Peace Movement Aotearoa

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NGO information for the Human Rights Committee, 110th session: List of Issues Prior to Reporting, 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) 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 ten main sections below:

A. Information on Peace Movement Aotearoa;

B. The constitutional and legal framework: lack of protection for Covenant rights (Article 2);

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

- **i**. Foreshore and seabed legislation;
- **ii**. Deep sea oil exploration and drilling, hydraulic fracturing (fracking) and mining
- **iii**. Fresh water and the privatisation of state-owned assets; and
- **iv**. Local government, the Treaty of Waitangi and indigenous peoples' rights.

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

E. Social welfare reform agenda (Articles 2, 3, 24, 26)

- **i**. Social Security (Youth Support and Work Focus) Amendment Bill 2012;
- **ii**. Social Security (Benefit Categories and Work Focus) Amendment Bill 2012; and
- **iii**. Social Security (Fraud Measures and Debt Recovery) Amendment Bill 2013.

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 (Articles 9 and 13):

- **i**. Immigration New Zealand directive;
- **ii**. Immigration Amendment Act 2013; and
- **iii**. Immigration Amendment Bill (No 2) 2013.

I. Electronic mass surveillance and expansion of state surveillance (Article 17)

J. Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (Article 25)

2. Thank you for this opportunity to provide information to the Country Report Task Force.

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 individuals (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 - 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 (the Treaty), 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. Our Report covers issues that are currently, or have been in the past, a specific focus of our work. With regard to the sections on indigenous peoples' rights, we wish to emphasise that the comments which follow are from our perspective and observations as a Pakeha organisation; we do not, nor would we, purport to be speaking for Maori in any sense.

6. 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] and 2013[3]; jointly with the Aotearoa Indigenous Rights Trust and others, to the Human Rights Council for the Universal Periodic Review of New Zealand in 2008[4], 2009[5] and 2013[6]; to the Human Rights Committee in 2009[7], 2010[8]and 2012[9]; to the Committee on the Rights of the Child in 2010[10] and 2011[11]; and to the Committee on Economic, Social and Cultural Rights in 2011[12] and 2012[13].

7. Please do not hesitate to contact us if the Country Report Task Force requires any clarification of any points in this report, or further information.

B. The constitutional and legal framework: lack of protection for Covenant rights (Article 2)

8. 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."* [14]

9. In some respects however, the situation can be said to have worsened as the state party has been implementing its particular political agenda by proposing and then enacting legislation in short time frames under urgency, with little or no time for public consideration or submissions; has introduced major changes with human rights implications to legislation at the final reading stage by way of Supplementary Order Papers; the minimal protection provided by the New Zealand Bill of Rights Act 1990 has been eroded; and the state party has enacted legislation that removes the possibility of scrutiny or judicial review by the courts for those affected by discriminatory policy and practice.

10. **Use of urgency**: The state party has made increasing use of urgency to pass legislation; for example, during the 49th parliament (December 2008 to October 2011), parliament was under urgency for 25% of the sitting time[15]; 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."*[16]

11. While we do not have access to figures for the use of urgency in the current session of parliament (2011 - 2014), our impression is that it may have increased further since then - for example, in just one sitting under urgency on 19 November 2013, 13 Bills were progressed through various stages: the first reading of three Bills (including two with major human rights implications, the Parole Amendment Bill 2012 and Immigration Amendment Bill (No 2) 2013); the second reading of two Bills; and the final reading of eight Bills, including the Social Housing Reform (Housing Restructuring and Tenancy Matters Amendment) Bill 2013 which, among other things, made fundamental changes to eligibility for social housing.

12. **Supplementary Order Papers (SOPs)**: The state party has introduced substantive amendments with major human rights implications to legislation via SOPs thus bypassing any Select Committee consideration of, and public input into, proposed legislation.

13. One example of this practice is SOP No 205[17] introduced to amend the Crown Minerals (Permitting and Crown Land) Bill 2012[18] immediately prior to its enactment in April 2013. The SOP criminalised peaceful protest at sea and introduced penalties for the captain of any vessel, and anyone on board it, who enters a *"non-interference zone for a permitted prospecting, exploration, or mining activity"* (regardless of whether such entry is intentional or inadvertent[19]), or who interferes with any structure involved in such activity. The penalties range from a term of imprisonment up to 12 month or a fine of $10,000 or $50,000 (for individuals), to a $100,000 fine (for a body corporate). [20]

14. The legislation provides the following powers to "an enforcement officer" - an employee *"of a government department, a Crown entity, or a local authority"*[21] - which can be used even when there is only cause to suspect a person might be *"attempting to commit an offence"*:

> *(a) stop a ship within a specified non-interference zone and detain the ship:*
> *(b) remove any person or ship from a specified non-interference zone:*
> *(c) prevent any person or ship from entering a specified non-interference zone:*
> *(d) board a ship (whether within a specified non-interference zone or otherwise), give directions to the person appearing to be in charge, and require the person to give his or her name and address:*
> *(e) without warrant, arrest a person.* [22]

15. **New Zealand Bill of Rights Act 1990 (NZBoRA) consistency**: The increasing speed with which legislation is introduced and enacted has contributed to the erosion of the minimal protection provided by way of advice on the consistency of proposed legislation with the NZBoRA. For example, the advice provided on the Social Security (Youth Support and Work Focus) Amendment Bill 2012 was on a draft of the legislation[23]; and the advice on the Mixed Ownership Model Bill 2012 (detailed in section C.iii below), which clearly has human rights implications, consisted of two paragraphs[24] - the first saying that the advice was provided on the understanding that the Bill may be subject to further amendments before it was introduced to parliament, and the second merely saying it appears to be consistent with the rights and freedoms affirmed in the NZBoRA, with no analysis.

16. Some other issues around the assessment of NZBoRA consistency, with regard to the role of the Attorney-General, are included in paragraphs 22 to 25 below.

17. **Removal of access to the courts:** The state party has enacted legislation that removes the possibility of scrutiny or judicial review by the courts, and, in some cases, also removes the possibility of complaints relating to discrimination being made to the Human Rights Commission.

18. An example of this unfortunate practice is the New Zealand Public Health and Disability Amendment Act 2013[25] - the state party's response to the 'Family Carers' case (Atkinson & Others v Ministry of Health) regarding the discriminatory policy and practice of the Ministry of Health funded home and community support services. Parents and resident family members who provide these services to their adult disabled family members are not paid - solely on the basis that they are related to the person requiring support - whereas the same support provided by a non-family carer is paid. The complaint of discrimination was laid with the Human Rights Commission in 2001; and in January 2010, the Human Rights Review Tribunal (HRRT) determined that the policy was unjustified discrimination on the ground of family status under the NZBoRA[26] - a determination subsequently upheld by the High Court in December 2010[27] and by the Court of Appeal in May 2012[28].

