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## **Universal Periodic Review of New Zealand**

**18th session of the Working Group on the UPR, January 2014**

### **Indigenous Peoples Rights and the Treaty of Waitangi**

Individual NGO report by the

Ngati Huarere ki Whangapoua Trust

Supported by:

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Te Runanga o Te Taou

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## **Introduction;**

1. This report has been prepared by the Ngati Huarere ki Whangapoua Trust (the Trust) for the purpose of informing the Universal Periodic Review of the New Zealand government. The Trust is an organisation that was duly established and mandated in 1998 by the Ngati Huarere people to act on behalf of the tribe in all matters pertaining to it. This includes the settlement of its historical Waitangi Treaty (the Treaty) grievances with the New Zealand (NZ) government.
2. The Trust is grateful for the opportunity to present our experiences as Treaty claimants. These include our exclusion from the negotiation of our Treaty claim, forced assimilation with other tribes who will receive and control our redress, territory and waters and the loss of our identity as a distinct people.
3. Other tribes in similar circumstances who endorse this reports content as being an accurate reflection of what is occurring under the control of the NZ government are listed on the cover page.

## **Executive summary;**

4. The NZ government is perpetrating injustices upon Māori in the settlement of historic Treaty grievances by its failure and/or refusal to fulfil its obligations under international human rights instruments. The government is discriminatory in its settlement process, which is causing irreversible prejudice to some claimants thereby creating a subclass of Māori, which will likely result in the cultural genocide of some tribes.
5. This report will cover:
  - (1) How the NZ government views its obligations under international human rights instruments.
  - (2) Whether the NZ government’s legislation, policies and practices align with international human rights instruments.
  - (3) Discrimination in the Treaty settlement process.
  - (4) The NZ government treating Māori as a lower class of citizen.
  - (5) How NZ government is allowing the Treaty settlement process to be hijacked.

## **How the New Zealand government views its obligations under international Human Rights instruments.**

6. In March of 2012 the Trust, under the name of Mangakahia Whanau, made a request to the United Nations to intervene in the Treaty settlement process (*Attachment 1*). It alleges the NZ government is violating its obligations under Articles 1, 2, 3, 4, 8, 18, 19, 26, 27, 28, 33, 37, 38, 39 and 40 the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and its obligations under Articles 1, 2, 5 and 6 of the United Nations Convention on the Elimination of all forms of Racial Discrimination (CERD) and also New Zealand human rights law. These breaches will result in tribes being dispossessed of their ancestral land, resources, taonga (treasure), mana (authority, integrity), tikanga (Māori custom) and most importantly their identity.
7. The Minister for Treaty settlements, Chris Finlayson, responded to the Trusts request to the UN by stating; “*while the Declaration carries significant moral force, it is not legally binding in New Zealand*” (attachment 2). This flagrant attitude exposes the NZ government’s true commitment to its obligations under international human rights instruments. It is also an admission by the government that it is acting immorally when it does not fulfil its obligations under the Declaration where it is reasonably able to do so.

8. Whilst the Declaration is not legally binding it is considered authoritative and the Trust does not consider the “non binding” status diminishes the government’s responsibility to fulfil its obligations under the Declaration. Only in extreme circumstance and with strong justification should this responsibility be waived. In any event it would not be onerous on the government to ensure its Treaty settlement processes align with international human rights instruments.
9. **Recommendation:** the NZ government appears unwilling to fulfil its obligations under various human rights instruments it is a party to. Therefore to demonstrate its commitment to the protection of these human rights the government should move immediately to sign the relevant optional protocols recognising the competency of the appropriate UN Committees overseeing these human rights instruments.

**Do the New Zealand government’s legislation, policies and practices align with international human rights instruments?**

10. The NZ government stated to the Trust in 2012 that; “*its policy on historical Treaty settlements is not affected by New Zealand’s statement of support for the Declaration on the Rights of Indigenous People*” (Attachment 2). Obviously the government is not intending to give effect to its human rights obligations through its Treaty settlement process.
11. The NZ government is simply creating a façade. It responded to recommendation 16 by the Czech Republic in the 2009 Universal Periodic Review:

*“New Zealand **agrees** that all international human rights obligations should be appropriately implemented in domestic legislation, policies and practices.”*

This response is in direct conflict with the NZ government’s position on Treaty settlement policy and highlights its blatant disregard for implementing UPR recommendations it has agreed to. The Trusts experiences confirm that the government is not implementing international human rights obligations in domestic legislation, policies and practices.

