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Comments on the draft government Universal Periodic Review report

Thank you for the opportunity to comment on the draft government report for New Zealand's second Universal Periodic Report. Our comments, mainly focussed on issues around the Treaty of Waitangi and indigenous peoples' rights[1], are listed under headings below and cross-referenced to the relevant paragraphs of the draft report.

- **Overall tone of the report**

One of the most striking features of the report is the lack of specific detail in some areas, and a reliance on generalisations such as: "The Government acknowledges these concerns and is committed to finding ways to overcome the challenges identified" (paragraph 6); "To the extent possible, New Zealand courts will interpret domestic legislation consistently with international obligations" (paragraph 12); "New Zealand is committed to withdrawing or narrowing the small number of reservations it maintains to human rights treaties, where it becomes possible to do so" (paragraph 15); "The Government recognises the importance of an individual complaints procedure, particularly in relation to issues as serious as racial discrimination" (paragraph 19); "[the government] recognises the need to consider the full range of human rights impacts of the earthquake in its on-going response and decisions on the rebuild" (paragraph 26); and "The Government recognises the importance of involving disabled persons' organisations in the on-going development of new policy on disability issues" (paragraph 70).

It would be useful if the report included exactly what will be done about whatever it is being acknowledged or recognised. Similarly, where the word "possible" is used, it would be helpful if an explanation of why there is a limitation on what is possible - for example, in relation to the interpretation of international human rights obligations, and narrowing the number of reservations to human rights treaties - is provided.

- **Consultation with civil society**

In paragraph 3, the draft report states that NZ has "engaged in regular consultation with civil society since the first review". According to our records, there was one post-review

consultation round in late-February / early-March 2011 organised by the Ministry of Justice, and one consultation round organised by the Ministry of Foreign Affairs and Trade prior to the drafting of the government's second UPR report - two consultation rounds hardly qualify as "regular" consultation.

Furthermore, there has been no apparent attempt to specifically consult with hapu and iwi on the outcome of the first UPR, nor the preparation of the report for the second. We note in paragraph 5 that " [g]iven New Zealand's constitutional relationships with the Cook Islands, Niue and Tokelau, efforts were made to engage ... those governments (as stakeholders)", yet despite the reference in the draft report to the Treaty as "a founding document" and it being part of the constitutional framework, there is no explanation of why the constitutional relationship with hapu and iwi was not accorded the same respect.

The inclusion in the draft report of some of the major themes raised during the civil society consultation earlier this year is a positive development.

- **Lack of constitutional protection for human rights**

While there is a brief reference to parliamentary sovereignty in paragraph 12 ("the NZBORA and other subject-specific legislation do not directly limit Parliament's legislative powers"), it would be useful if the report included more information about the lack of protection for the Treaty of Waitangi and human rights from Acts of Parliament. The human rights treaty monitoring bodies regularly raise concerns about the overall lack of constitutional protection for the Treaty and human rights, and about specific legislation which breaches either or both.

While paragraph 12 of the draft report refers to the Section 7 provision of the NZ Bill of Rights Act (NZBoRA) requiring the Attorney-General to alert Parliament to any provision in any Bill that appears to be inconsistent with the NZBoRA, such legislation is regularly enacted regardless. Similarly, the Cabinet manual provision referred to in paragraph 28 has had little discernible effect in preventing the enactment of legislation that breaches the NZBoRA and other legally binding human rights obligations, and it would be helpful to include these points in the report.

With regard to the UPR recommendation that the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) should be integrated into domestic legislation, and related recommendations, the paragraphs from 11 to 13 do not directly address why the rights articulated in the ICESCR are not specifically included in, for example, the NZBoRA.

- **Lack of constitutional protection for the Treaty of Waitangi**

In addition to the points raised in the section above, we are concerned that the draft report does not refer to the lack of constitutional protection for the Treaty of Waitangi.

We note that the opening paragraph of the 'Constitutional and legislative framework' section refers to the Treaty of Waitangi "as a founding document of modern government in New Zealand". However, the draft report fails to mention that the Treaty cannot be legally

enforced unless it is incorporated into domestic legislation, therefore the rights and guarantees it contains are not well protected. In practice, the Treaty is often referred to and praised as an example of partnership but it has little weight beyond the rhetoric. Even the use of the term "partnership" (for example, in paragraph 6 and B1) in relation to the Treaty is illustrative of this - treaties are between parties, not partners. Further, the report does not make reference to the fact that the government will not discuss the guarantee of the continuance of tino rangatiratanga in the Treaty, thereby denying hapu and iwi the right of self-determination.

