Peace Movement Aotearoa

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NGO information for the Human Rights Committee, 105th session: for consideration when compiling the List of Issues Prior to Reporting on New Zealand

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Overview

1. This report provides an outline of some issues of concern with regard to the state party's compliance with the provisions of the International Covenant on Civil and Political Rights (the Covenant). Its purpose is to assist the Human Rights Committee (the Committee) with drawing up the List of Issues Prior to Reporting in advance of New Zealand's Sixth Periodic Report. There are eight main sections:

A. Information on Peace Movement Aotearoa;

B. The constitutional and legal framework (Article 2);

C. Indigenous Peoples' Rights (Articles 1, 26 and 27):

i. Foreshore and seabed legislation;

ii. Deep sea oil exploration, hydraulic fracturing (fracking) and mining;

iii. Privatisation of state owned assets;

iv. Local government and indigenous people' rights: Treaty of Waitangi Audit.

D. Rights of the Child: Child Poverty Action Group case (Articles 2, 24 and 26)

E. Social Security (Youth Support and Work Focus) Amendment Bill 2012 (Articles 2, 3, 24, 26)

F. Privatisation of prisons (Articles 2 and 10)

G. Deployment of electro-muscular disruption devices / tasers (Articles 6 and 7)

H. Developments in immigration policy and legislation (Article 13):

i. Immigration New Zealand directive;

ii. Immigration Amendment Bill 2012.

2. Thank you for this opportunity to provide information to the Country Report Task Force compiling the List of Issues Prior to Reporting on New Zealand.

A. Information on Peace Movement Aotearoa

3. Peace Movement Aotearoa is the national networking peace organisation, registered as an incorporated society in 1982. Our purpose is networking and providing information and resources on peace, social justice and human rights issues. Our membership and networks mainly comprise Pakeha (non-indigenous) organisations and individuals; and we currently have more than two thousand people (including representatives of more than one hundred peace, social justice, church, community, and human rights organisations) on our national mailing list.

4. Promoting the realisation of human rights is an essential aspect of our work because of the crucial role this has in creating and maintaining peaceful societies. In the context of Aotearoa New Zealand, our main focus in this regard is on support for indigenous peoples' rights - in part as a matter of basic justice, as the rights of indigenous peoples are particularly vulnerable where they are outnumbered by a majority and often ill-informed non-indigenous population as in Aotearoa New Zealand, and because this is a crucial area where the performance of successive governments has been, and continues to be, particularly flawed. Thus the Treaty of Waitangi, domestic human rights legislation, and the international human rights treaties to which New Zealand is a state party, and the linkages among these, are important to our work; and any breach or violation of them is of particular concern to us.

5. We have previously provided NGO reports to treaty monitoring bodies and Special Procedures as follows: to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in 2005[1]; to the Committee on the Elimination of Racial Discrimination in 2007[2]; jointly with the Aotearoa Indigenous Rights Trust and others, to the Human Rights Council for the Universal Periodic Review of New Zealand in 2008[3] and 2009[4]; to the Human Rights Committee in 2009[5] and 2010[6]; to the Committee on the Rights of the Child in 2010[7] and 2011[8]; and to the Committee on Economic, Social and Cultural Rights in 2011[9] and 2012[10].

B. The constitutional and legal framework (Article 2)

6. Since the Committee last considered the state party's constitutional and legal framework, there has been no progress towards better implementation of Covenant rights. The constitutional arrangements remain the same as described in the state party's replies to the Committee's List of Issues in 2010:

> *"Under New Zealand's present constitutional structure, it remains open to Parliament to legislate contrary to the Bill of Rights Act and the other legislative protections set out above and so to the Covenant."*[11]

7. In some respects however, the situation can be said to have worsened as the state party has been implementing its policy agenda by proposing and then enacting legislation in short time frames, with scant time for public consideration and submissions - two examples of this are provided below, the Mixed Ownership Model Bill 2012 (in section C. iii) and the Social Security (Youth Support and Work Focus) Amendment Bill 2012 (in section E.).

8. The state party has made increasing use of urgency to pass legislation - during the 49th parliament (December 2008 to October 2011), the House of Representatives was under urgency for 25% of the sitting time[12]; 300 Bills were enacted during 266 sitting days, and:

> *"More disquieting, 30 urgency motions allowed the Government to fast-track new laws and deny the public an effective say on their content. The Video Camera Surveillance (Temporary Measures) Bill was the most contentious recent example."*[13]

9. Furthermore, the increasing speed with which legislation is introduced then enacted has led to an erosion of the minimal protection provided by way of advice on the consistency of proposed legislation with the New Zealand Bill of Rights Act 1990 (NZBoRA). For example, the advice provided on the Social Security (Youth Support and Work Focus) Amendment Bill was on a draft of the legislation[14]; and the Mixed Ownership Model Bill, which clearly has human rights implications, was not examined for consistency with the NZBoRA.

10. Finally in this section, it should be noted that the state party appointed a Constitutional Advisory Panel to conduct a review of New Zealand's constitutional arrangements in 2011.[15] The Panel released its engagement strategy on 15 June 2012, and while the strategy importantly asks questions about the place of the Treaty of Waitangi (the Treaty) in the constitutional arrangements, human rights are not referred to at all in the document.[16]

C. Indigenous Peoples' Rights (Articles 1, 26 and 27)

11. As outlined in the information provided to the Committee in 2009 and 2010 by Peace Movement Aotearoa[17] and the Aotearoa Indigenous Rights Trust[18], the constitutional arrangements are especially problematic for Maori because their collective and individual rights guaranteed in the Treaty remain unprotected from Acts of parliament and actions of the Executive. The rights of Maori are particularly vulnerable as hapu and iwi are minority populations within a non-indigenous majority, and there is a long history of New Zealand governments enacting legislation that discriminates against Maori, which continues to the present day.

