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Sent by email to UPR@mfat.govt.nz

Submission on the Draft New Zealand National Report for Public Consultation

This feedback is submitted jointly by the Aotearoa Indigenous Rights Trust, Peace Movement Aotearoa, Christian World Service, INA (Maori, Indigenous & South Pacific) HIV/AIDS Foundation, Maori Party, Network Waitangi Otautahi, Pacific Centre for Participatory Democracy (a project of Te Ora Hou Aotearoa Inc.), Pax Christi Aotearoa New Zealand, Quaker Treaty Relationships Group, Tamaki Treaty Workers, Tauiwi Solutions, Treaty Tribes Coalition, Wellington Treaty Educators Network, and the Women's International League for Peace and Freedom (Aotearoa).

We appreciate this opportunity to provide feedback on New Zealand's draft report to the Universal Periodic Review (UPR), and your attention to our comments. For clarification of any of the points below, or further information, please contact Aotearoa Indigenous Rights Trust, email aotearoaindigenousrightstrust@gmail.com and Peace Movement Aotearoa, email pma@xtra.co.nz

Our comments are focused on indigenous people's rights and the Treaty of Waitangi, and should be read together with our submission to the UPR which was filed last November with the Office of the High Commissioner for Human Rights. We attach a copy for your information. For ease of reference, below we have used the headings and paragraph numbering in the draft state report.

Introduction

Paragraph 2 makes reference to the Treaty of Waitangi (the Treaty) "of 1840 which was the treaty between the Government and the indigenous Maori tribes". This is historically inaccurate as in 1840 it was "the indigenous Maori tribes" who were the sovereign entities, and thus collectively are the only entity which could be described as "the government" at the time. The Treaty was signed with a foreign government, Britain.

This paragraph also refers to New Zealand aspiring to forming a national partnership with indigenous people by way of the Treaty, which is described as New Zealand's founding document, and part of New Zealand's constitutional framework. The report fails to mention that the Treaty, whilst referred to in such glowing terms, 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" 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 refuses to discuss the guarantee of the continuance of tino rangatiratanga in the Treaty, thereby denying Maori 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 (Declaration of Independence of New Zealand) by which tribal sovereignty over Aotearoa New Zealand was recognised by the British Crown and others.

Paragraph 6 refers to New Zealand continuing "to take an active and constructive role in the evolution of international rights standards and norms". This does not reflect the experience of Maori interactions with the government during the working groups of the UN Declaration on the Rights of Indigenous Peoples (the Declaration). New Zealand did take an active role in the negotiations on the Declaration but it could in no way be described as "constructive", especially in the final 5 years of the process. The UPR report should reflect this. We refer to this more fully in our comments in the section on the Declaration below.

1. Methodology and Consultation Process

Paragraph 2 states that the report has been brought to the attention of interested Maori. This does not equate even to consultation, nor could it be seen in any sense as the practical fulfillment of the "partnership" mentioned in the report introduction. At the public consultation meeting on the draft state report in Wellington on 2 March 2009, when questioned on the degree of consultation with hapu and iwi Maori, the Ministry of Foreign Affairs and Trade (MFAT) representative said that some might be on the email list to which the notice of the public meetings were sent. MFAT arranged only two meetings (in Christchurch and Rotorua) to discuss the draft state UPR report specifically with Maori. There has clearly been no attempt to

undertake a comprehensive national consultation process with hapu and iwi on this; nor on other international issues impacting on Maori, such as the Declaration.

We note the reference in paragraph 2 to consultation with the governments of the Cook Islands, Niue and Tokelau because of "New Zealand's special constitutional relationship" with them. Given the frequent references in the draft UPR report to the Treaty as "a founding document" and it being part of the "constitutional framework", it would be useful to include an explanation in the report of why the special constitutional relationship with hapu and iwi was not accorded the same respect.

2. Background of Country

2.1 Constitutional, Political and Legal Structure

Paragraph 1 refers to New Zealand's "unwritten constitution" increasingly reflecting regard for the Treaty - yet there is no reference to the Treaty in the list of key elements of the constitution.

