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Tena koe,

Feedback on draft report on New Zealand's performance under the International Covenant on Civil and Political Rights ("draft report")

1. This submission is by the Human Rights Lawyers Association of Aotearoa New Zealand ("**HRLA**"). We welcome this opportunity to provide feedback on the draft report. Below we set out comment on those issues that we feel require specific feedback.

Waitangi Tribunal (paragraphs 115-119 of the draft report)

Funding

2. The Waitangi Tribunal ("**Tribunal**") is under increasing pressure from the Crown to spend less on the process of hearing claims. Both the Tribunal and Crown law are under considerable pressure to cut costs. This is to the detriment of the people, whanau, hapu and Iwi that seek to have their claims against the Crown heard.

3. There is an inherent tension here, in that the Crown must contribute funds to Maori groups so that they can prosecute claims against the Crown. This ensures that there is a power imbalance between the Crown and Maori groups, who have suffered prejudice through the actions of the party that now funds their efforts at removing that prejudice. The Crown must take a hands-off approach to the allocation of funding, and simply ensure that the funds allocated are sufficient. This is not what is happening.

4. It is not disputed that it takes some time for claims to be heard by the Tribunal and for a quality report to be issued. This does not mean that claims are being dealt with as quickly and efficiently as they should be. The Tribunal is handicapped by a lack of report writing staff, a lock of funding for research, and a lack of certainty over future funding.

5. The need for more resources to be dedicated to the Tribunal was evidenced in the preparation of the Stage One Report for the Northland Waitangi Tribunal. The need to share staff with other inquiries, notably urgent inquiries, delayed the release of the report for a considerable period.

6. The delays created by the Crown failing to allocate sufficient resources to the Tribunal are significant for two reasons. The first is that it saps the enthusiasm of those prosecuting their claims. If their claims are not heard in a timely way, and a report not produced within a reasonable time frame, then the people do not see that justice has been done. They do not feel listened to. The potential for grievances to be heard and healed is diminished greatly.

7. The second way that the delay is important is that it is used to the Crown's advantage to seek to bypass the Tribunal and reach a settlement of claims through direct negotiations. By seeking settlement with groups who have not had the benefit of a report on their claims by the Tribunal the Crown deprives the people of a significant tool to use in settlement negotiations. The huge power imbalance between the Crown and Maori groups is exacerbated.

8. At paragraph 117 the draft report seeks to show examples of allocation of sufficient resources. Where all that is able to be pointed to is the introduction of Ipads for Tribunal members it is clear that more needs to be done to ensure that Maori are able to have their claims heard in a meaningful manner that complies with the rules of natural justice.

Backlog

9. At paragraph 118 of the draft report it states that the Crown does not consider that there is a backlog of claims, but then sets out a picture that shows that by the numbers there is indeed a backlog. Some of the 1865

claims that the draft report claims the Tribunal currently has at hand were lodged decades ago. Many claimants and witnesses have passed away waiting for claims to be heard.

10. At the time of the enactment of the Crown Forests Assets Act 1989 ("**CFAA**") it was envisaged by all parties that the claims it covered would be dealt with within a few years. To date many have still not been heard. The repercussions of this delay are set out further below.

Issues with Settlement

11. We first note that while there is nothing wrong with settlement per se, the figure of settled claims does not reflect the number of claims settled *voluntarily*. The Crown points to the large number of settlement bills that have gone before Parliament in recent years with some pride; however many of these settlements have been achieved not with settling grievances in mind, but for political expediency.

12. The Crown has developed its own settlement policy without meaningful consultation with the groups it seeks to settle with. Over numerous objections, the Crown determines the terms of negotiation, the identity and composition of the group it is settling with, and ultimately settlement quantum. This approach shifts the focus from reconciliation to economic stimulus.

13. Compounding the issues with settlement, the Crown has developed a policy of only settling with what it deems to be a "large natural grouping" of Maori. This policy means that smaller groups may not seek settlement with the Crown, and are often 'swallowed up' or 'steamrolled' by larger commercially oriented Maori groups. We repeat, the Crown decides what constitutes a large natural grouping, not claimants, not Maori. There is a very real possibility that some groups with established Treaty breaches are unable to have their grievances settled because they are not "large" enough.