12. In particular, the state party's attitude towards the guarantee of the continuance of tino rangatiratanga (somewhat analogous to the right of self determination articulated in Article 1 of the two International Covenants, and further elaborated in the United Nations Declaration on the Rights of Indigenous Peoples) in the Treaty, and its failure to comply with the minimum international standard of obtaining the free, prior and informed consent of indigenous peoples in matters that affect their rights and interests, continues to negatively impact on Maori as outlined in the four examples provided in this section.

i. Foreshore and seabed legislation

13. As the Committee is aware, following the change of government in 2008, the state party announced a Ministerial Review of the Act. The Review Panel reported back in June 2009 and recommended repeal of the Act, and a longer conversation with Maori to find ways forward that respected the guarantees of the Treaty, as well as domestic human rights legislation and the international human rights instruments.

14. In response, in 2010, the state party issued a consultation document, 'Reviewing the Foreshore and Seabed Act 2004' and held public consultation meetings, including a limited number with Maori, on its proposals for replacement legislation.

15. It should be noted that despite hapu and iwi representatives clearly rejecting the government's proposals, on the grounds that the replacement legislation was not markedly different from the Act, the state party nevertheless introduced the legislation, the Marine and Coastal Area (Takutai Moana) Bill, in September 2010.

16. The replacement legislation retains most of the discriminatory aspects of the Foreshore and Seabed Act as it treats Maori property differently from that of others, limits Maori control and authority over their foreshore and seabed areas, and it also effectively extinguishes customary title - all concerns expressed by the Committee about the Foreshore and Seabed Act in 2010.[19]

17. Of the 72 submissions to the Select Committee considering the Bill that came from marae, hapu, iwi and other Maori organisations, only one supported the Bill.[20] In addition, the Hokotehi Moriori Trust, on behalf of the Moriori people of Rekohu (Chatham Islands), supported the Bill only in so far as it repealed the Foreshore and Seabed Act and removed Te Whaanga lagoon from the common coastal marine area.

18. Regardless of the fact that 71 out of the 72 submissions from marae, hapu, iwi and other Maori organisations did not support the Bill, it was enacted and entered into force in March 2011.

ii. Deep sea oil exploration, hydraulic fracturing (fracking) and mining

19. Another example of state party breaches of Articles 1 and 27 relates to the state party awarding the Brazilian oil company Petrobras a five-year exploration permit for oil and gas in the Raukumara Basin in June 2010.

20. The Raukumara Basin is a marine plain that extends 4 and 110 kilometres to the north-northeast of the East Coast of the North Island, located between the volcanically active Havre Trough to the west and the active boundary of the Pacific and Australian tectonic plates to the east. The permit covers 12,330 square kilometres.

21. A deep-sea oil survey ship, Orient Express, has been conducting seismic testing in the Raukumara Basin on behalf of Petrobras. The first two stages of exploration involve seismic surveying - firing compressed air from the surface to the seabed, and measuring the acoustic waves bouncing back to the sonar array trailing 10 kilometres behind the Orient Express. Seismic surveying can have an adverse impact on marine life, especially marine mammals. The surveying took place during the season of whale migration along the East Coast.

22. Local iwi, Te Whanau a Apanui and Ngati Porou, did not give their consent to the exploration permit being issued or to the seismic survey[21] which they are strongly opposed to:

> *This activity is being permitted in the rohe of Te Whanau a Apanui and Ngati Porou:*
>
> *a. Without our agreement or consent,*
>
> *b. In the face of strong opposition,*
>
> *c. Contrary to the acknowledged mana of our hapu,*
>
> *d. Contrary to agreements either entered into or being concluded with the Crown,*
>
> *e. Without assurances regarding environmental standards and protection,*

f. In breach of the Treaty of Waitangi, and the Declaration of the Rights of Indigenous Peoples, and

g. Which detrimentally affects the lives, livelihoods and survival of the communities of Te Whanau a Apanui and Ngati Porou.[22]

23. The permit includes permission for Petrobras to drill an exploratory well and the local iwi are also strongly opposed to the possibility of an exploration well being drilled off their coast. The Deepwater Horizon oil and gas spill in the Gulf of Mexico in 2010 - which threatened the economic and cultural survival of local indigenous communities[23] - was from an exploratory well at a depth of 1500 metres, whereas the proposed depth for drilling an exploratory well in the Raukumara Basin ranges from 1500 to 3000 metres. In addition, the Raukumara Basin sits on a major and active fault line, and there are frequent earthquakes in the area. It is therefore a particularly hazardous area in which to undertake any drilling activities.

24. When the seismic survey began, a flotilla of small boats travelled to the area to observe the Orient Explorer and to protest its presence; in response, the state party sent two navy warships and an air-force plane. On 23 April 2011, the skipper of the Te Whanau a Apanui tribal fishing boat San Pietro, was arrested at sea and detained on a navy vessel while fishing in Te Whanau a Apanui customary fishing grounds approximately 1.5 nautical miles away from the Orient Explorer. The arrest came the day after Maritime NZ withdrew the exclusion orders that police officers, assisted by the navy, had issued to boats in the vicinity of the Orient Explorer the previous week.