12. It is difficult to comprehend how the most important interaction between Māori and the government in 173 years to resolve historic human rights injustice does not take into consideration the basic rights affirmed through UNDRIP. This demonstrates again the attitude the NZ government has of ‘only fulfilling its Human Rights obligations where it is convenient and beneficial for itself to do so’.
13. The NZ government’s sense of justice appears to be totally unreasonable. The Trust has an email (Attachment 3) dated 02/02/12 by the NZ government which states the Crowns policy on Treaty negotiations is;

*“...that Hauraki iwi and Collective together have the mandate to settle the Hauraki claims and that it is not necessary for every person with a WAI claim to agree to that mandate or agree that their claim is settled for it to be settled.”*

14. This demonstrates that according to government policy a claimant may disapprove of a negotiator but that negotiator may still negotiate their claim and the claimant may reject the settlement but the claim will still be regarded as settled. This is an outrageous situation that removes any input from aggrieved claimants. Currently the government is forcing some claimants to have their claim negotiated and settled by others and to achieve this the government is redefining peoples identities against their will. The NZ government is essentially saying “I not you, will determine who you are”. It is orchestrated to allow the government to acquire a cheap, timely tick in the “settled” box.

It is allowing claimant “A” to determine the outcome for claimant “B” without claimant “B’s” free, prior and informed consent.

15. In November of 2012 the Trust made a complaint to the New Zealand Human Rights Commission (NZHRC) alleging the Treaty settlement process is largely discriminatory and fails to meet the standards of Natural Justice (*Attachment 4*). The Trust believes the government is treating tribes, in substantially the same circumstances, quite differently. The Initial verbal response from the NZHRC is that the Human Rights Act definition of racial discrimination does not prohibit discrimination based on genealogy (whakapapa) within a race. This clearly does not align with CERD, which prohibits discrimination based on dissent. Therefore our experience is that New Zealand legislation falls short of reflecting international Human Rights standards.

**16. Recommendation:** the NZ government agreed to recommendation 16 by the Czech Republic in the 2009 but has done nothing to progress its implementation. Therefore the government should immediately begin aligning all domestic legislation, policy and practices with international human rights instruments, particularly those afforded to indigenous peoples.

### **Discrimination by the New Zealand government in Waitangi Treaty settlement negotiations.**

17. To hasten Treaty settlements, the NZ government has chosen to group claimant tribes in each region and negotiate with them collectively. For convenience the government is “picking winners” amongst these claimants and allowing them to claim the redress of other claimants by blocking their participation in negotiations and then forcing them to assimilate with tribes with whom they do not identify.

18. Here is an excerpt from page 12 of the Waitangi Tribunal’s Tamaki Makaurau Report that demonstrates how groups are marginalized within settlements:

*“Winners tend to be groups who, relative to other Maori groups, have already had successes. They are led by outstanding people like Sir Hugh Kawharu, they have good infrastructure (communication capability, sound accounting practices and good legal structures), and stable, committed membership. Arguably, though, those most in need of settlements – who may often be the very groups whose Treaty rights were least respected in the process of colonisation – are those who do not fulfil a ‘success’ profile. On the ‘picking winners’ basis, those groups will be last in the settlement queue. When the Crown targets for settlement the most high profile, effective group in a district, and leaves out the other tangata whenua groups, it reinforces the view that they matter less. When the Crown keeps doing it (in Auckland, Ngati Whatua o Orakei has now been chosen four times), that implication is even stronger. When the winners are picked out, they feel and act more like winners. This can leave the other tangata whenua groups in the district feeling like losers. They can feel that they have been relegated to a class of also-rans”.*

19. Claimants entered the settlement process in good faith and with a fair and reasonable expectation that the process would be equitable and that all claimants would be treated in substantially the same manner. It is disappointing therefore that the NZ government has facilitated these injustices through a patently discriminate process, instigated and enforced under the guise of expediency and cost efficiencies. If the government adhered to its obligations as a signatory to international human rights instruments these injustices would not exist.

20. Here is an excerpt from the New Zealand Herald 5<sup>th</sup> February 2011 on the collective process that demonstrates this issue is spread throughout New Zealand;

*“The minister (Chris Finlayson) was responding to concerns by a number of iwi that the fast-track process is having disastrous consequences - mainly because, in its haste to settle, the Government is signing deals with iwi groupings to the exclusion of legitimate tribes and hapu. Iwi expressing misgivings are spread far and wide - from Ngati Kahu in the far north to Te Atiawa at the top of the South Island.....”*

*“But while the new fast-track, regional approach is working for some, elsewhere there are signs the Crown is reverting to its old ways - accepting artificial groupings and arbitrarily excluding iwi or forcing them to join groups to which they don't belong.”*

21. United Nations Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, is well aware of this situation and in his report titled *“The situation of Maori people in New Zealand”* dated the 31<sup>st</sup> May 2011, he states:

