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HUMAN RIGHTS FOUNDATION OF NEW ZEALAND  
TUĀPAPA TIKA TANGATA O AOTEAROA

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## **Comments on the government's Universal Periodic Review draft report**

19 September 2013

## 1. Introduction

1.1 This report by the Human Rights Foundation of Aotearoa New Zealand (the HRF) comments on the government's Universal Periodic Review draft national report (the "draft national report") released in late August 2013 by the Ministry of Foreign Affairs and Trade (MFAT).

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 The HRF coordinated NGOs preparing stakeholder reports for the UPR and developed a Stakeholder's Coalition Report and a Stakeholder's Over-Arching Report both of which are available on the HRF website:  
[www.humanrightsfoundation.wordpress.com](http://www.humanrightsfoundation.wordpress.com)

We appreciate this valuable opportunity to present our views to the Ministry.

## 2. Executive Summary

2.1 The draft report covers many issues and the HRF report addresses only a few particular issues of concern.

2.2 To facilitate comparison of this report with the government's draft national report, we have addressed issues in the same order as they appear in that report.

2.3 We comment on six issues we consider insufficiently or inaccurately dealt with in the draft national report:

- Follow up and consultation with civil society since the first review (paragraph 2 of the draft national report);
- interpretation of domestic legislation (paragraph 12 of the draft national report);
- human rights policy measures (paragraph 14 of the draft national report);
- parental leave (paragraph 61 of the draft national report);
- domestic violence (paragraph 84-94 of the draft national report);
- migrants, refugees and asylum seekers (paragraph 104 of the draft national report).

2.4. Bearing in mind Human Rights Council guidelines that national reports should *inter alia* address not only follow-up on recommendations from the first UPR cycle, but also report on the human rights situation on the ground, we also comment on 7 other issues not addressed in the government report:

- juvenile detention facilities;
- the Parental Leave and Employment Protection (Six Months Paid Leave) Amendment Bill;
- off-shore detention centres;
- education access for children of asylum seekers;
- access to health for non-resident children;
- the Government Communications Security Bill 2013, and
- Operation 8 and excessive use of Police powers.

### **3. Follow up and consultation with civil society since the first review (paragraph 2 of the government's UPR draft report)**

3.1 During the first UPR, the government agreed<sup>1</sup> to have regular consultation with civil society to follow-up on the recommendations made to it during the Review.

3.2 The draft report states that the government has engaged in regular consultation with civil society. In fact, in Auckland where the largest number of NGOs are based, only one meeting for civil society was organised by MFAT – a two hour meeting attended by over 20 NGOs at the Human Rights Commission. Three quarters of the time was taken up by the HRC and MFAT leaving very little time for input from the civil society representatives there. The consultation was not *regular* nor was it *adequate*.

3.3 We suggest that for the upcoming UPR the government commit to meet more regularly (at least once a year) with civil society actors to discuss follow-up of UPR recommendations.

### **4. Interpretation of domestic legislation (paragraph 12 of the draft national report)**

4.1 The draft report states that there exists a broad range of mechanisms to protect fundamental human rights in New Zealand in accordance with international standards.

4.2 But New Zealand has no overarching government strategy to ensure that human rights are known, understood and taken into consideration by all policy makers. Also, the New Zealand Cabinet Manual expressly requires Ministers to advise the Cabinet of any international human rights obligations affected by proposed legislation.<sup>2</sup> However, this requirement is constantly overlooked.

4.3 The HRF suggests that the government, in consultation with the civil society, considers the establishment of a Parliamentary Select Committee for Human Rights and the development of mechanisms and human rights indicators, including a Government National Human Rights Action Plan, to independently monitor human

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<sup>1</sup> Recommendation made by the Netherlands. See the UPR Progress Chart by the MoJ (July 2011) on <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/universal-periodic-review/upr-documents-relating-to-new-zealand-1/upr-documents-relating-to-new-zealand>

<sup>2</sup> Section 7.60 of the *Cabinet Manual*, Cabinet Office, 2008.

rights and UPR recommendations. Given that this proposal has been aired publicly on more than one occasion, we consider the draft national report should comment on it.

## **5. Human Rights Policy Measures (paragraph 14 of the draft national report)**

5.1 Following a recommendation from South Africa that the government adopt the national human rights action plan, the government noted that it considered that the most suitable approach was for government departments to consider the appropriateness of implementing the NZ Human Rights Commission's 2005 Action Plan (NZHRC first Action Plan) priorities for action as part of normal business<sup>3</sup>.