25. In September 2011, Te Whanau a Apanui applied to the High Court for a judicial review of the permit on the grounds that the state party:

- failed to properly consider the environmental impact of Petrobras' activities, as required by New Zealand's obligations under customary international law, the United Nations Convention on the Law of the Sea 1982 (UNCLOS), and the Convention for the Protection of Natural Resources and Environment of the South Pacific Region 1986 (the South Pacific Convention);
- failed to properly consider the potential effects on marine wildlife;
- failed to factor in the requirements of the Treaty of Waitangi, which should have included consulting with Te Whanau a Apanui; and
- failed to consider the iwi's fishing rights and customary title claims to the area.

26. In December 2011, the High Court approved the application for the judicial review, and it was heard on 5 and 6 June 2012[24] - the judge's decision has been reserved.

27. Concern about the possible impact of deep sea drilling was heightened in early October 2011 when the container ship MV Rena ran aground on the Astrolabe Reef, 22 kilometres from the entrance to the port of Tauranga in the Bay of Plenty on the East Coast of the North Island. The resulting environmental disaster from leaking oil and the contents of containers washed off the ship[25] not only heightened awareness of the costs of oil contamination, but also of the state party's unpreparedness for even a comparatively small marine oil spill - salvage vessels and equipment had to be brought from overseas.

28. The coastline, estuaries and seafood gathering areas of hapu and iwi in the Bay of Plenty,

including Te Whanau a Apanui, were seriously affected by the oil spill in particular. The threat to Ngati Porou's coastline prompted one of their leaders to describe the state party's assurances that the country is prepared to respond to marine oil spills as "fictitious myths".[26]

29. Beaches were closed while the oil washing ashore was removed, and while most re-opened five weeks after the grounding[27], there have been intermittent beach closures since due to subsequent oil leaks and hazards from containers washed off the wreck, including from rotting food and hazardous materials. A health warning in relation to shellfish is currently in place due to high levels of Paralytic Shellfish Poisons in the area.[28] Warnings of further issues with the wreck and the 685 containers remaining onboard are still being issued whenever bad weather threatens the area.[29] In January 2012, 16 coastal iwi affected by the Rena disaster called for a Royal Commission of Inquiry into the grounding.[30]

30. In November 2011, in its replies to the Committee on Economic, Social and Cultural Rights' List of Issues, the state party assured the Committee that it had consulted with hapu and iwi in the area affected by the Petrobras permit and that it is committed to effectively engaging with them on the management of minerals and petroleum.[31] These assurances are at odds with the facts relating to the Petrobras permit. In December 2011, Radio New Zealand reported that:

> *"Court documents obtained by Te Manu Korihi show the Government denies it unlawfully granted the permit. The papers show the legal team for the Minister of Energy and Resources say* ***there was no obligation to consult*** *with the iwi about the granting of the permit to the Brazilian company, Petrobras."*[32] [our emphasis]

31. Furthermore, it is clear that the free, prior and informed consent of Te Whanau a Apanui was not obtained in relation to the Petrobras permit - when asked that question in parliament in 4 May 2011, the Acting Minister of Energy and Resources replied "no".[33]

32. We note also that in its replies to that List of Issues, the state party pointed out that permits granted under the Crown Minerals Act 1991 do not address environmental effects and in that context refers to the Resource Management Act (RMA) as providing such assessment[34] - however, the RMA only covers activities as far as the edge of the territorial sea (12 nautical miles) and it is likely that any deep-sea oil drilling will take place beyond that limit.

33. In 2010, the Ministry of Economic Development stated that there is a lack of an environmental permitting regime in the exclusive economic zone, the area beyond the territorial sea.[35] In February 2012, the Parliamentary Commissioner for the Environment (PCE) told the Select Committee considering the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 that the legislation has some serious flaws which undermine its purpose of environmental protection[36], in part because of the clause which provides for a marine consent to be granted for an activity if *"the activity's contribution to New Zealand's economic development outweighs the activity's adverse effects on the environment"*.[37] The PCE's written submission pointed out:

> *"This test undermines clauses 10 through 13: 'Purpose', 'International obligations', 'Matters to take into account', and 'Information principles', because it sets out a single overriding criterion for making decisions. The EPA [Environmental Protection Authority] may set aside all other considerations and simply make decisions on this single criterion. This is a serious error."*[38]

34. It should be noted that the Raukumara Basin is not the only area where hapu and iwi are concerned about off-shore and on-shore oil exploration and drilling - in its enthusiastic support for the exploration industry and its aim to make New Zealand a net exporter of oil by 2030[39], the state party has issued permits similar to that awarded to Petrobras for areas covering most of New Zealand's coastline. According to the PCE, licences and permits granted in the last 10 years in relation only to petroleum deposits on and beneath the ocean floor include two permits for mining petroleum and 21 permits for exploring for petroleum.[40] The Ministry of Economic Development earlier this year announced:

> *" we have proposed 25 onshore and offshore blocks for competitive tender from April 2012. The proposed blocks for 2012 cover approximately 40,285 km2 of offshore seabed and approximately 5,704 km2 of land in Waikato, Taranaki, Tasman, the West Coast and Southland."*[41]

35. The Texas-based oil company Anadarko is currently undertaking exploratory drilling at depths of 1400 and 1600 metres off the Taranaki coast.[42] The PCE has pointed out that*: "It has recently been highlighted that New Zealand had only one government inspector for all of New Zealand's onshore and offshore oil and gas operations."*[43]

36. It should further be noted that hapu and iwi are similarly concerned about the impacts of proposed hydraulic fracturing (fracking) in their respective areas - for example, Te Whanau a Apanui has indicated their opposition to fracking in their territory[44], other East Coast iwi have expressed concern[45], as have Taranaki hapu[46].