19. The New Zealand Public Health and Disability Amendment Bill (no 2) 2013 was introduced to parliament, read and enacted as the New Zealand Public Health and Disability Amendment Act 2013 on 16 May 2013, with no reason given for such extreme urgency. The legislation sets in law discrimination against family members providing care for relatives who require full or part time care, as is evident from its Overview:

> *"reaffirms that **people will not generally be paid** to provide health services or disability support services to their family members:*
> *confirms that the Crown and DHBs [District Health Boards] may operate, and always have been authorised to operate, policies in respect of family carers that allow payment in certain limited circumstances, or **allow for payment at a lower rate than that for carers who are not family members**"[our emphasis]*[29]

20. Furthermore, the legislation takes away the possibility of any remedy for complaints and civil proceedings alleging unlawful discrimination in respect of policies on payment for providing health and disability support services to family members. It:

> *"stops claims of unlawful discrimination being made concerning any care policy, except for any claim that arises out of a complaint that was lodged with the Human Rights*

> *Commission before 16 May 2013. A claim that arises out of such a complaint may proceed, but the remedy that may be granted is restricted to a declaration that the policy is inconsistent with NZBORA"* [30]

21. Section 70E 'Claims of unlawful discrimination in respect of this Act or family care policy precluded' states that any 'specified allegation' that the right to freedom from discrimination under the Human Rights Act and NZBoRA has been breached by the Act, or "*(b) by a family care policy; or (c) by anything done or omitted to be done in compliance, or intended compliance, with this Part or in compliance, or intended compliance, with a family care policy"* cannot be the basis of a complaint to the Human Rights Commission, and "*no proceedings based in whole or in part on a specified allegation may be commenced or continued in any court or tribunal."*[31]

22. The Attorney-General's Report on the consistency of the New Zealand Public Health and Disability Amendment Bill (no 2) with the NZBoRA[32] (presented on the same day the legislation was introduced then enacted) provides an excellent illustration of the hazards of having a government politician, rather than an independent body, responsible for assessing the human rights implications of proposed legislation. While the Report does conclude that the limitation on the right to judicial review is an unjustified limitation, because the legislation prevents any challenge on the lawfulness of a decision under the NZBoRA, the Attorney-General then voted in favour of enacting the Bill.

23. Rather than focusing on the human rights implications of the Bill, and the human rights and care needs of those with disabilities, the Report talks of "*the right of the Crown to set funding policy for disabled carers"*[33] and seeks to justify the legislation in terms of the financial cost. It includes the assertion that the cost of extending eligibility for payment in a non-discriminatory manner would be too expensive, but does not supply any information about what the cost might be or any analysis as to why that cost should not be incurred.

24. Even more concerning, the Attorney-General states "*I do not consider [the] courts sufficiently deferred to the Crown's view"*[34] and "*I do not agree the prohibition at issue in the Family Carers case was discriminatory"*[35]. Furthermore, the Attorney-General appears to be saying it is not the role of courts to scrutinise legislation that has cost implications:

> *"Decisions about how scarce resources are to be allocated must reside with the Crown. By their nature, courts must decide each case on the individual facts in front of them. With respect, they lack the institutional competence to consider the range of competing claims on public funds which government must contend with every day, and which cannot be approved or dismissed in isolation. The enactment of the Bill of Rights Act was not intended to alter that."*[36]

25. This is an extraordinary statement given that most, if not all, legislation and government policy and practice has cost implications. In any event, the HRRT and courts were ruling on the matter of unjustified discrimination, not economic policy.

26. The New Zealand Public Health and Disability Amendment Act is not the only recent legislation that removes the possibility of scrutiny or judicial review by the courts; in its submission for New Zealand's second Universal Periodic Review, the Law Society provides four further examples:

- Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010: Denies access to the Environment Court for the resolution of environmental and resource-management matters in the Canterbury region.
- Taxation (Tax Administration and Remedial Matters) Act 2011: Requires taxpayers to obtain the Commissioner of Inland Revenue's consent before commencing proceedings to challenge an assessment.
- Immigration Amendment Bill 2012: Would further restrict judicial review of decisions of the Immigration and Protection Tribunal.
- Canterbury Earthquake Response and Recovery Act 2010: Prevents challenge to or review of exercises of ministers' power to exempt, modify or extend provisions of primary legislation.[37]

27. In its submission, the Law Society also provided three examples of recent legislation that enable enactments to be overridden by regulation, that is, which empower the Executive to override parliament, as follows:

- Immigration Amendment Bill 2012: Would empower the suspension of the processing of refugee and protection claims by regulation.
- Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010: Enables the Minister for the Environment to choose what law will or will not apply to Commissioners appointed to replace the Canterbury regional councillors.
- Canterbury Earthquake Response and Recovery Act 2010: Accords Ministers wide powers to exempt, modify or extend provisions of primary legislation, and prevents challenge to or review of exercises of such power in the courts.[38]

28. It should also be noted that the state party enacted legislation last year that removes the right of a party to be legally represented in the initial stages of proceedings before the Family Court - the Family Court Proceedings Reform Bill 2012[39]. The imposition of significant fees and costs for Family Dispute Resolution has been highlighted by the Law Society as another aspect of the new legislation which is of particular concern[40].

29. **Consideration of constitutional issues**: The state party announced a consideration of constitutional issues in December 2010, which was part of the November 2008 Relationship and Confidence and Supply Agreement between the National Party and the Maori Party; the Terms of Reference were released in May 2011, and the state party appointed a 12 person Constitutional Advisory Panel to run a public discussion process in August 2011. [41]

30. The Terms of Reference were comparatively restrictive about what could be discussed; for example, the reference to the NZBoRA referred only to the inclusion of property rights and possible entrenchment[42] (with no indication that full entrenchment is not currently possible because of the state party's commitment to the notion of parliamentary supremacy).

31. Human rights were not referred to at all in the initial engagement strategy released by the Panel in June 2012, although there was reference to human rights in the subsequent resources published by the Panel.[43] The Panel's report 'New Zealand's Constitution: A Report on a Conversation' was released in December 2013[44].

32. The state party has used the Consideration of Constitutional Issues to deflect treaty monitoring body criticism of the current constitutional arrangements, particularly around the status of the Treaty[45]; and stated in its second Universal Periodic Review national report: *"Advancing the Consideration of Constitutional Issues process is a key priority for the Government"*[46]. There is no evidence to support that assertion, however, and it is unlikely that the process will effect any substantive change as there is no apparent commitment to anything other than "continuing the conversation".

33. When announcing the release of the report, the Deputy Prime Minister stated *"there is no sense of an urgent or widespread desire for change"*[47]. The extent of the state party's failure to ensure proper protection of the human rights articulated in the international instruments, including the Covenant, the Treaty, and domestic human rights legislation - as well as the lack of effective remedies for human rights and Treaty violations - would clearly suggest otherwise.

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

34. As outlined in the information provided to the Committee in 2009, 2010, 2011 and 2012 by Peace Movement Aotearoa[48] and the Aotearoa Indigenous Rights Trust[49], the constitutional arrangements are especially problematic for Maori because their collective and individual rights 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 as the Committee is aware, there has been a persistent pattern of state party actions, policies and practices which discriminate against Maori (collectively and individually), both historically and in the present day.

35. Underlying this persistent pattern of discrimination has been the denial of the inherent and inalienable right of self-determination. Tino rangatiratanga (somewhat analogous to self-determination) was exercised by hapu and iwi prior to the arrival of non-Maori, was proclaimed internationally in the 1835 Declaration of Independence, and its continuance was guaranteed in the 1840 Treaty.

36. In more recent years, self-determination was confirmed as a right for all peoples, particularly in the shared Article 1 of the two International Covenants, and in the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) - which the state party announced partial support for in 2010 - where it is explicitly re-affirmed as a right for all indigenous peoples. The Committee on Economic, Social and Cultural Rights referenced the shared Article 1 in its 2012 Concluding Observations on New Zealand in relation to its recommendations on the inalienable rights of Maori to their lands, territories, waters and maritime areas, and other resources.[50]

37. Allied to the right of self-determination is the right of indigenous peoples to own, develop, control and use their communal lands, territories and resources, as indicated by the shared Article 1 and articulated in the UN Declaration.