5.2 The draft report states that the government has a "robust" framework for the promotion and protection of human rights and such framework includes the implementation of the priorities for action from the NZHRC first Action Plan. In fact, the government did not adopt the NZHRC first Action Plan and has not implemented some of its priorities.

5.3 The draft report also mentions the preparation of the NZHRC second Action Plan in close collaboration with the MoJ and other agencies, without acknowledging that it declined to adopt the first one, as recommended during the UPR.

5.4 The HRF believes that simply referring to the fact that the NZ HRC is preparing a second Action Plan having declined to adopt the first plan does not meet Human Rights Council expectations that the national report should be open and honest. The report should acknowledge that the government has not adopted the Action Plan. If the national report is to mention that a second plan is under preparation, it should indicate its approach to that plan.

## **6. Parental Leave (paragraph 61 of the draft national report)**

6.1 While the government agreed with the goal of reinforcing the rights of women in society, in particular in the labour market and in government and other leadership roles<sup>4</sup>, New Zealand is in the least generous category (those with less than four months of earnings-related leave) of three possible categories of paid parental leave.<sup>5</sup>

6.2 An opposition MP introduced a private members bill seeking to extend paid parental leave to 26 weeks<sup>6</sup>. Submissions on this bill were heard in early 2013 and the Bill is now awaiting further consideration by the House of Representatives.

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<sup>3</sup> See recommendation 22 (by South Africa) in the UPR Progress Chart by the MoJ (July 2011) on <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/universal-periodic-review/upr-documents-relating-to-new-zealand-1/upr-documents-relating-to-new-zealand>

<sup>4</sup> See recommendation 41 (by Canada) in the UPR Progress Chart by the MoJ (July 2011) on <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/universal-periodic-review/upr-documents-relating-to-new-zealand-1/upr-documents-relating-to-new-zealand>

<sup>5</sup> "Paid Parental Leave – Issues for Today's Economic Times" (Issues Paper 04)

<sup>6</sup> The Parental Leave and Employment Protection (Six Months' Paid Leave) Amendment Bill.

6.3 The draft report mentions only that officials were asked to review the Parental Leave and Employment Protection Act 1987. The HRF considers the government should make clear its position on the Parental Leave and Employment Protection (Six Months' Paid Leave) Amendment Bill in the national report..

## **7. Domestic violence (paragraph 84-94 of the government's UPR draft report)**

7.1 Although the government reports extensively (in comparison with other matters considered in the report) on domestic violence, it fails to acknowledge that policies to address the issue have been ineffectual and sometimes counter-productive. New Zealand is yet to formally recognise violence against women as a gross breach of women's and children's human rights and that women and children have a right to safety and to be free from gender-based violence, coercive control, and exposure to domestic and sexual violence. This should be addressed in the draft national report.

7.2 The HRF believes that the government should develop an evidence-based approach to domestic violence. All government agencies need to be involved in a fully-funded and comprehensive strategy that is developed in collaboration with domestic and sexual violence service providers and users and recognises the gendered nature of domestic violence. It should also ensure that all those who work with abused women and children are required to complete a certificated national training programme.

## **8. Migrants, refugees and asylum seekers (paragraph 104 of the draft national report)**

8.1 The government report fails to address a few important refugees and asylum seekers related issues such as off-shore detention centres, education access for children of asylum seekers and access to health for non-resident children.

8.2 In February 2013, New Zealand made an arrangement with Australia by which New Zealand will resettle 150 of Australia's refugees per year, in exchange for the ability to process any mass arrivals to New Zealand in Australia's offshore processing centres. The 150 refugees will form part of the New Zealand UNHCR quota of 750. The arrangement fails to meet New Zealand's international obligations under the 1951 Refugee Convention as it denies asylum seekers the right to claim protection in New Zealand and excludes them from New Zealand's justice system.

8.3 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.

8.4 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.<sup>7</sup> This ensures compliance

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<sup>7</sup> *Immigration New Zealand Operational Manual*, above n 16, at [U10.1.1]

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.

8.5 Although New Zealand reported to the Committee on the Rights of the Child that it will withdraw its reservation to UNCROC about being able to "*distinguish as it considers appropriate in its law and practice between persons according to the nature of their authority to be in New Zealand including but not limited to their entitlement to benefits and other protections described in the Convention*" this has not happened<sup>8</sup>. There are concerns that non-resident children are missing out on important health care even though some limited free coverage is available<sup>9</sup>. New Zealand has agreed to ICESCR, CEDAW, CERD and CRPD which all include the right to health without such a reservation. The rights that non-resident children enjoy under these treaties are therefore being routinely violated.