37. The City Council of Christchurch, the city devastated by major earthquakes in 2010 and 2011, earlier this year asked the state party to impose a moratorium on fracking in Canterbury until an independent inquiry is carried out into its effects[47] - the City Council and wider community is understandably concerned about the risks of fracking near known and undetected fault lines and the associated earthquake risk.

38. The state party refused the request from the Christchurch City Council, with the Minister of Energy and Resources stating there is no need for a moratorium because:

> *"I am satisfied that hydraulic fracturing is an appropriately regulated activity in New Zealand and I am not aware of any reason to justify a moratorium on the activity because of either environmental damage or the risk of inducing earthquakes."*[48]

39. On 28 March 2012, the PCE announced that preliminary investigation had showed a substantive case for an official investigation into fracking and the PCE's office will conduct this over the next few months[49]. The state party has not put a moratorium in place pending the outcome of the investigation.

40. In addition, the state party has been inviting tenders for permits to explore for commercially viable metallic mineral deposits in different parts of the country[50], including in Northland where at least one iwi has stated it will not permit mineral exploration to take place on its land[51].

iii. Privatisation of state owned assets

41. Early this year, the state party confirmed it was preparing to remove four state-owned enterprises (SOEs) from the State-Owned Enterprises Act 1986 (SOE Act) in order to partially privatise them as part of its "mixed-ownership model" (51% state-owned, 49% privatised) policy. The first SOEs to be partially privatised are the energy companies Genesis Power, Meridian Energy, Mighty River Power, and Solid Energy New Zealand.

42. While there is a high level of public opposition to this, there is particular concern among Maori because the SOE Act is one of the few pieces of legislation that has a specific Treaty requirement (Section 9 *"Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi"*) and also provisions to protect existing and likely future claims relating to land currently in Crown ownership (Section 27A-D). The level of Maori concern greatly increased when it appeared that Section 9 of the SOE Act would not be included in the proposed new legislation.

43. In response, the state party announced a process of "consultation" with Maori on 27 January 2012, less than a fortnight before the first consultation hui (meeting) was held on 8 February. The consultation document was not available until 1 February, a week before the first hui. The deadline for written submissions was only twenty-one days after the consultation document was released. Ngati Kahungunu, the third largest iwi, was left off the initial consultation hui list.

44. The government's original intention to keep the clause relating to the Treaty out of the SOE sales legislation was publicly revealed on 2 February 2012, following the accidental uploading of a draft document to the Treasury website.[52] When the final consultation document became available, it did not invite comment on the desirability of the SOE partial privatisation, but only put forward three options: that the new legislation include a clause similar to Section 9 of the SOE Act, that it should have a more specific Treaty clause, or that it should have no Treaty clause at all.

45. Our written submission on this issue, included the following comments on the consultation process:

> *The repeated statements from various government politicians indicating that the decision to go ahead with the SOE privatisation has apparently already been made regardless of what is said during the consultation, illustrate it is clearly not even a proper consultation, let alone the negotiation that the Treaty requires.*
>
> *We note in this regard that Section 9 of the SOE Act requires the Crown to act consistently with the principles of the Treaty - such principles are said to include good faith and partnership, active protection, and a principle of redress. None of these have been met by this consultation process.*
>
> *In addition, the government has not met its obligations under international law with regard to the minimum standards of behaviour expected of states in their relationship with indigenous peoples ...*
>
> *Free, prior and informed consent requires the government to approach hapu and iwi with an open mind as to the possibilities on any decision that may affect their lands, resources, rights and interests - not with a pre-determined agenda where the underlying decision, privatisation of state owned assets, has already been made.* [53]

46. On 7 February 2012, while the "consultation" process was underway, the Maori Council and ten hapu lodged an urgent application with the Waitangi Tribunal[54] for a hearing into the SOE privatisation on the grounds that the Crown has breached the Treaty since 1840 by failing to recognise Maori control and rangatiratanga over fresh water and geothermal resources, and has expropriated these resources without Maori consent or compensation.

47. In early March, the state party tried to have the application dismissed[55], but on 28 March 2012, the Waitangi Tribunal agreed that the urgent hearing should go ahead. Among other things, the Waitangi Tribunal held that if the state party *"proceeds with its proposed asset sales without resolving these claims, the claimants are likely to suffer imminent, significant and irreversible prejudice."*[56]

48. Based on past experience, the state party will disregard whatever recommendations the Waitangi Tribunal makes if it does not agree with them - and the state party is in any event proceeding its SOE partial privatisation agenda without waiting for the outcome of the urgent hearing.

49. The state party introduced the privatisation legislation - the Mixed Ownership Model Bill 2012 - on 5 March 2012, and following its first reading on 8 March, the Bill was referred to the Finance and Expenditure Select Committee. There was an opportunity for public submissions to be made, and the Select Committee was required to report back to parliament by 16 July 2012. However, the Select Committee reported back to parliament six weeks early on 7 June 2012. It is widely perceived that this move was to have the legislation passed before sufficient signatures on a citizens-initiated referendum opposing the privatisation are collected.[57] The second reading of the Bill took place on 14 June 2012, and thirty one related Supplementary Order Papers (containing government and opposition party amendments that there will be no public input on) were released between 14 and 19 June 2012. It is anticipated that the Bill will be enacted within the next week.