38. In addition, the UN Declaration includes the requirement that no decisions affecting the rights and interests of indigenous peoples are to be taken without their free, prior and informed consent - a minimum standard that the state party has yet to meet, as outlined by the examples in the four sub-sections below. The provisions of the UN Declaration at Article 32 are particularly relevant to these examples:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

39. It should be noted that while the state party regularly refers to the Treaty as the founding document of the nation, there is no reference to the Treaty in the Constitution Act 1986 nor is it a formal part of domestic law.

40. The Treaty is not legally enforceable against the legislature, and requires legislative incorporation to be enforced generally. Even where the Treaty is incorporated into legislation, this does not guarantee protection for the rights of Maori - in part because of New Zealand's tendency to minimise or ignore such provisions for political purposes, and in part because the rights and interests of other New Zealanders are generally given priority over those of Maori. In addition, there are concerns about how local authorities approach their statutory Treaty obligations, as outlined in sub-section iv below.

41. Furthermore, the Waitangi Tribunal's recommendations are not binding on the Executive or the legislature, and are frequently ignored by the government of the day. The courts have generally refused to review the fairness of Treaty settlements between iwi and hapu and the Crown on the basis that they are political matters; and the processes and substance of Treaty settlements, policy and practice cannot be legally challenged.

C.i. Foreshore and seabed legislation

42. 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.

43. 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.

44. 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.

45. 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.[51]

46. 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.[52] 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.

47. Regardless of the fact that hapu and iwi did not generally support the Bill, it was enacted as the Marine and Coastal Area (Takutai Moana) Act 2011[53] and came into effect in March 2011.

48. In 2013, the Committee on the Elimination of Racial Discrimination (CERD) stated:

> *The Committee remains concerned that the Marine and Coastal Areas (Takutai Moana) Act of 2011 contains provisions that, in their operation, may restrict the full enjoyment by Maori communities of their rights under the Treaty of Waitangi, such as the provision requiring proof of exclusive use and occupation of marine and coastal areas without interruption since 1840 (arts. 2 and 5).* And *... urged NZ to continue to review the Marine and Coastal Area (Takutai Moana) Act of 2011 with a view to facilitating the full enjoyment of the rights by Maori communities regarding the land and resources they traditionally own or use, and in particular their access to places of cultural and traditional significance*.[54]

49. As CERD identified, one of the provisions of the 2011 Act that restricts the full enjoyment of human rights by Maori communities, is the test of "exclusive use and occupation" of foreshore areas since 1840 - as many foreshore areas belonging to hapu and iwi were unlawfully taken or confiscated from the mid-nineteenth century until the present day, this provision represents a double injustice for those affected by such actions.

50. Under the 2011 Act, hapu and iwi can apply for recognition of limited 'customary title' or 'customary rights' by either: i) lodging an application directly with the government (with applications accepted at the discretion of the Office of Treaty Settlements, and "*nothing requir[ing] the Crown to enter into the agreement, or to enter into negotiations for the agreement: in both cases this is at the discretion of the Crown*"[55]); or ii) application to the High Court (not to the Maori Land Court which has specialist knowledge of Treaty matters). In both cases, any application must be lodged before 3 April 2017.

51. The most recent information we have been able to obtain is that there have only been 15 applications (from 10 applicant groups) for recognition agreements via direct negotiation, of which only three have progressed beyond the preliminary appraisal or pre-determination phase: all three began under the 2004 Act. There are 12 applications for recognition orders in the High Court; all remain in the first phase (application). According to the Office of Treaty Settlements, no determinations of customary title or customary rights have yet been made.[56]

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

52. **Deep sea oil exploration and drilling**: 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.

53. 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.

54. In 2011, a deep-sea oil survey ship, Orient Express, conducted seismic surveying in the Raukumara Basin on behalf of Petrobras. 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 - 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.

55. 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[57] 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.*[58]

56. The permit included permission for Petrobras to drill an exploratory well and the local iwi were 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[59] - 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.

57. 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. (The charges against the skipper of the Te Whanau a Apanui fishing boat were dismissed on 26 July 2012, on the grounds that there was no jurisdiction to arrest or charge him as the alleged offences had taken place beyond the 12 mile nautical limit, beyond the state party's jurisdiction[60] - presumably one of the triggers for the state party's enactment of the SOP No 205 amendments to the Crown Minerals (Permitting and Crown Land) Bill 2012 in April 2013, as described in section B above).

58. In September 2011, Te Whanau a Apanui applied to the High Court for a judicial review of the Petrobras 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, and the Convention for the Protection of Natural Resources and Environment of the South Pacific Region 1986; failed to properly consider the potential effects on marine wildlife; failed to factor in the requirements of the Treaty, 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.

59. In December 2011, the High Court approved the application for the judicial review, and it was heard on 5 and 6 June 2012[61]. It emerged during the court hearing that Te Whanau a Apanui had asked for the Petrobras permit to be put on hold pending foreshore and seabed negotiations with the state party, but the then Minister of Energy and Resources, Gerry Brownlee, said there was no connection between the negotiations and the permit and issued it.

60. The application for judicial review was dismissed by the High Court on 22 June 2012, which highlights the inability of the constitutional and legal system to protect the rights and interests of hapu and iwi. The following month, Te Whanau a Apanui lodged an appeal against the decision, on the grounds that the Minerals Programme for Petroleum - which the Minister of Energy was legally required to follow - required consideration to be given to any international obligations that were relevant in managing the petroleum resource; this must include environmental considerations, and the Minister told the High Court that he did not consider these before granting the permit. Another of the grounds for appeal was the High Court's finding that the Crown did not breach its Treaty obligations, including duties of active protection and proper consultation with iwi before awarding the permit. There has been no decision on the appeal to date.

61. It should be noted that in 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.[62] 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."*[63] [our emphasis]

62. 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".[64]

63. Although Petrobras withdrew from the Raukumara permit in December 2012, there is no guarantee that it will not be issued to another oil company in future.

64. 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[65], the state party has issued permits similar to that awarded to Petrobras for areas covering most of

New Zealand's coastline.[66] The Texas-based oil company Anadarko is currently undertaking exploratory drilling at depths of 1400 and 1600 metres off the Taranaki coast, despite opposition from local hapu and iwi.

65. In October 2013, the new Environmental Protection Authority announced that in future, hapu and iwi would be notified on oil companies' plans to drill test wells off the coast of New Zealand, but there would not be the opportunity for any submissions or hearing process.[67]

66. **Hydraulic fracturing (fracking)**: Hapu and iwi are similarly concerned about the impacts of proposed fracking in their respective areas - for example, Te Whanau a Apanui has indicated their opposition to fracking in their territory[68], other East Coast iwi have expressed concern[69], as have Taranaki hapu[70].

67. Furthermore, the City Council of Christchurch, the city devastated by major earthquakes in 2010 and 2011, asked the state party to impose a moratorium on fracking in Canterbury until an independent inquiry is carried out into its effects[71] - 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.

68. 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."*[72]

69. On 28 March 2012, the Parliamentary Commissioner for the Environment (PCE) announced that preliminary investigation had showed a substantive case for an official investigation into fracking and that it would be conducted later that year[73]. The PCE released an interim report in November 2012[74], and a further report is due this year. The state party has not put a moratorium in place pending the outcome of the investigation.