In addition, there is no reference to what could be more accurately described as “the founding document”, the 1835 He Wakaputanga o te Rangatiratanga o Nu Tirene (The Declaration of Independence of New Zealand) by which Maori sovereignty over Aotearoa New Zealand was recognised by the British Crown and others.

We note that the draft report responds to the UPR recommendations around entrenching the Treaty of Waitangi as a constitutional norm by referring to the government’s Consideration of Constitutional Issues process. It would therefore be useful if the report provides an explanation of why the government considers this a matter to be decided by public discussion, rather than by negotiation with hapu and iwi as would be standard practice among the parties to a Treaty.

We note that paragraph 9 refers to “the future of the Maori seats in parliament, and how Maori electoral participation could be improved”. It would be helpful if the report clarified that this does not reflect the constitutional relationship as laid out in the Treaty of Waitangi and, in a majoritarian parliamentary system, does not give Maori decision-making powers over matters that affect them and their individual and collective rights.

There is no reference in the draft report to the minimum international law standard required of states with regard to indigenous peoples, that is, the requirement of obtaining their free, prior and informed consent in relation to matters affecting their rights and interests, including lands and resources. We note that the section on the Marine and Coastal Area (Takutai Moana) Act 2011 - paragraphs 35 to 38 - refers to “extensive dialogue with Maori” but does not mention that hapu and iwi were overwhelmingly opposed to the legislation; nor are there references to other legislation that has been enacted in the face of opposition from hapu and iwi, for example, the State-Owned Enterprises Amendment Bill 2012. Furthermore, there is no reference to the failure to respect the right of free, prior and informed consent in relation to government policy and practice around, as one example, the granting of exploration, mining and drilling permits to extractive industries.

It would be helpful if the report could include a statement on the government’s position on free, prior and informed consent.

- **Settlement of historic Treaty of Waitangi breaches**

We are concerned about the focus in paragraphs 39 to 43 for a number of reasons, two in particular. Firstly, those paragraphs give the impression that the Treaty of Waitangi is about an economic relationship, rather than political and constitutional relationships.

Secondly, they fail to mention that the Treaty settlements policy and process are determined wholly by the government of the day, meaning that one party to the Treaty, and the party principally responsible for the breaches of the Treaty, is also the arbiter of the fairness of the measures to provide redress for historic injustices against hapu and iwi. We note that paragraph 39 states that the government is "seeking to negotiate settlements that are timely, fair and durable", but the inequitable treatment of hapu and iwi - for example, some settlements have relativity clauses whereas others do not, and the government decides who it will negotiate with, which has resulted in claims for redress by some hapu and iwi being denied - in effect result in the settlements process, intended to resolve historical Treaty breaches, creating contemporary Treaty breaches.

It would be useful if the report could refer to some of these issues.

- **Article 14 declaration**

Paragraph 19 covering the government's decision not to make an Article 14 declaration under the International Convention on the Elimination of all Forms of Racial Discrimination gives the impression that this decision was based in part on consultation with civil society. Our clear impression from discussion with Ministry of Justice officials at the time of the consultation, was that civil society was strongly in favour of an Article 14 declaration. We therefore suggest that the report accurately reflects that the government's decision was made in that context.

The statement that there are sufficient domestic remedies to deal with issues of racial discrimination does not adequately explain the government's decision. In any event, the logical conclusion from successive Concluding Observations of the Committee on the Elimination of Racial Discrimination, and their 2005 decision on the foreshore and seabed legislation, is that there are not sufficient domestic remedies in place.

- **Recommendations of treaty bodies**

We note that the list of recommendations of treaty monitoring bodies under active consideration (paragraph 22) does not include the 2012 recommendations of the Committee on Economic, Social and Cultural Rights and suggest an explanation be provided as to why they are not being actively considered.

Thank you for your attention to our comments.

[1] Based on the Joint NGO submission to the Universal Periodic Review of New Zealand: Indigenous Peoples' Rights and the Treaty of Waitangi, submitted jointly by the Aotearoa Indigenous Rights Trust and Peace Movement Aotearoa, fifteen other organisations, and supported by seven other organisations, 17 June 2013