50. While the Mixed Ownership Model Bill does include the provisions of Sections 27A-D of the SOE Act, and the SOE Act Section 9 clause *"Nothing in this Part shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)"*[58], the latter is followed by *"For the avoidance of doubt, subsection (1) does not apply to persons other than the Crown."*[59]

51. In the state party's information sheet on the new legislation, this addition is explained as follows:

> *"The Treaty is an agreement between the Crown and iwi. Therefore, it is not possible to bind non-Crown groups to Treaty provisions. Under the SOE Act, section 9 applies only to the Crown, and not to the SOEs themselves. Similarly, the Treaty clause in the Public Finance Act will apply to the Crown and not to the mixed ownership companies or minority shareholders."*[60]

52. This argument is based on faulty logic because if the state party is going to divest itself of responsibilities by giving up full control of state owned assets, then it needs to do so in a way that ensures Maori rights and interests under the Treaty are protected. Requiring third parties to act consistently with the Treaty would not make them parties to it.[61] Furthermore, if the state party is retaining 51% ownership of the companies created by the new legislation, then surely those companies must be subject to Treaty provisions.

53. It should be noted that there are other issues with the Mixed Ownership Model Bill - for example, the SOE Act included a social responsibility clause requiring every SOE to be: "an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so."[62] There is no social responsibility clause in the new legislation.

54. In addition, the new companies created by the Bill have been removed from the ambit of the Ombudsmen Act 1975 (which provides a mechanism for the investigation of complaints about administrative acts, decisions, recommendations and omissions of central and local government agencies, including SOEs, by an Ombudsman) and the Official Information Act 1982.

55. According to some reports, the Minister of Finance has acknowledged that the profits the government will lose as a result of the SOE partial privatisation will exceed the savings from the resulting reduction in debt[63] - this calls into question the purpose of this exercise, as the state party has described it from the outset as a way of reducing debt.

iv. Local government and indigenous people' rights: Treaty of Waitangi Audit

56. In the information provided to the Committee in 2010, we included a section on participation in local government - at that time an issue of great public concern due to the state party's amalgamation of the eight local authorities in the wider Auckland region into one unitary authority - and the specific matter of Maori representation on the new authority.

57. The Royal Commission on Auckland Governance had recommended that there be three seats for Maori on the unitary authority - two elected by voters on the Maori roll and one appointed by a forum of iwi representatives. However, on 24 August 2009, the Prime Minister announced there would be no Maori seats on the authority, even though the Select Committee considering the options was not due to report back until 4 September 2009 - a premature, politically expedient decision that was widely condemned.[64]

58. Since then, an Independent Maori Statutory Board (IMSB) has been established, chosen by representatives of nineteen hapu and iwi in the region.[65] Among other things, the IMSB has a statutory obligation to assist Auckland Council to act in accordance with statutory provisions referring to the Treaty.

59. As part of its work programme, the IMSB commissioned an independent Treaty of Waitangi Audit by PricewaterhouseCoopers to assess the Council's performance in accordance with statutory references to the Treaty and its statutory responsibilities to Maori.

60. The Treaty of Waitangi Audit was released earlier this year, and provided a rating in ten areas: 1. Knowledge of obligations; 2. Policies; 3. Processes, Systems and Data; 4. Roles and Responsibilities; 5. Decision Making; 6. Consultation and Engagement; 7. Capacity; 8. Training and Awareness; 9. Communication; and 10. Monitoring.

61. In four of these areas (knowledge of obligations; policies; consultation and engagement; and capacity), the Audit found significant weaknesses or gaps which are almost certain to compromise Maori legislative rights; and in the other six, found serious weaknesses or gaps which are likely to compromise Maori legislative rights.[66]

62. It should be noted that Auckland Council has expressed a willingness to address these deficiencies. However, this raises obvious questions about the state party's own performance in relation to its statutory responsibilities to Maori (we suspect a national audit would reveal similar deficiencies), and also around how it is communicating these responsibilities to local authorities.

D. Rights of the Child (Articles 2, 24 and 26): Child Poverty Action Group case

63. In 2010, the Committee noted that laws adversely affecting the protection of human rights have been enacted by the state party, notwithstanding their being inconsistent with the NZBoRA, and restated its recommendation that victims of violations of Covenant rights should be provided with access to effective remedies. [67] We provide here an example of a legal challenge taken with respect to a violation of Covenant rights, related to child poverty, which indicates that such remedies are not easily accessible.

64. In 2001, a case was taken by the Child Poverty Action Group[68] regarding the discriminatory nature of the In-Work Tax Credit (IWTC) - part of the Working for Families (WWF) package - which is available to families whose income comes from paid work, but not to families on social security benefits.

65. It should be noted that an estimated one in five children in Aotearoa New Zealand live in households with an income below the poverty line[69] - one third in a household with income from paid work, and two-thirds in households reliant on social security.[70] In 2009, the OECD reported that:

> *New Zealand government spending on children is considerably less than the OECD average. The biggest shortfall is for spending on young children, where New Zealand spends less than half the OECD average.*[71]

66. New Zealand performs poorly in a number of indicators when ranked against the other OECD countries, for example, ranked 21st (out of 30) on material well-being for children, and 29th on health and safety.[72]

67. As mentioned above, the Child Poverty Action Group case began in 2001, and after seven years of legal wrangling and attempts by government lawyers to stop it, it was considered by the Human Rights Tribunal (HRT) in 2008. The HRT ruled that the IWTC package did constitute discrimination with significant disadvantage for the children concerned:

> *(192) We are satisfied that the WFF package as a whole, and the eligibility rules for the IWTC in particular, treats families in receipt of an income-tested benefit less favourably than it does families in work, and that as a result families that were and are dependent on the receipt of an income-tested benefit were and are disadvantaged in a real and substantive way. (Human Rights Tribunal, 2008)* [73]

68. However, the HRT also found that the state party had proved this discrimination was justified.

69. The state party appealed the HRT's finding that the IWTC is discriminatory, and the Child Poverty Action Group appealed the finding that such discrimination is justified. The case then moved on to the High Court where it was heard in September 2011. The Child Poverty Action Group argued that the IWTC package is inconsistent with the right to be free from discrimination on the grounds of employment status, guaranteed in the NZBoRA, as it unlawfully discriminates against children on the basis of their parents' work status.