70. **Mining**: The state party has been inviting tenders for permits to explore for "commercially viable" metallic mineral deposits in different parts of the country[75], including in Northland where at least one iwi has stated it will not permit mineral exploration to take place on its land[76], and on the East Coast where Ngati Porou has opposed Crown approval of further mining exploration[77].

71. In September 2013, New Zealand Petroleum and Minerals announced that it would not exclude Maori sacred sites from areas being tendered for permits to explore for metallic minerals.[78]

C.iii. Fresh water and the privatisation of state-owned assets

72. The state party's approach to the partial privatisation of state-owned assets provides another illustrative example of its refusal to respect the right of self-determination and to seek and obtain the free, prior and informed consent of Maori with regard to matters that affect their rights and interests.

73. In early 2012, 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. It announced that the first SOEs to be partially privatised would be the energy companies Genesis Power, Meridian Energy, Mighty River Power, and Solid Energy New Zealand.

74. While there was a high level of public opposition to this, there was particular concern among Maori for two main reasons: in part because of the Treaty clause in the SOE Act; and in part because a high percentage of electricity here is generated using fresh water (hydro generation comprised 57.6% of all electricity generation in 2011) and geothermal resources (13.4% in 2011), and issues around their control and use have never been satisfactorily resolved.

75. With regard to the first, the SOE Act is one of the few pieces of legislation that has a specific Treaty of Waitangi 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 about the partial privatisation greatly increased when it appeared that Section 9 of the SOE Act would not be included in the proposed new legislation.

76. 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.

77. The state party's original intention to keep the clause relating to the Treaty of Waitangi 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.[79] 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 of Waitangi clause, or that it should have no Treaty of Waitangi clause at all.

78. Our written submission on the document, included the following comments on the consultation process, which we include here as a summary of some of the relevant issues:

> *"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."*[80]

79. With regard to the matter of control and use of fresh water and geothermal resources, on 7 February 2012 (while the "consultation" process was underway), the Maori Council and ten hapu lodged an urgent application with the Waitangi Tribunal[81] for a hearing into the SOE privatisation on the grounds that the Crown has breached the Treaty of Waitangi 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. In response, the Prime Minister announced: *"the government is going to sell shares in state-owned energy companies regardless of Maori opposition"*.[82]

80. In early March 2012, the state party tried to have the application dismissed[83], but on 28 March 2012, the Waitangi Tribunal agreed that the urgent hearing should go ahead. When deciding to proceed, the Tribunal reportedly 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."*[84]

81. In the interim, the state party introduced the new 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. While the Mixed Ownership Model Bill did 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)"*[85], the latter is followed by *"For the avoidance of doubt, subsection (1) does not apply to persons other than the Crown."*[86]

82. In the state party's information sheet on the new legislation, this addition was 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."*[87]

83. 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 of Waitangi are protected. Requiring third parties to act consistently with the Treaty of Waitangi would not make them parties to it.[88] 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.

84. Public submissions on the Bill were due on 13 April 2012 - only 9 of the 1,448 submissions received were in favour of it, while 98.1% were opposed.[89]

85. Before the Select Committee considering the Bill had even reported back to parliament, the state party was already setting in place the regulations for the new mixed ownership model companies, for example, gazetting the Securities Act (Mixed Ownership Model Companies, Crown Pre-Offer) Exemption Notice on 24 April 2012 with an entry into force date of 26 April 2012.

86. On 30 May 2012, after only one of hour of deliberation following a rushed process of oral submissions, during which most submitters were allocated a five minute time slot, the Chair of the Finance and Expenditure Select Committee (a government politician) unexpectedly announced that deliberations were complete, and the Bill was reported back to parliament on 11 June 2012 (five weeks before the Select Committee report was due).

87. The Mixed Ownership Model Bill was divided into two Bills on 21 June 2012 - the Public Finance (Mixed Ownership Model) Amendment Bill 2012 and the State-Owned Enterprises Amendment Bill 2012 - both passed by a 1 vote majority on 26 June 2012, and received Royal Assent three days later.

88. The Waitangi Tribunal (the Tribunal) held its Stage I hearings into the National Freshwater and Geothermal Resources Inquiry (WAI 2358) from 9 to 16 July and 19 to 20 July 2012. During the hearings, the Prime Minister continued to make public statements to the effect that the state party may ignore the Tribunal's finding and continue with the first sale, of Mighty River Power, in November as planned.[90] In addition, the state party put pressure on the Tribunal to issue its findings by 24 August 2012[91], presumably so it could proceed with the Mighty River Power sale.

89. On 30 July 2012, the Tribunal issued an Interim Direction to the Crown stating their initial conclusion:

> *" ... that the Crown ought not to commence the sale of shares in any of the Mixed Ownership Model companies until we have had the opportunity to complete our report on stage one of this inquiry and the Crown has had the opportunity to give this report, and any recommendations it contains, in-depth and considered examination."*[92]

90. The Tribunal released the pre-publication edition of its Stage I Interim Report on 24 August 2012 (the final Stage I report was released on 10 December 2012). In the Letter of transmittal to the Prime Minister and other appropriate Ministers of the Crown, the Tribunal said, among other things:

> *"In our view, the recognition of the just rights of Maori in their water bodies can no longer be delayed. The Crown admitted in our hearing that it has known of these claims for many years, and has left them unresolved.*[93]*"* and that *"Although the claim was filed in February 2012, it is but the latest in a long series of Maori claims to legal recognition of their proprietary rights in water bodies, many of which date back to the nineteenth century."*

91. The Tribunal concluded that:

> *"If the Crown proceeds with its share sale without first creating an agreed mechanism to preserve its ability to recognise Maori rights and remedy their breach, the Crown will be unable to carry out its Treaty duty to actively protect Maori property rights to the*

fullest extent reasonably practicable. Its ability to remedy well-founded claims will also be compromised. We find in chapter 3 of this report that the Crown will be in breach of Treaty principles if it so proceeds."[94]

92. The Tribunal recommended:

"that the Crown urgently convene a national hui, in conjunction with iwi leaders, the New Zealand Maori Council, and the parties who asserted an interest in this claim, to determine a way forward. In our view, such a hui could appropriately be held at Waiwhetu Marae. We recognise the Crown's view that pressing ahead with the sale is urgent. But to do so without first preserving its ability to recognise Maori rights or remedy their breach will be in breach of the Treaty. As Crown counsel submitted, where there is a nexus there should be a halt. We have found that nexus to exist. In the national interest and the interests of the Crown-Maori relationship, we recommend that the sale be delayed while the Treaty partners negotiate a solution to this dilemma."[95]

93. The state party rejected the Tribunal's recommendation for a national hui, and instead embarked on a five week pseudo consultation process on the possibility of a "shares-plus" arrangement for hapu and iwi, one of the possible ways forward suggested by the Tribunal, even though the Tribunal had pointed out "*not all of the affected Maori groups want shares"*[96]. Prior to and during this process, the Prime Minister described the "shares-plus" concept as fundamentally flawed,[97] and made comments to the effect that the state party was only undertaking the "consultation" to demonstrate it was "acting in good faith" should the matter be taken to court.