*“Furthermore, with respect to Treaty settlement negotiations, the Government should make every effort to involve all groups that have an interest in the issues under consideration.”*

22. In our experience the NZ government has made no effort to follow this recommendation and as a result is creating new grievances and causing discord amongst Māori. For its own convenience the government is recognising and funding only those claimants it wishes to deal with. Other claimants are left to the mercy of the recognised claimants. This is allowing some “recognised” claimants to gain control of the redress of “non-recognised” claimants and rewrite history that conflicts with the facts and has the aim or effect of the ethnocide of some tribes. These tribes are being forced to assimilate with tribes they do not identify with and who in some cases are their traditional enemies. The current process allows the “winners” to conquer with the pen where they failed with the spear.
23. The government is extinguishing these disadvantaged claimants access to justice by refusing funding to any claimant intending to challenge its actions. This is denying these claimants their right to an “effective remedy”. Many injustices are left unchallenged due to the significant cost of litigation.
24. The NZ government arrogantly disregards decisions by the Waitangi Tribunal and Māori Land Court. Recently the Trust applied to the Māori Land Court for a determination on representation of the Trust in settlement negotiations. The government requested the Court strike out the application on the basis that the Trust was essentially wasting the Courts time as the Court's decision would not be binding on the government and they would take little, if any notice of it.
- 25. Recommendation:** to ensure durable settlements, an independent body to the NZ government, such as the Waitangi Tribunal or the Māori Land Court should be given binding powers to make determinations on disputes over the representation of claimants. The government should fund these disputes as it is largely creating them by “picking winners”.

### **The New Zealand government views Māori as lower class citizens.**

26. The average Treaty settlement in New Zealand equates to around 2% of what Māori have had taken. On the 7 May 2012 Ms Jane Fletcher, Deputy Director New Zealand Office of Treaty Settlements stated to the UN Permanent Forum on Indigenous Issues;

*“The New Zealand government is only able to embark on this process through the generosity of the indigenous peoples”*. This infers that Māori are willing to give up 98% of what has been taken from them. This is not the case. For example, the government owns the Department of Conversation estates. These significant areas of land were mostly stolen from Māori yet they do not form part of any redress. The government claims they are for the enjoyment of all New Zealanders. If that is the case then all New Zealanders should compensate Māori for these lands. Māori are essentially being forced to provide these reserves for the benefit of everyone. New Zealand Courts will not make determinations on whether Treaty settlements are fair compensation as they claim the decision is a political one.

27. Māori are blackmailed into accepting unreasonable settlements by threats of their claims being relegated to the back of the queue and revisited years in the future, if there is any money left. To date the government have spent approximately \$1billion on Treaty settlements and say the money's nearly gone. In contrast, in 2010 it bailed out South Canterbury Finance with \$1.6billion to prevent the average New Zealand investor loosing money, but is accepting of Māori loosing 98% of their wealth base.
- 28. Recommendation:** Settlements should be reviewed through an independent inquiry by an appropriate entity or person such as the Special Rapporteur on Indigenous Rights, to determine if Waitangi Treaty settlements are fair compensation for the injustices suffered by Māori and also if these settlements are being accepted under duress.

**The New Zealand government is allowing the Treaty settlement process to be hijacked.**

29. Any reasonable mind would conclude that Treaty settlements are to compensate Māori for grievances that occurred as a result of the NZ government failing in its obligations under the Treaty of Waitangi. What is actually occurring is something very different. The government is allowing “winners” to go back many generations, long before the Treaty and colonisation, and raise issues that are totally irrelevant to the Treaty.
30. The government is allowing the settlement process to be hijacked to accommodate historic grievances between tribes rather than dealing explicitly with grievances against the government. The government is taking advantage of this inter-tribal conflict to suit its own ends. It is applying the philosophy of “divide and conquer”. For example, Treaty settlements place little emphasis on who had ownership of land when it was taken. Often in settlements land is given or shared with tribes who claim they have an interest in it when in fact they have no legitimate claim to it. The government will often accept these unsubstantiated claims as fact if the result is a cheaper overall settlement. This results in the government creating contemporary grievances while attempting to settle historic ones.
31. The government has chosen to allocate settlements by population as opposed to who suffered the loss. This is creating new injustices, as it does not take into consideration ownership of the resources when they were confiscated. It is redistributing redress according to a tribe's size rather than their legitimate claim to those resources.
- 32. Recommendation:** An independent body such as the Waitangi Tribunal or the Māori Land Court should be given binding powers to determine the interests of various parties in assets under Treaty claim. The Waitangi Tribunal has some power in this regard over Crown Forest land, however the Trust considers the scope is far too narrow.