70. Following the hearing, the High Court, like the HRT, ruled that the IWTC is discriminatory in part, but said that this discrimination could be justified because the purpose of the IWTC is to incentivise parents into paid work.[74]

71. In November 2011, the Child Poverty Action Group filed an application for leave to appeal the High Court decision in the Court of Appeal, arguing that while the IWTC aims to incentivise parents to enter paid work, beneficiary families are ineligible for the IWTC even when paid work is not available, or when parents cannot meet the IWTC work requirements because of their child-caring responsibilities, disability or sickness. The state party's own estimates are that only 2% to 5% of beneficiary families are able to leave the benefit and obtain the IWTC (by getting a job or starting a relationship with somebody who is in paid work), yet the IWTC excludes the entire group of beneficiary parents and their children - more than 200,000 children are affected by this discrimination, and they are the poorest children in New Zealand.[75]

72. The outcome of the application for leave to appeal is not yet known.

73. This case is just one example of the difficulties in challenging discriminatory policy or legislation through the courts, as the state party persistently opposes any decision it perceives is at odds with its policies, resulting in any legal challenges becoming a long drawn out and costly exercise.

74. Furthermore, it highlights the inadequacies of the NZBoRA under Section 5, 'Justified Limitations':

> *"the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."*[76]

75. It is difficult to see how a discriminatory policy that affects the welfare of the poorest children can be demonstrably justified in a free and democratic society.

E. Social Security (Youth Support and Work Focus) Amendment Bill 2012 (Articles 2, 3, 24, 26)

76. The Social Security (Youth Support and Work Focus) Amendment Bill 2012 is the first legislative move to implement the state party's social welfare reform agenda, and if enacted, it will have a number of negative and discriminatory effects as outlined below.

77. Firstly, a comment about the process the state party has followed with this Bill as it illustrates the point made earlier about the haste with which the state party is proceeding with its legislative programme. On 8 March 2012, the Minister of Social Development said:

"The first stage of legislation will be introduced to Parliament this month. It affects DPB, Widow's and Woman Alone Benefits, as well as young people and teen parents. Changes will begin to take place from late July, ***but we have a robust Select Committee process to go through before then****."*[77] [our emphasis]

78. The Bill was introduced to parliament on 19 March 2012, and following its first reading on 27 March, was referred to the Social Services Select Committee. On 29 March, the Select Committee called for public submissions on the Bill - the deadline for submissions was 13 April 2012, only 11 working days after the call for submissions. There were subsequently only five days of public hearings; the Bill was reported back to parliament on 29 May 2012, and the second reading took place on 12 June 2012. This can hardly be described as a "robust process".

79. As to the content of the Bill in relation to the state party's Covenant obligations - in summary, it is targeted at young persons (aged 16 to 18 years), sole parents on the Domestic Purposes Benefit (DPB), women receiving the Widows' and Women Alone benefits, and partners of recipients of other social welfare benefits. The Bill imposes training, education and / or work requirements as follows:

Youth obligations

• full-time education, training or work-based learning working towards at least NCEA Level 2 qualification or equivalent;
• undertaking an approved budgeting programme and requirements;
• for parents, undertaking an approved parenting education programme and requirements.

Work availability expectations for sole parents, widows, women alone, and partners

• require sole parents receiving the domestic purposes benefit and partners of other main benefit recipients to be available for part-time work when their youngest child is five years of age:
• require sole parents receiving the domestic purposes benefit and partners of other main benefit recipients to be available for full-time work when their youngest child is aged 14 or older:
• extend these work availability expectations to women receiving the widows' benefit and the domestic purposes benefit for women alone:
• extend the ability to require pre-benefit activities before grant of a domestic purposes benefit for sole parents or women alone or widow's benefit.

Changes to work availability expectations for parents on benefit who have subsequent children:

• where a parent has additional children while receiving a benefit, their work availability expectations will be based on the age of their previous youngest child, once their newborn turns one year of age. [comment: if their previous youngest child is aged 14 years or over, these parents will be required to be available for full-time work when their newborn is one year old] .

Activation powers

The Bill creates a new activation power which will enable Work and Income to require beneficiaries who are not expected to be available for work to take steps to prepare for work. It:

• replaces the existing provisions that focus on planning alone to set an expectation that, in general, beneficiaries should be taking reasonable steps to prepare for work:
• establishes a broad range of activities that people can be directed to do in order to improve their work readiness:
• aligns sanctions for non-compliance with the sanctions that apply to people who do not meet their work obligations.[78]

80. Administration and delivery of the new Youth Payment and Youth Parent Payment will be contracted out to service providers (including private companies), and the Bill allows for the sharing of personal information about young persons between the Ministry of Education, Ministry of Social Development, contract service providers, and any agency specified by an Order in Council.

81. Social welfare payments for young persons will be distributed through redirections for accommodation and utility costs, a payment card for food and groceries, and an in-hand allowance.