Paragraph 2 refers to the "fundamental tenet" of the separation of powers - "the legislature, executive and judiciary must be kept separate from each other to provide checks and balances within the system". This is a contradiction with the reference in paragraph 6 to parliamentary supremacy (and in practice). Further comment on this point is provided in the section on 2.6 below.

Paragraph 7 refers to the Maori seats having been established to "give Maori a direct say in parliament", and that there are now eighteen Maori MPs in parliament. The report should also say that this does not reflect the constitutional relationship as laid out in the Treaty and, that in a majoritarian parliamentary system, this does not give Maori decision-making powers over matters that affect them and their individual and collective rights as required by international law.

2.2 Relationships with the Cook Islands, Niue and Tokelau

As mentioned above, an explanation of the different treatment for the governments of the Cook Islands, Niue and Tokelau, as compared with hapu and iwi Maori with whom New Zealand also has a constitutional relationship would be helpful.

2.4 International Commitments

This section should also list the human rights instruments that New Zealand has not ratified (for example, ILO 169), the reservations and exclusions on ratified instruments (including, for example, the failure to make a declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination), and those instruments which the government refuses to support (for example, the Declaration) - together with an explanation of the government's position on each. The government's position on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights should also be included.

2.6 Human Rights Legislation

Paragraph 2 states that human rights are protected in New Zealand even though there is no supreme law. This statement is incorrect because there are no legal constraints on parliament. For example, the legislature is not legally bound to comply with domestic human rights law, nor with international instruments. The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 are not enforceable as against the legislature.

If legislation is found to breach either Act, the *only* domestic remedy is a declaration that it is inconsistent with the right to freedom from discrimination. There is no requirement for the government to modify or repeal discriminatory legislation. This highly irregular situation of a state deciding that politicians are best placed to decide whether or not human rights obligations will be met is not only a breach of the international obligations on New Zealand to provide effective remedies for human rights violations, but while it continues, is also a breach of the obligation to take measures to prevent a recurrence of any human rights violation. The report should explain this accurately, and provide an explanation of how the government intends to remedy this unfortunate situation.

Paragraph 3 states that the New Zealand Bill of Rights Act "is designed to affirm, protect and promote human rights and fundamental freedoms" - it should also state that the rights in the International Covenant on Economic, Social and Cultural Rights are not included in the Act, and that it only partially incorporates the rights in the International Covenant on Civil and Political Rights.

2.7 Remedies, Compensation and Rehabilitation

The first paragraph gives the false impression that there are effective remedies for those whose rights have been breached by an Act, or action, of parliament and this should be amended as per our comments above.

3. Promotion and Protection of Human Rights

3.1 Treaty of Waitangi and the Rights of Indigenous People

The reference in paragraph 1 to New Zealand having "one of the largest and most dynamic indigenous people" is patronising, grammatically incorrect, and has the misleading implication that this is somehow to the credit of the government. The Maori population is made up of a number of iwi and hapu, namely indigenous peoples. The sentence should be removed.

The statement that the Treaty "aimed to protect the rights and properties of Maori" is inaccurate. It would be more accurate to say that it gave some rights to British settlers and a limited form of governance to the British Crown, while guaranteeing the continuance of all the rights and freedoms which Maori enjoyed at the time of signing.

Paragraph 3 refers to the Waitangi Tribunal (the Tribunal). There is no mention that the recommendations of the Tribunal are not binding and are frequently dismissed and criticised by the government. Further, the report does not mention that the courts have refused to review the fairness of Treaty settlements reached between iwi and hapu and the Crown on the basis that they are political matters.

The Tribunal's workload is huge and its budget is meagre. The need for increased financial resources along with providing binding powers to the Tribunal are outstanding issues that have been raised by Maori as well as by international bodies.[1]

- **Treaty settlement process**

We are concerned about the focus on Treaty settlements in section 3.1 for two reasons. Firstly, it gives the impression that the Treaty is about an economic relationship, rather than political and constitutional relationships.

Secondly, it fails to mention that the Treaty settlements policy and process are determined wholly by the government, 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 Maori.

[1] See for example CERD/C/NZL/CO/17 para 18 and E/CN.4/2006/78/Add.3, paras. 89-90.

