disproportionately high rate of suicides amongst Maori.

7.2 The total (ie overall) number of suicides reported for 2010 was 522 (rate / 100,000=11.5).²⁸ This is the third lowest rate since 2000, and is lower than every other year back to 1985. However, the consistent drop in the overall suicide rate since the mid-90s is much more pronounced for non-Maori than for Maori. The report by the Ministry of Health, "Suicide Facts 2010, Deaths and intentional self-harm hospitalisations" published in August 2012 has some very concerning statistics.

7.3 The figures show that Maori still have the highest rate of suicide in New Zealand. In 2010, the total Māori suicide rate was 16.0 per 100,000 population, 53.6% higher than the non-Māori rate (10.4).²⁹

7.4 Statistics for the youth population are alarming too. In 2010, the Māori youth rate (35.3 per 100,000 population) was more than 2.5 times higher than the equivalent rate for non-Māori (13.4 per 100,000). Youth rates for non-Māori seem to be trending downwards over time, but Māori rates are showing no such trend³⁰.

²⁶ Greenpeace, <http://www.greenpeace.org/new-zealand/en/press/Rainbow-Warrior-crew-celebrate-Petrobras-exit-with-Te-Whanau-a-Apanui/> (accessed 30.1.2013)

²⁷ Radio New Zealand, <http://www.radionz.co.nz/news/national/122566/petrobras-pulls-out-of-nz-oil-exploration> (accessed on 30.1.2013)

²⁸ NZ Ministry of Health, "Suicide Facts 2010, Deaths and intentional self-harm hospitalisations", <http://www.health.govt.nz/publication/suicide-facts-deaths-and-intentional-self-harm-hospitalisations-2010> (accessed on 31.1.2013)

²⁹ *Idem*

³⁰ *Idem*

7.5 Statistics for self harm hospitalisations also show a wide disparity between Māori and non-Māori. There were 83.6 Māori intentional self-harm hospitalisations per 100,000 Māori population in 2010, compared to 33.5 per 100,000 Pacific population and 64.8 per 100,000 non-Māori, non-Pacific population. The most common age group for Māori males to be hospitalised for intentional self-harm was 25–29 years, and for Māori females it was 15–19 years. Intentional self-harm hospitalisation rates for non-Māori dropped markedly between 1996 and 2010 (by 28.7%), while Māori rates increased by 13.7%³¹.

7.6 There are several causes of the disproportionately high suicide rate and the general sense of psychological discontent amongst Maori. Racism, or fears of it, is accepted as a significant factor in the high suicide rate amongst Maori youth.³² Mental Health Foundation chief executive Judi Clements has also pointed to unemployment and the consequentially high risk of depression as a likely factor.³³ According to research on the risk and prevention factors of suicide among Maori youth, feeling disconnected from Pakeha culture stops Maori from accessing support systems, welfare and good education.³⁴ The report also lists other suicide risk factors, such as anxiety, psychiatric conditions, family violence and sexual abuse.³⁵

7.7 A number of possible solutions to the issue have been suggested: the role of a family, the feeling of belonging and being cared about are vital for Maori youth in particular.³⁶ Another necessary step is eradicating the negative stereotypes of Maori, and the value they add to the New Zealand community.³⁷ Furthermore, Mental Health Foundation chief executive Judi Clements says the whānau (family group) should talk about suicide and whakapapa (lineage) with depressed members of the community. This might help the affected people to find strength and meaning as well as giving them a sense of acceptance and feeling that they're not alone in the world³⁸. Having iwi or hapu getting strategies in place to address broader issues such as drug and alcohol use and sexual abuse will also help to attack the root cause of the problem.³⁹

³¹ *Idem*

³² <http://www.stuff.co.nz/sunday-news/latest-edition/4947196/Why-our-kids-are-dying> (accessed on 31.1.2013)

³³ <http://www.stuff.co.nz/sunday-news/latest-edition/4947196/Why-our-kids-are-dying> (accessed on 31.1.2013)

³⁴ *Idem*

³⁵ *Idem*

³⁶ <http://www.stuff.co.nz/sunday-news/latest-edition/4947196/Why-our-kids-are-dying> (accessed on 31.1.2013)

³⁷ *Idem*

³⁸ <http://www.radionz.co.nz/news/te-manu-korihi/126492/maori-culture-in-the-prevention-of-maori-suicide> (accessed on 31.1.2013)

³⁹ <http://www.stuff.co.nz/sunday-news/latest-edition/4947196/Why-our-kids-are-dying> (accessed on 31.1.2013)

7.8 All these important elements require urgent government attention. The HRF raised these issues in response to the draft report, but the report still contains no reference to them.

The Foundation recommends that the Committee:

1. In relation to 'Operation 8', condemns the 'Operation 8' raids in the strongest terms and recommends to the Government that it implements fully the forthcoming recommendations of the Independent Police Conduct Authority.

2. In relation to Tasers, welcomes the increased transparency, particularly in relation to the establishment of the Police Use of Force Community Reference Group, but expresses concern at several aspects of Taser use, including in relation to use on people with mental health issues and that Tasers are used on the Pacific community at a rate twice that of Pakeha ("Europeans").

3. In relation to education of the children of overstayers, recommends that the government includes children of over-stayers with a visa process on its way as a third category of children who could obtain a visa and facilitates access to higher level education in a similar way.

4. In relation to the Petrobras affair, recommends that, at the very least, there be adequate consultation with local Iwi and, where necessary, oil exploitation is not permitted in zones where Maori will be adversely affected.

5. In relation to the high level of suicide and self-harming rates among Maori, recommends that the government address the issue as a matter of urgency.