94. On 13 September 2012, a hui organised by Maori, which was attended by more than 700 Maori representing hapu and iwi, as well as Maori urban authorities and other Maori organisations, passed a resolution calling on national negotiations to take place before the sale of shares in state-owned power companies, and resolved to fund a Maori Council court challenge if the issues of proprietary rights over water were not settled before the sale of Mighty River Power.[98] Following the hui, the Prime Minister said that there would be no national settlement of water rights[99], and subsequently commented that *"Maori had more positions on water than Lady Gaga had outfits"*.[100]

95. On 15 October 2012, the state party announced there would be no further consultation with hapu and iwi, and an Order in Council on 23 October would remove Mighty River Power from the SOE Act and bring it under the Public Finance Act (as amended by the Public Finance (Mixed Ownership Model) Amendment Bill 2012) to prepare it for sale. [101]

96. On 19 October 2012, the Maori Council sought a judicial review in the High Court of some of the state party's decisions around the partial sale of state-owned assets, and the Waikato River hapu Pouakani (which had obtained a Supreme Court decision clearing the way for them to claim ownership of parts of the Waikato River earlier in 2012) initiated legal action to block the Order in Council.[102] On 22 October, the High Court set a November date for the Maori Council hearing, and the state party put the Order in Council on hold.

97. During the three-day High Court hearing in November 2012, the Maori Council (joined by the Waikato River and Dams Claims Trust and the Pouakani Claims Trust) sought to challenge three key decisions made by the Crown*:*

(a) the direction by the Cabinet to the Governor-General to bring into force by Order in Council the State-Owned Enterprises Amendment Act 2012. This has the effect of changing the status of Mighty River Power ('MRP') from a State-Owned Enterprise (SOE') to a Mixed Ownership Model ('MOM') company;

(b) amending the constitution of MRP (and later the other SOE companies) which currently requires 100 per cent of the shares to be held by the Crown through the relevant Minister, to permit 49 per cent ownership by private persons; and

(c) offering for sale and selling up to 49 per cent of the shares in MRP.

The Maori Council contended that, with respect to each decision, the Crown must act in a manner that is not inconsistent with the principles of the Treaty of Waitangi. This argument was premised on the decisions being subject to the Treaty principles provision in either s 9 of the SOE Act or s 45Q of the Public Finance Amendment Act. According to this argument, ministerial action would be inconsistent with the Treaty if the Crown did not first implement protective mechanisms to provide for redress and protect Maori proprietary rights to water and geothermal resources before making any of the three decisions.[103]

98. The Maori Council also argued that:

there was inadequate consultation in relation to these decisions, which was inconsistent with the principles of the Treaty; the Crown made an error of law by taking into account the idea that "no-one owns the water" when deciding whether its actions were consistent with Treaty principles; the Crown's failure to wait for the completion of both stages of the Waitangi Tribunal inquiry was unreasonable; it was an error of fact or law to conclude that a sale of 49 per cent of the shares of MRP would not be inconsistent with Treaty principles; the intention to proceed with the sale of shares was a breach of a legitimate expectation held by Maori that the Crown would act with utmost good faith and actively protect Maori interests; and that the Crown had breached the requirements of natural justice by proceeding with the sale of shares before Maori claims to the water and geothermal resources could be properly heard.

The Waikato River and Dams Claims Trust also argued that the Crown's decision to proceed with the sale of shares in MRP is a breach of s64(3) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.[104]

99. While the High Court hearing was underway, the Prime Minister said in parliament that there would be no negotiations, even if the Maori Council action was successful.[105]

100. The High Court decision, released on 11 December 2012, found in favour of the state party, ruling that none of the decisions taken by the Crown to advance the sale of those shares were reviewable, that is, those decisions could not be reviewed by the courts; and that even if the decisions were reviewable, none of the grounds for review that were argued by the Maori Council would succeed.[106] Rather a contrast to the findings of the Waitangi Tribunal, which is, after all, the specialist Permanent Commission of Inquiry charged with making recommendations on claims brought by Maori relating to actions or omissions of the Crown, which breach Treaty of Waitangi.

101. On 18 December 2012, the Maori Council was given leave to appeal the decision, and the case was considered by the Supreme Court on 31 January and 1 February 2013. The appeal bypassed the Court of Appeal at the request of the Crown, as explained by the Supreme Court: *"The appeal from the High Court is brought directly to this Court at the request of the Crown to meet the time constraints it has in finalising the IPO and realising up to 49 per cent of the value of Mighty River Power for important government purposes."*[107]

102. Although the state party demanded the Supreme Court decision by 18 February, the Court resisted such unseemly political interference[108] and released its judgement on 27 February 2013. While confirming that "*the mere transfer of the companies from the State enterprise regime to the mixed ownership model regime does not alter the Crown's obligations to act in accordance with the Treaty*"[109], among other things, the Supreme Court nevertheless dismissed the appeal.

103. To conclude this sorry saga, in keeping with its clear determination to go ahead with the asset sales regardless of opposition from hapu and iwi, to undermine rather than to respect and protect their rights and interests, and in an apparent attempt to discredit the decision of the Supreme Court before it had even heard the appeal, there were reports in December 2012 that the state party had asked Crown Law to look into the possibilities of challenging the Chief Justice being on the full-court panel that would consider the appeal, or requesting her to recuse herself from it, on the grounds that prior to her appointment she had acted for the Maori Council in several cases in the late 1980s through to the mid-1990s.[110] There was no similar suggestion that other Supreme Court judges might recuse themselves on the grounds that they have acted for the Crown in the past, not even in the case of one who was Solicitor-General for 11 years before he became a judge in 2000.

104. 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."*[111] There is no social responsibility clause in the new legislation.

105. In addition, the new companies created by the legislation 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.

C.iv. Local government, the Treaty of Waitangi and indigenous peoples' rights

106. 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.

107. 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.[112]

108. Since then, an Independent Maori Statutory Board (IMSB) has been established, chosen by representatives of nineteen hapu and iwi in the region.[113] Among other things, the IMSB has a statutory obligation to assist Auckland Council to act in accordance with statutory provisions referring to the Treaty.

109. 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.

110. The Treaty of Waitangi Audit was released in March 2012, 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.

111. 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.[114]

112. 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.

113. At the end of 2013, Te Puni Kokiri (the Ministry for Maori Development) released the results of a survey into how iwi and hapu are involved in natural resource management by local authorities through processes such as the Resource Management Act 1991[115].

114. The survey found there is a tendency for local authorities to preserve their own authority and status, and to relegate Maori participation in decision making to a minor role[116]. Key challenges include: a poor attitude towards engaging with iwi or hapu, or both, including a lack of willingness to engage; a lack of commitment to Treaty of Waitangi policy and practice; issues around local authorities dominating agenda setting and a low level of iwi influence and representation in decision-making; a low level of understanding about iwi and hapu, and of cultural issues including relationships with the land, rivers and the sea; and unrealistic timeframes with decisions having to be made more quickly than the capacity of iwi and hapu permits. [117]

115. As with the Treaty of Waitangi audit, the Te Puni Kokiri survey raises questions around how the state party is communicating Treaty responsibilities to local authorities.

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

116. 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.[118] We provide here an example of a legal challenge taken with respect to a violation of Covenant rights, related to child poverty, which demonstrates that such remedies are not easily accessible.

117. In 2002, a complaint was laid with the Human Rights Commission by the Child Poverty Action Group[119] 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 receiving social welfare assistance.