The report also fails to mention that a number of aspects of the Treaty settlement policies are manifestly unfair for example:

- the government will not address the issue of Maori self-government/self-determination/tino rangatiratanga;

- the government will not address the issue of Maori interests in oil and gas;

- the government will only settle with "large natural groupings" and, as a result, often overlooks the specific claims of less numerous peoples;

- the government determines the entity it will negotiate with;

- the settlements are unjust as between iwi and hapu: some tribes receive much less in financial and cultural terms than others - for example, some will receive an additional 17c of every New Zealand dollar that the government spends over $1NZD billion on Treaty settlements, others will not;

- the amount allocated to Treaty settlements is miserly, being approximately 2% of the original claims. This is particularly poor when compared to the value of what has been taken from hapu and iwi; and

- the requirement that all settlements include a clause stating it fully and finally extinguishes the claim.

- **Foreshore and Seabed Act 2004**

The report does not mention that the Foreshore and Seabed Act 2004 (FSA) is an example of legislation that breaches both the Treaty, and the human rights of Maori as defined in domestic legislation and international instruments. To name a few examples of how the FSA breaches human rights:

- fee-simple titles in the foreshore and seabed were not extinguished, Maori titles were;

- a foreshore and seabed reserve, a possible option for redress, does not give Maori any proprietary rights in the area over which they have proven their territorial rights.

- if Maori choose to negotiate redress for the loss of their territorial customary rights, the government is under no obligation to provide redress. There will be no independent and impartial oversight of the negotiating process. Indeed, Maori will be in a very poor negotiating position; and

- the FSA legislatively overrode Maori access to the courts to prove their territorial and non-territorial interests in the foreshore and seabed under Te Ture Whenua Maori Act 1993 and common law aboriginal title.

The government has relied on the current negotiations with hapu and iwi to impliedly mitigate the severity of the FSA's discriminatory consequences. However, the negotiations precede the FSA and were entered into in circumstances where hapu and iwi were confronted with no real choice but to negotiate with the Crown. In any event, the existence of negotiations does not negate the basic injustice of the legislation, denial of due process, and continued absence of guaranteed compensation. In addition, the report fails to mention that only a small proportion of hapu and iwi have entered into negotiations or used the provisions of the FSA - most have not. There is no mention of the ongoing widespread Maori opposition to the FSA, nor that many non-Maori share their concerns about it.

The report refers to a number of agreements having already been reached. This is incorrect. The Crown is *currently* negotiating with Ngati Pahauwera, Te Runanga o Ngati Porou, Te Runanga o Te Whanau, Ngati Porou ki Hauraki Trust and Te Runanga o Te Rarawa. Whilst some agreements may have been reached in principle, no legal rights have yet been realised as an outcome of these negotiations.

The result of the negotiations with Ngati Porou is the Nga Rohe Moana o Nga Hapu o Ngati Porou Bill. This Bill creates opportunities for nga hapu o Ngati Porou to be involved in existing decision making processes as well as the recognition of their relationship to the foreshore and seabed. The overall outcome is the creation of some rights of a far lesser nature than ownership. The result of these negotiations within the confines of the FSA is a continual and ongoing breach of Maori human rights.

While the report refers to the Committee on the Elimination of Racial Discrimination's (CERD) 2007 Concluding Observations, it does not refer to its 2004 decision on the FSA, and the government's unfavourable reaction to the decision as well as its derogatory remarks about CERD. This should be included, along with fact that the Waitangi Tribunal described the (then proposed) FSA as fundamentally flawed, the Human Rights Commission said it had serious human rights implications, and the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People recommended it should be repealed or amended.

We welcome the recently announced Foreshore and Seabed Review and recommend that the report indicate a willingness on behalf of the government to assess the outcomes of that review in the light of the New Zealand's international human rights obligations.

- **Social inequalities**

The content and tone of paragraph 7 is patronising and insulting in a number of ways. In particular, there is an implication of Maori dependency on the government, which acts not only to deny the ability of Maori to identify and develop their own aspirations and development, but also to obscure the ongoing process of colonisation, government policy and practice which has deprived them of the resources to do this.

- **UN Declaration on the Rights of Indigenous Peoples**

The report does not reflect the attitude or the actions of the New Zealand government during the drafting of the Declaration. The government persistently and consistently opposed the passage of the Declaration during the negotiations conducted at the UN, especially during the final 5 years of negotiations.