8.7 Although the draft report mentions the Immigration (Mass Arrivals) Amendment Act 2013, it fails to acknowledge that the Act is in violation of New Zealand international human rights obligations. The Act made radical changes in the name of "enhancing New Zealand's ability to deter people-smuggling to New Zealand" and to "enable the effective and efficient management of a mass arrival of illegal migrants".<sup>10</sup> The Act establishes a definition of 'mass arrival group of 30 people'<sup>11</sup> and imposes upon this group mandatory detention, a restriction on judicial review and a limitation on family reunification rights, among other human rights breaches.<sup>12</sup> The HRF wishes that the government would address this issue in its report and act upon it.

8.8 In addition, the HRF suggests that to improve coherence of the report, the government should address all migrants, refugees and asylum seekers related issues under one single heading. That means grouping paragraph 82-83-104-109-110 and 111.

## **9. Human Rights and counter-terrorism (paragraph 105 of the government's UPR draft report)**

9.1 The draft national report does not mention the Government Communications Security Act (GCSB Act) introduced and passed under urgency without adequate opportunity for submission and in the face of substantial opposition.

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<sup>8</sup> NZ's third and fourth report to UNCRC at <http://www.msd.govt.nz/documents/what-we-can-do/children-and-young-people/uncroc-in-nz-3rd-and-4th-periodic-report-full-doc.pdf> especially para 1.6

<sup>9</sup> [http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.NZL.CO.3-4\\_en.pdf](http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.NZL.CO.3-4_en.pdf) - see Para 8 and 9

<sup>10</sup> At s. 1.

<sup>11</sup> Each of whom must fall within one or more of the following classes of persons (as listed in s 115(1)(a)-(f) of the Immigration Act). See Immigration Amendment Act 2013 s 5.

<sup>12</sup> S.12.

9.2 Under the 2013 Bill, the Government Communications Security Bureau is to be given the authority to access the 'information infrastructures (eg IT systems) and intercept the private communications of both NZ citizens and permanent residents in potentially a wide range of circumstances. The prohibition referred to above will apply only to the Bureau's foreign intelligence' function. This is of real concern to many civil society members who fear that the Bill will breach New Zealanders' right to privacy and their right not to be free from unwanted surveillance<sup>13</sup>.

9.3 The HRF considers that to provide a fuller picture of terrorism and security issues, the GCSB legislation ought to be included in the draft national report.

## **10. Equality and Discrimination (Operation 8 - not addressed in the report)**

10.1 The Independent Police Conduct Authority (IPCA) investigated multiple complaints about the Police "Operation 8" which began in late 2005 and ended on 15 October 2007 with the coordinated execution of 41 search warrants throughout the country. Road blocks were established at Ruatoki and Taneatua in the heart of the indigenous Maori community and there were arrests and detentions mostly of Maori. Subsequently, most charges arising from Operation 8 were dismissed by the Courts with only 4 defendants out of 17 being convicted of lesser charges.

10.2 The nature of complaints received by the IPCA ranged from the impact on the community of Armed Offender Squad officers at a road block to ill-treatment by Police during the execution of search warrants at properties. The Authority investigated Police actions at 11 properties, found that Police actions were unlawful, unjustified and unreasonable and made a number of recommendations to the Police.<sup>14</sup>

10.3 These events also raised justified concerns about Police abuse of powers in the so-called "war on terror" and in our society more generally<sup>15</sup>.

10.4 The HRF considers that given the extensive coverage of criminal justice matters in the draft national report it should also refer to the ICPC's report and state whether or not the recommendations made by the ICPC will be implemented.

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<sup>13</sup> The individual's right to privacy is a fundamental human right recognised in the United Nations International Covenant on Civil and Political Rights 1966 (Article 17); which the NZ Government ratified in 1978. The High Court has recently held that the tort of intrusion upon seclusion is a part of NZ law (*C v Holland* [2012] NZHC 2155).

<sup>14</sup>The IPCA Report Operation 8 is available at: <http://www.ipca.govt.nz/Site/media/2013/2013-May-22-Operation-Eight.aspx>

<sup>15</sup>References to "Operation 8" in other Human Rights Reports: CERD 20<sup>th</sup> Report Concluding Observations para 113; ICCPR<sup>TH</sup> Report Concluding Observations para 18, Follow Up Add1 para 46/49, Follow Up Add 2 para 14/18 CAT list of Issues 2012 para 7