118. 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[120] - one third in a household with income from paid work, and two-thirds in households reliant on social security.[121] 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.*[122]

119. 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.[123]

120. As mentioned above, the Child Poverty Action Group case began in 2002, and after six years of legal wrangling and attempts by government lawyers to stop it proceeding[124], it was considered by the HRRT in 2008. The HRRT 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 Review Tribunal, 2008)* [125]

121. However, the HRRT also found that the state party had proved this discrimination was justified.

122. The state party appealed the HRRT's finding that the IWTC is discriminatory, the Child Poverty Action Group appealed the finding that such discrimination is justified, and the case moved on to the High Court where the appeal 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.

123. Following the hearing, the High Court, like the HRRT, 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.[126]

124. 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.[127]

125. The High Court turned down the application for leave to appeal in 2012, and the Child Poverty Action Group therefore filed an application directly with the Court of Appeal for special leave to appeal the High Court decision - the special leave to appeal was granted on 17 July 2012.

126. The Court of Appeal heard the case in May 2013, and released its judgement in August 2013[128]. Although the Court stated beneficiaries with children are materially disadvantaged by the IWTC[129], and concluded that the policy is prima facie discriminatory because *"[i]t takes as an operative characteristic a prohibited ground of discrimination and results in a lack of comparable gain to beneficiaries with children"*[130], it nevertheless found that *"the off-benefit rule is a justified limit on the right to freedom from discrimination on the ground of employment status"*[131].

127. Given the apparent inability of the courts to provide a remedy in this matter, the Child Poverty Action Group decided not to seek leave to appeal to the Supreme Court.

128. 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.

129. 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."*[132]

130. 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 welfare reform agenda (Articles 2, 3, 24, 26)

E.i. Social Security (Youth Support and Work Focus) Amendment Bill 2012

131. The Social Security (Youth Support and Work Focus) Amendment Bill 2012, enacted in July 2012, was the first legislative move to implement the state party's social welfare reform agenda and has a range of negative and discriminatory effects as outlined below.

132. 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****."*[133] *[our emphasis]*

133. 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, the second reading took place on 12 June 2012, and it was enacted on 19 July 2012. This can hardly be described as a "robust process".

134. As to the content of the legislation in relation to the state party's Covenant obligations, in particular the right to freedom from discrimination - 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.[134]

135. Administration and delivery of the new Youth Payment and Youth Parent Payment has been contracted out to service providers (including private companies), and the legislation 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.

136. Social welfare payments for young persons are being distributed through redirections for accommodation and utility costs, a payment card for food and groceries, and a small "in-hand" allowance.

137. Enactment of the legislation has set in law prohibited discrimination on the grounds of age, gender, family status and employment status. Persons in need of social welfare assistance are 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 are subjected to punitive and coercive measures that persons with other sources of income are not.

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

139. 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" [135] which raises a further issue of racial discrimination.

140. Children in families whose income is derived from social assistance are 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 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[136] 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.

141. 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.

142. There is another issue of concern around the state party's social welfare reform agenda that 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"[137] and "intergenerational dependence on welfare"[138] 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, and has the effect of acting to justify its discrimination against them.

143. It should be noted that the state party does not use similar derogatory language around the provision of pensions for military veterans - even though the amount allocated to veterans pensions and administration is higher than the cost of the DPB (now including income support for sole parents, caregivers of sick or infirm people or women alone): in the 2013 Budget, for example, $167,448,000 for the former and $149,349,000 for the latter.[139]

144. 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"*[140] (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.

145. 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."*[141]

146. That pattern is precisely why social welfare assistance for parents, provided without coercive or punitive measures and in a non-discriminatory manner, is so essential - to enable parents to care for their children without falling apart.

147. 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 (when the reform proposals were being introduced), the overall unemployment rate was 6.3%[142]. The unemployment rate varies by age, gender and ethnicity, for example, the rate for young persons was 17.3%[143]; for women, 6.7%[144]; for Maori, 13.4%[145]; and Pacific peoples, 13.9%[146]. 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[147] 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%).[148]

148. As of November 2013, the overall unemployment rate was 6.2 %; the rate for Maori was 12.2% and for Pacific peoples, 15.7%. [149] As of March 2013 (the most recent figures available), the unemployment rate for young persons was 17.1%[150]; and for women, 7.3%[151]. The regional figures for March 2013 were: Auckland, 7.6%[152]; Northland, 9.9%[153]; Bay of Plenty, 7.4%[154]; and Hawkes Bay, 8%[155].

149. 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.

150. A report on initial research on the effects of the sanctions regime on children, released in October 2013[156], illustrated the discriminatory nature of the policy and concluded that:

> *"The sanctions regime puts children's needs in second place behind the ideologically driven desire to move sole parents (and other beneficiaries and their partners) into paid work. The work-first income support regime now in place ignores the needs of children, and violates their rights under the UN Convention on the Rights of the Child: arguably the resulting insecurity is a form of economic violence that New Zealand – already a divided society – can ill afford. Reliance on paid work for an adequate (although by no means secure) income effectively creates a class of economically vulnerable, invisible and unequal children whose wellbeing is intimately tied to the welfare/labour market status of their caregivers.* ***This necessarily means some children will not have the same opportunities as their peers*** *- indeed, it is a long way from the Minister's goal that "every child thrives, belongs, achieves" (New Zealand Government, 2011).*
>
> *With the latest changes the focus on work has been bolstered by the imposition of social obligations; the failure to comply with these can also result in benefit cuts. In effect, this augments the threat to children's security of income and potentially further stresses already stretched households."[157] [our emphasis]*

E.ii. Social Security (Benefit Categories and Work Focus) Amendment Bill 2012

151. Stage two of the state party's social welfare reform agenda, involving 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[158], came via the Social Security (Benefit Categories and Work Focus) Amendment Bill 2012[159], which was enacted in April 2013 and came into effect in July 2013.

152. The Bill compressed the range of social welfare assistance into three categories. It placed additional requirements on carers of children, such as ensuring each child under the age of five attends an early childhood education centre (despite there being insufficient places in early childhood education centres for those parents who currently wish to enrol their children, and a

freeze on funding for such centres in 2012[160]); and instituted drug testing for social welfare recipients seeking, or forced to seek, paid employment, with financial sanctions for non-compliance - again, setting in place discriminatory requirements on those in receipt of social welfare assistance, which do not apply to anyone else.

E.iii. Social Security (Fraud Measures and Debt Recovery) Amendment Bill 2013

153. The Social Security (Fraud Measures and Debt Recovery) Amendment Bill was introduced to parliament in February 2013, and is currently being considered by the Social Services Select Committee. The introduction to the Bill states: *"Its main aim is to strengthen further the approach to relationship fraud by making spouses and partners, as well as beneficiaries, accountable for fraud."*[161] Aside from the general issue that fraud (including by spouses and partners) is already covered by existing law, there are two particular concerns about this legislation, which departs from the usual standards of criminal liability by:

> *"enabling payments, credits, or advances to which a beneficiary was not entitled, and that were obtained by fraud by the beneficiary, to be recovered from the beneficiary's spouse or partner who knowingly benefited, or* ***ought to have known*** *he or she was benefiting, from that fraud"*[162] *[our emphasis]* - and -
>
> *"making it a criminal offence for a beneficiary's spouse or partner to benefit from an excess amount that the beneficiary obtained by fraud if the spouse or partner knows,* ***or is reckless as to whether****, the amount is an excess amount and obtained by the beneficiary's fraud".*[163] *[our emphasis]*

154. "Ought to have known" is a departure from the standard of actually knowing as in, for example, the Criminal Proceeds (recovery) Act 2009; and "reckless as to whether" is a departure from the general legal principle that a positive act is required to establish criminal liability.