82. If the legislation is enacted, it will set in law prohibited discrimination on the grounds of age, gender, family status and employment status. Persons in need of social welfare assistance will be treated differently from those who have other sources of income with respect to how they spend their income (young persons), how they care for their children, when they have children, and so on. They will be subjected to punitive and coercive measures that persons with other sources of income are not.

83. The legislation involves cross-cutting discrimination - for example, women, who are the majority of sole parents with child-rearing responsibilities, will be subjected to coercive and punitive measures that women with other sources of income are not, and will be subjected to discrimination on the grounds of gender, family status and employment status. Young women who are parents will be subjected to discriminatory measures involving age, gender, family status and employment status.

84. According to the state party's analysis of parents who have "subsequent children" while receiving social welfare assistance, 59% are Maori and 12% are "Pacific Island" [79] which raises a further issue of racial discrimination.

85. Children in families whose income is derived from social assistance will be negatively affected by the work requirements on their parents, when compared with other children, so in that sense, the legislation also involves discrimination against children. It should be noted in this connection that the figures (as detailed in section D above) indicate that of the one in five children in households with an income below the poverty line, one third are in a household with income from paid work[80] which indicates that paid work is not necessarily a solution to poverty. This suggests that rather than forcing parents whose income comes from social welfare assistance to seek paid work, the state party should instead raise the level of social welfare assistance.

86. The state party's analysis of the Bill in terms of its consistency with the NZBoRA (which in any event was of a draft version of the Bill), raised issues with respect to discrimination on the grounds of age, family status and employment status only, but concluded that the discrimination is justified. This highlights further the lack of constitutional protection for Covenant rights and

the ability, and indeed willingness, of parliament to enact legislation without due regard to its human rights obligations.

87. There is another issue of concern around the state party's social welfare reform agenda which relates to its general impact on societal attitudes to Covenant rights. The state party's discourse (and thus the public discourse) is framed in a way that suggests those in receipt of social welfare assistance are in that position by choice, due to deficiencies in their moral character such as laziness or a lack of personal responsibility. There is much reference to "welfare dependency"[81] and "intergenerational dependence on welfare"[82] as though those in need of social welfare assistance are somehow addicted to its provision, or suffering from an affliction that can only be overcome by the prescription of paid work. The state party's discourse further reinforces prejudice against "the undeserving poor", for want of a better phrase.

88. The discourse around women who are in need of social welfare assistance while raising children is particularly offensive, especially around those "who choose to have more children while on a benefit"[83] (who have been singled out for work requirements when the child is one year old, rather than when the child is older). The reasons for, and the circumstances around, women conceiving are many and varied, and not all pregnancies are a result of choice. It is highly unlikely that many, if any, parents "choose" to have a child for the purpose of receiving or continuing to receive social welfare assistance at a level that almost certainly guarantees poverty for them and their children.

89. Most sole parents move between the DPB and paid work as their circumstances permit. It should be noted that the Minister of Social Welfare (the Minister leading the state party's social welfare reform agenda) herself as a sole parent followed that pattern - in an interview in 2008, she said that she had two part time jobs while her daughter was young:

> *"Then I pretty much fell apart because I was exhausted. I went back on the DPB", she says. Over the next few years she worked as a cleaner, went back to the tourist job and was receptionist at a hair salon. In between, she was on and off the benefit."*[84]

90. That pattern is precisely why social welfare assistance for parents, without coercive or punitive measure, is so essential - to enable parents to care for their children without falling apart.

91. With regard to the work requirements on parents who are in need of social welfare assistance, even if these were desirable which they are not, there are practical issues around the availability of paid work. As at December 2011, the overall unemployment rate was 6.3%[85]. The unemployment rate varies by age, gender and ethnicity, for example, the rate for young persons was 17.3%[86]; for women, 6.7%[87]; for Maori, 13.4%[88]; and Pacific peoples, 13.9%[89]. It also varies by geographic region, and in relation to the work requirement on women "who have subsequent children" while receiving the DPB, we note that the state party's figures[90] on the regions where the rate of women "who have subsequent children" is highest include Auckland (overall unemployment rate of 6.7%), Whangarei in Northland (overall unemployment rate of 8.3%), Rotorua, Whakatane and Kawerau in the Bay of Plenty (overall unemployment rate of 8.3%) and Wairoa in Hawkes Bay (overall unemployment rate of 7%).[91]

92. The work requirements on parents also raise issues around the availability and affordability of good quality childcare, which is already a difficulty for parents involved in part-time and

full-time paid work, and other affordability, availability and accessibility issues such as transport.

93. Finally in this section, it should be noted that stage two of the state party's social welfare reform agenda involves similar punitive and coercive measures in relation to persons who are in need of social welfare assistance due to disability or ill health, and those who care for them, as well as those caring for those with terminal health conditions.[92]

F. Privatisation of prisons (Articles 2 and 10)

94. Since the Committee considered the state party's Fifth Periodic Report, two private prison contracts have been awarded under the Corrections (Contract Management of Prisons) Amendment Act 2009.