New Zealand has relentlessly attempted to weaken indigenous peoples' land rights norms to standards that are less than those developed by the human rights treaty monitoring bodies, in particular by CERD and the provisions of its General Comment 23: Indigenous Peoples. For example, New Zealand sought: to delete any reference to indigenous peoples' material relationship with their traditional lands; to weaken references to indigenous peoples' land ownership under indigenous peoples' customary law; to protect non-indigenous peoples' land rights relative to indigenous peoples' land rights; and to avoid reasonable obligations to provide restitution and compensation for illegitimate takings of indigenous peoples' traditional lands and resources.

New Zealand's position on the Declaration has been criticised by states, indigenous peoples and human rights non-governmental organisations here and around the world.

New Zealand has persistently and consistently refused to consult properly with Maori on their position on the Declaration, and did not consult with Maori about its position at all since before 2002. Officials in government delegations to negotiations on the Declaration have been hostile to Maori participating in those meetings.

We note that the report states that a number of civil society groups and Maori remain critical of the government's stance - it is not sufficient to merely state this without also stating how this will be resolved.

- **Operation Eight**

The report does not refer in this section to Operation Eight, the so-called "anti-terrorism" raids carried out in October 2007. Information about the raids should be included here because Maori communities and families were treated very differently from others during Operation Eight. For example, Tuhoe communities in the Ruatoki valley were locked down and blockaded by armed and masked police. A number of human rights violations occurred at that time, including: the targeting of individuals with laser gun sights; the separation of children from their parents; illegal detention; the photographing of children and adults who were not under arrest nor subsequently charged with any offence; the search of homes and seizure of property belonging to people who were not under arrest nor subsequently charged with any offence; and later, comments by politicians, including the Prime Minister, who referred to the existence of "terrorist camps" and made other assertions as though they were facts rather than matters yet to be proved or disproved in court. Those affected have yet to receive an explanation of why the raids took place in the way they did, and this is an ongoing concern to Maori.

The government should also mention that the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, the Special Rapporteur on Counter-terrorism and Human Rights and the Special Representative of the UN Secretary General expressed their concern to the government about these raids and their impact, particularly, on Maori.

4. Identification of Achievements, Best Practices, Challenges and Constraints

4.1.8. Open Invitation to all UN Special Procedures Mandate Holders

We are surprised that the visit of the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People is referred to in the section on achievements and best practices, given the response of politicians to the Special Rapporteur's Report at the time. Members of the last Government described it as disappointing, unbalanced and narrow,

among other things; and those in the current Government, for example, the then National Party Maori Affairs spokesperson, said it should be shown the respect it deserved and thrown in the dustbin. These responses should be included in the UPR report in the interests of accuracy, and to enable Human Rights Council members to assess whether or not this was in fact an achievement.

4.2.2 Human Rights and Countering Terrorism

We suggest that rather than the focus on Operation 8, this section be replaced with a consideration of the real human rights challenges when it comes to countering terrorism, such as the requirement on all UN member states to ensure they do not themselves breach human rights in their counter terrorism efforts. This is a requirement that New Zealand has yet to meet, and not only with respect to the rights of Maori.

In any event, the paragraph about training camps etc should be removed as that is an allegation yet to be established in court; similarly the reference to the Secretary-General's Special Representative expressing appreciation "for the government's detailed response" should be removed as that is standard UN speak and does not add anything to this section.

- **Other human rights challenges that could be included**

There are other human rights challenges that could usefully be added to this section, for example, the decision to issue police officers with taser guns, and what measures will be taken to ensure that they are not used disproportionately against Maori individuals (as happened during the year of the trial taser deployment).

5. Key Human Rights Priorities

The report refers to a key human right priority as “realising Maori potential and continuing the momentum on achieving fair, just and practical settlements of historical claims under the Treaty of Waitangi”. We refer to our views above regarding the unfairness of the current Treaty settlement process. We also note that in order to realise Maori potential, the state must acknowledge that the Treaty is about a constitutional relationship based on the continuance of tino rangatiratanga and desist from its efforts to diminish it. If the government is truly committed to improving the rights of Maori, self determination must be addressed.