F. Privatisation of prisons (Articles 2 and 10)

155. 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, and expressions of interest have been invited to rebuild and run the maximum-security wing at Auckland prison.

156. The first contract, to manage the Mt Eden / Auckland Central Remand Prison, went to the British based corporation, Serco, in December 2010.[164] Serco has a less than positive human rights record in running detention facilities in Britain and Australia. There have been indications of issues with Serco's management of Mt Eden prison[165], and reports that the prison is seriously under-staffed[166]. Concerns have also been raised about Serco in the light of the major fraud allegations made against its parent company in Britain.[167]

157. 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.*[168]

158. The contract was signed in September 2012[169], and construction began later that month[170]. The prison is due to be completed in early 2015[171]. It should be noted that the state party's announcements about the prison repeatedly refer to its "economic benefits" and include the phrase that the 25-year contract "*represents a 17 per cent, or $170 million, saving for taxpayers than if it had been procured through conventional means"*[172], rather than focussing on the state party's obligations to those who will be incarcerated in it.

159. In October 2013, the state party announced that it is seeking expressions of interest from any consortia wishing to take part in a public private partnership to redesign, design, build, finance and maintain Paremoremo, the maximum-security wing at Auckland Prison, on a 25-year contract.[173]

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

160. 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."*[174]

161. In 2012, the 'Sunday' programme 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 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.[175]

162. 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""*[176], the "double-shot" taser which is capable of firing two cartridges instead of one.[177] The Taser X2 was trialled in April 2012[178], but there is no publicly available information as to whether it has now been fully operationally deployed.

163. Finally in this section, in November 2013, the police announced that the XM1006 "sponge round", fired from a 40mm gas launcher, would be deployed by specialist police staff. In the announcement, the XM1006 is described as *"an effective tool that can help resolve dangerous incidents from a safe distance, where previously firearms may have been the only remaining option"*.[179]

H. Developments in immigration policy and legislation (Articles 9 and 13)

H.i. Immigration New Zealand directive

164. 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).

165. 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.[180]

166. 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."*[181]

H.ii. Immigration Amendment Act 2013

167. The state party introduced the Immigration (Mass Arrivals) Amendment Bill 2012 (subsequently 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 report back to parliament in August 2012, and the Bill was enacted as the Immigration Amendment Act 2013[182] in June 2013.

168. The purpose of the legislation is to deter "people-smuggling operations" and to legislate for a most unlikely possibility - the mass arrival of "illegal immigrants" on a craft.[183] 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.

169. Among other things, the legislation:

- *establishes a definition of mass arrival group (a group of more than 30 people, initially ten in the Bill);*
- *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.*[184]

170. In relation to the review processes for refugee and protection claims, the legislation:

- *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.*[185]

171. 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.*[186]

172. The Immigration Amendment Act 2013 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.

H.iii. Immigration Amendment Bill (No 2) 2013

173. The Immigration Amendment Bill (No 2)[187] was introduced to parliament in October 2013, and referred to the Transport and Industrial Relations Select Committee in November 2013; the Committee is due to report back to parliament by May 2014.

174. The primary purpose the legislation is to make *"the exploitation of migrants on a temporary entry visa with work conditions an offence"*, and the employer liable for deportation costs, which is commendable. However, among other things, the Bill provides for "enhanced search powers" for immigration officers, who will be enabled to:

> *• undertake a personal search at the border:*
> *• search a property or place for identity documents in order to facilitate a deportation or turnaround:*
> *• enter and search an employer's premises in order to search for unlawful workers, check documents and interview employees to ascertain whether the employees and employer are complying with the principal Act:*
> *• apply for and execute a search warrant.*

175. Currently, most of those powers are reserved for police officers, and there is no explanation as to why they are being extended to immigration officers.

176. In addition, the legislation removes the ability to request personal information under the Privacy Act 1993 in relation to the reasons for decisions made using absolute discretion:

> *"Clause 8 amends section 11 of the principal Act to provide that, where a person purports to apply for a matter or decision that is in the absolute discretion of the decision maker, the reasons for any decision made in relation to the purported application may not be accessed via privacy principle 6 of the Privacy Act (which provides for access to personal information held by agencies)."*[188]

I. Electronic mass surveillance and expansion of state surveillance (Article 17)

177. New Zealand is part of the United States' global mass surveillance system - along with the United Kingdom, Canada, and Australia - via the UKUSA agreement, a grouping known as the 'Five Eyes' alliance. The Waihopai satellite communications monitoring facility - run by the Government Communications Security Bureau (GCSB) - is part of the United States National Security Agency (NSA) network, using the ECHELON global communications interception system to intercept private and commercial communications[189].

178. Due to the intimate relationship with the NSA, it is widely believed that other NSA interception systems, such as the recently revealed PRISM, may also be used although the state party will not confirm or deny that[190]. In response to questions in parliament about PRISM, whether the state party has contracts with the intelligence data-mining company Palantir, and whether a Palantir analyst would be embedded within the government, the Prime Minister has repeatedly responded with the statement *"It is not my practice to discuss the operational capabilities or contracts of the New Zealand intelligence agencies"*[191] or words to that effect.

179. Information about the activities of the GCSB and the operational capabilities of the Waihopai facility has long been withheld from parliament and the public, together with information about the extent to which they are independent of, or act in concert with, the NSA.[192]

180. The GCSB was established in 1977 in secret by the Prime Minister of the day, and its involvement in "signals intelligence" was not made public until 1984.[193] The Waihopai facility began operating in 1989 with one satellite interception dish, with a second added in 1998. The GCSB also has a high frequency radio interception and direction-finding station at Tangimoana, in the lower North Island.[194]

181. The GCSB operated without any legislation for 26 years, a situation that changed in 2003 with the enactment of the Government Communications Security Bureau Act[195].

182. The 2003 Act clearly laid out the two key roles of the GCSB: to provide foreign intelligence to the government and foreign intelligence to meet its international obligations and commitments; and to protect and enhance the security of government communications, information systems, and computer systems.[196] The GCSB was prohibited from intercepting the communications of any New Zealand citizen or a permanent resident:

> *"**14. Interceptions not to target domestic communications**. Neither the Director, nor an employee of the Bureau, nor a person acting on behalf of the Bureau may authorise or take any action for the purpose of intercepting the communications of a person (not being a foreign organisation or a foreign person) who is a New Zealand citizen or a permanent resident."*[197]

183. The GCSB reports directly to the government Minister responsible for the GCSB - generally the Prime Minister - and interception warrants *"authorising the use of interception devices to intercept communications not otherwise lawfully obtainable by the Bureau"*[198] are issued by the Prime Minister (not the judiciary) following a written application by the GCSB Director.