95. The first contract, to manage the Mt Eden / Auckland Central Remand Prison, went to the British based corporation, Serco, in December 2010. [93] Serco has a less than positive human rights record in running detention facilities in Britain and Australia. Reports last month indicate that there have been some issues with Serco's management of Mt Eden prison.[94]

96. On 8 March 2012, the Minister of Finance and Minister of Corrections announced a new public-private partnership prison would be built at Wiri, South Auckland. The announcement included the information that it would be a multi-company contract, as follows:

> *The Government has chosen a consortium of companies, SecureFuture, to design, finance, build, operate and maintain the new 960-bed facility, which is needed to meet growing demand for prisoner accommodation in Auckland.*
>
> *Fletcher Construction will build the new prison, it will be operated by Serco and maintained by Spotless Facility Services. Construction will start in the second half of this year, once the 25-year contract has been finalised. The prison is expected to open in 2015.*[95]

G. Deployment of electro-muscular disruption devices / tasers (Articles 6 and 7)

97. In 2010, the Committee noted the state party's assurances that tasers would only be used in situations in which such use is warranted by clear and strict guidelines, and recommended that: "*it should intensify its efforts to ensure that its guidelines, which restrict their use to situations where greater or lethal force would be justified, are adhered to by law enforcement officers at all times.*"[96]

98. The 'Sunday' programme recently broadcast footage of an unarmed man who was backing away from police officers when he was tasered, a very clear breach of the guidelines, which the Assistant Police Commissioner, Nick Perry, attempted to justify by saying he had thrown a brick at the officers when they had first arrived. According to the Assistant Police Commissioner, this incident did comply with the requirements for taser use. It should be noted that as a consequence of falling backwards onto concrete when he was tasered, the man received a blow to the back of the head which exacerbated a pre-existing head injury.[97]

99. In March 2012, Police Superintendent John Rivers confirmed that the police force is "planning to replace its fleet of Taser X26s with a more current model, the Taser X2, which allows for a "back-up shot""[98], the "double-shot" taser which is capable of firing two cartridges instead of one.[99]

H. Developments in immigration policy and legislation (Article 13)

i. Immigration New Zealand directive

100. In November 2011, a directive was sent by Immigration New Zealand to staff instructing them not to record any reasons or rationale for accepting or refusing discretionary visas (the granting of a visa in special cases under Section 61 of the Immigration Act 2009, which are open to review by the Office of the Ombudsmen).

101. According to information made public after it was released under the Official Information Act 1982, the reason for this was to avoid judicial review and complaints to the Office of the Ombudsmen, as well as to reduce staff workload.[100]

102. In response to media coverage of this directive, the Minister of Immigration, Nathan Guy, said that hiding the rationale was not inappropriate for an agency charged with protecting New Zealand's borders: *"Persons who are unlawfully in New Zealand can't expect to be treated in the same way as those who lodge proper immigration applications."*[101]

ii. Immigration Amendment Bill 2012

103. The state party introduced the Immigration (Mass Arrivals) Amendment Bill 2012, now known as the Immigration Amendment Bill 2012, on 30 April 2012; the first reading of the Bill was on 3 May 2012, and it was subsequently referred to the Transport and Industrial Relations Select Committee. The Select Committee is required to report back to parliament by September 2012.

104. The purpose of the Bill is to deter "people-smuggling operations" and to legislate for a most unlikely possibility - the mass arrival of "illegal immigrants" on a craft.[102] It should be noted that no craft carrying a group of asylum seekers, undocumented refugees or indeed "illegal immigrants" has arrived on New Zealand's shores since the establishment of the colonial government in the late 1800s. In any event, people smuggling and trafficking in people are already crimes under Sections 98C and 98D of the Crimes Act 1961.

105. Among other things, the Bill:

- *establishes a definition of mass arrival group (a group of more than ten people);*
- *allows for the mandatory detention, under a group warrant, for an initial period of up to six months, of illegal migrants (other than unaccompanied minors) arriving as part of a mass arrival group;*
- *provides for further periods of detention for up to 28 days with court approval, or release on binding conditions; and*

- *empowers the suspending of the processing of refugee and protection claims by regulation.*

106. In relation to the review processes for refugee and protection claims, the Bill:

- *provides that the Immigration and Protection Tribunal is not required to provide an oral hearing in cases where a second or further claim has been lodged and declined "on the papers" by a refugee and protection officer;*
- *provides that there is no obligation to consider a third or subsequent claim from the same person (while providing discretion to consider such a claim if warranted);*
- *provides that second and further claims can be rejected where there has been no material change of circumstances, or where the claim is manifestly unfounded, clearly abusive, or repeats an earlier claim;*
- *provides that review proceedings cannot generally be taken on matters being dealt with by the Immigration and Protection Tribunal until it has made a final decision on all relevant matters; and*
- *provides that judicial review proceedings can only be filed by leave of the High Court.*[103]

107. The Office of the United Nations High Commissioner for Refugees (UNHCR), in the introduction to its submission to the Select Committee considering the Bill, outlined concerns about its provisions as follows:

> *3. The Immigration Amendment Bill 2012 introduces a number of measures that will have a direct impact on the manner in which a new category of asylum-seeker and refugee is received and processed on arrival in New Zealand. Those falling within the proposed statutory definition of a 'mass arrival group' will be treated in a manner differently from those arriving and claiming asylum by other means of transport.*
>
> *4. For this new category of asylum-seeker and refugee, the proposed changes anticipate (both through legislative changes and policy flowing from it): procedures involving mandatory detention; the suspension of refugee status procedures; restrictions on family reunion; and a requirement to re-establish refugee status after a period of three years. The proposed changes will also affect the rights and treatment of children who form part of family groups arriving as part of a "mass arrival group".*
>
> *5. In UNHCR's view the combined effect of these proposed measures represents a significant change of direction from New Zealand's traditional, and very positive, approach to asylum-seekers and refugees. The proposed legislative amendments and the policy changes that will flow from them raise important questions about their compatibility with New Zealand's obligations under the 1951 Convention and other related human rights treaties to which it is party.*[104]

108. The Immigration Amendment Bill is clearly not compatible with the state party's obligations under the Covenant, one of the human rights treaties referred to in the UNHCR's submission.

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