184. In September 2012, it was revealed that the GCSB - acting on behalf of United States' authorities - had illegally intercepted communications of permanent resident Mr Kim Dotcom (founder of Megaupload) and Mr Bram van der Kolk in the run-up to the raid on Mr Dotcom's home in New Zealand in January 2012, which was carried out also at the request of United States' authorities.[199] Incidentally, the warrants for the raid, conducted by 90 anti-terrorism and police officers, were found by the High Court to be unlawful, as was the seizure and subsequent removal of cloned hard drives from New Zealand to the United Sates Federal Bureau of Investigation.[200]

185. In October 2012, the Co-Leader of the Green Party laid a complaint with police regarding the GCSB's illegal interception of Mr Dotcom's communications. The outcome of the police investigation was released in August 2013, and it found that while GCSB staff had acted unlawfully, *"they did not have the necessary intent to satisfy the elements of the offence and be considered criminally liable"*, and no criminal charges would be laid[201].

186. Given the clear wording of Section 14 of the 2003 Act (as detailed on the previous page), it is difficult to imagine how GCSB staff could be unaware of the prohibition on intercepting the communications of a New Zealand citizen or permanent resident. In any event, the decision not to prosecute is a curious approach given the state party's recent enactment of the SOP No 205 amendment to the Crown Minerals (Permitting and Crown Land) Bill 2012 (as outlined in section B) and provisions of the Social Security (Fraud Measures and Debt Recovery) Amendment Bill 2013 (as outlined in section E.iii) - both of which establish criminal liability whether or not there is any intent to commit an offence.

187. Also in October 2012, the Secretary of the Cabinet / Clerk of the Executive Council (the Cabinet Secretary) was seconded to the GCSB to undertake a review of the legality of the GCSB's activities and of its compliance framework. The Report[202] was completed on 22 March 2013, but was only publicly released following a leak of its contents to the media. In addition to identifying a very disturbing range of compliance, oversight and organisational issues in the GCSB, the Report revealed "*some aspects of the GCSB Act have recently been found to have been open to question or incorrectly applied since the legislation was enacted"*[203]. It also revealed that the GCSB may have illegally spied on 88 New Zealanders between April 2003 and September 2012 on behalf of the domestic security agency, the Security Intelligence Service, and the police.[204]

188. Given the relevance of the provisions of the Covenant to the issue of state surveillance, the Committee may be interested to know that the Cabinet Secretary reported: *"I have not seen any evidence of a systematic and ongoing process to identify relevant compliance obligations that apply to GCSB"* ... and *"I did not find any collection of relevant international conventions or treaties."*[205]

189. The Report recommends, among other things, that: "*an exercise be undertaken to assess relevant laws (including common law and international law) relevant to the Bureau and to ensure that current practice is consistent with the law"*.[206]

190. Rather than investigating further with a view to holding those responsible for the unlawful actions outlined above, or taking the time to assess the state party's obligations under international law (including under the Covenant) and the NZBoRA as recommended by the Cabinet Secretary, the state party chose instead to introduce new legislation on 5 May 2013 to expand the GCSB's powers - the omnibus Government Communications Security Bureau and Related Legislation Amendment Bill 2013.

191. The Bill expanded the role of the GCSB from the collection of foreign intelligence only, to include the interception and collection of domestic communications and information, including a new role:

> "*to co-operate with, and provide advice and assistance to, the following for the purpose of facilitating the performance of their functions: (a) the New Zealand Police; and (b) the New Zealand Defence Force; and "(c) the New Zealand Security Intelligence Service."*[207]

192. The legislation allows the GCSB to access, gather and analyse intelligence about information infrastructures "information structures", which was defined in the Bill as computer systems and networks[208], but had expanded to include "electromagnetic emissions, communications systems and networks, information technology systems and networks, and any communications carried on, contained in, or relating to those emissions, systems, or networks" when the Bill was enacted[209].

193. The legislation was described by the Law Society as providing "*for the extraordinary extension of powers of the GCSB to conduct surveillance on New Zealand citizens and residents"*[210]; and the Law Society's submission to the Intelligence and Security Select Committee summarised the changes thus:

"3. The Bill changes the Government Communications Security Bureau (GCSB) from being a foreign intelligence agency to a mixed foreign and domestic intelligence agency. The Bill empowers the GCSB to spy on New Zealand citizens and residents, and to provide intelligence product to other government agencies in respect of those persons, in a way not previously contemplated and that is inconsistent with the rights to freedom of expression and freedom from unreasonable search and seizure under the New Zealand Bill of Rights Act 1990 (NZBORA) and with privacy interests recognised by New Zealand law.

4. The Law Society's concerns regarding the absence of clear justification for these changes are exacerbated by the use of Parliamentary urgency, and the consequent short timeframe provided for consultation and submissions. The Law Society is concerned that, in the absence of compelling grounds for urgency, its use degrades the democratic quality of the legislative process."[211]

194. The Intelligence and Security Committee reported back to parliament on 25 July 2013, and proposed some minor changes to the Bill, which did not address the fundamental flaws in the legislation[212]. Further last minute changes were made to the legislation by way of SOPs, and the Bill was enacted on 21 August 2013[213] as the Government Communications Security Bureau Amendment Act 2013[214]. It came into effect in September 2013.

195. On the same day as it introduced the Government Communications Security Bureau and Related Legislation Amendment Bill, the state party introduced companion legislation - the Telecommunications (Interception Capability and Security) Bill 2013[215]. Following its first reading, the Bill was referred to the Law and Order Select Committee. The legislation imposes obligations on telecommunications companies to ensure that public telecommunications networks and telecommunications services have full interception capability, and to provide eavesdropping capability to the GCSB and other state agencies.

196. As with the Government Communications Security Bureau and Related Legislation Amendment Bill, there was widespread public concern about this Bill. As one example, the Law Society said it contains inadequate safeguards and risks breaching defendants' rights to natural justice in enforcement proceedings.[216] Among the provisions of concern are those relating to enforcement proceedings for non-compliance with *"lawful interception and network security obligations"*, which can be heard in the High Court with any classified security information presented in the absence of the defendant or defendant's lawyers if the Attorney-General so requests. Instead, a special advocate for the defendant may be appointed.

197. In relation to those provisions, the Law Society stated that the Bill:

... "is vague and overly general, the threshold for receiving secret evidence is too low, and the role of the special advocate is not as well defined as it should be.

The use of secret evidence in court proceedings is inherently unfair, and more safeguards need to be put in place to ensure the provisions to protect classified information impair defendants' right to natural justice – a right affirmed by s 27(1) of the New Zealand Bill of Rights Act 1990 – as little as possible ...

The Law Society says the process of the selection of a special advocate and its role should be further defined, as well as the process for such persons obtaining the necessary security clearance.

Other issues surrounding the appointment of a special advocate include whether the defendant has a choice in who will represent them and the extent of communication that is allowable between the special advocate and defendant."[217]

198. The Bill was also opposed by telecommunications companies[218] and corporations providing internet services. In October 2013, Facebook, Microsoft, Google and Yahoo wrote to the state party reiterating their concern about the legislation, asking to be exempted from the provisions of the Bill, and pointing out, among other things, that requiring them to make their systems interception-capable for New Zealand spy agencies *"would present serious legal conflicts for companies headquartered in other countries"*.[219]

199. The Bill was enacted as the Telecommunications (Interception Capability and Security) Act 2013[220] on 5 November 2013[221] and received Royal assent on 11 November 2013 - some provisions will come into effect in February 2014 and the full Act in May 2014.

J. Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (Article 25)

200. The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010[222] amended Sections 80 and 81 of the Electoral Act 1993[223], to remove the right to vote from citizens who are imprisoned, regardless of the length of sentence (prior to the Amendment Act, only citizens who were serving a prison sentence of three years or longer were disenfranchised).

Thank you for your consideration of this report.

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