The Tribunal in the future

14. The report states that Kaupapa claims will be heard following historical claims; However these claims can only be heard where Maori have not settled their claims—either voluntarily or involuntarily. If Maori are not heard on the issues involved in Kaupapa claims then the country loses out on important information about the past, and Maori lose the chance to give their grievance a voice before the body created to hear them. Where Maori have a voice to add to a Kaupapa claim they should not be estopped from doing so by virtue of a generic settlement that they may not have assented to in the first place.

15. Finally on this point, Maori have no means to judicially review settlements, as decisions on mandate are not currently reviewable by Courts. We consider that legislation should be passed to allow Courts to intervene, as this would go some way to addressing the power imbalance between the Crown and Maori.

Urgent Inquiries of the Waitangi Tribunal

16. The draft report states that once historical claims have been dealt with the Tribunal will move onto Kaupapa claims, but the draft report does not consider urgent hearings before the Tribunal.

17. Where any Crown action, omission, or policy will cause imminent irreversible prejudice to Maori by breach of Te Tiriti then they may apply for an urgent hearing. These are not granted lightly, but are not infrequent. There are several urgent inquiries underway at the moment, and some further inquiries pending.

18. The Crown states that partly it is multiple applications for urgent hearings that are causing difficulty in funding, and seek to place some of the blame on claimant lawyers for bringing these claims. Seeking to shift the focus does not change the fact that where hearings are granted they are the result of Crown actions prejudicing Maori. They should be funding adequately, as they only exist because Maori feel compelled to apply for urgent hearings due to Crown actions.

19. The result of these urgent hearings is that the Tribunal budget that the Crown has planned for is not enough to cover all of the Tribunal's activities. This creates delay, and is not mentioned in the draft report as it stands. This is a significant oversight. We note here that urgent inquiries play an important constitutional role, as they are often the only means by which Maori can seek relief—the Court often not accepting review of Crown actions.

20. The report is also silent on contemporary claims, and how they may change the funding picture. The assumption seems to be that the Crown is and will be Treaty compliant in current times. Claimants regarding current Treaty breaches that are not accorded urgency nevertheless have the right for their claims to be heard. Again inquiries of this kind will have important constitutional repercussions and must be resourced sufficiently.

The deadline

21. Paragraph 117 mentions "Any remaining historical claims". Simply because an artificial cut off date was enforced does not mean that there are no remaining claims. The 2008 bar to claims has had the effect of driving people who would have had claims heard into settlement—which is to the benefit of the Crown. This is especially the case for the younger generation. People who, as a result of Treaty breaches, were not in a position to lodge a claim have been denied the chance to have their claims heard and properly reported.

Crown treatment of Tribunal decisions

22. Where the Government decides to act in a manner contrary to the recommendations of the Tribunal there is no necessity for any justification. Recommendations are simply brushed aside as non-binding. The Government should adopt a framework to ensure that Tribunal recommendations are only overridden with sufficient justification, and that steps are taken to mitigate the harm to Maori caused by such actions

Settlement policy versus rights enshrined in legislation

23. As above, the CFAA was the result of an agreement reached by the Crown and Maori at the end of the 1980s. Under the agreement the Tribunal was given some of its only powers to make binding recommendations on the Crown.

24. The agreement and the CFAA are being overridden by Crown policy. In the urgent Mangatu remedies hearing held during 2012 the Crown said that the legislative framework was out of step with settlement policy and so the Tribunal should avoid making a binding recommendation. The Crown, as above, developed this settlement policy, almost completely independently of Maori. The Crown now seeks to use policy to brush aside statute law, and the rights guaranteed within the law, in favour of its unilaterally developed policy.

25. The Act was passed following an agreement between Maori and the Crown that was mutually beneficial. Since the Act was passed, the Crown has generated an enormous amount of money by selling state forests. Due to delays in having claims heard and reported upon, Maori have not benefitted from the agreement. Now that some groups are at the point where their claims have been heard and they do seek to reap that benefit, they are told that the Act is too generous compared with the settlement policies that the Crown has developed in the meantime.

26. Maori are in effect being punished due to the Crown's unwillingness to fairly compensate for its breaches of Te Tiriti. Policy should not trump the rights enshrined in legislation, but this is happening, and is not mentioned in the report. There is currently High Court action pending on this issue.

Private Prisons

27. We do not support the proliferation of private prisons. Outsourcing key state powers over our most vulnerable citizens to private, profit-driven companies is a concerning trend. Overseas experiences show that private prisons tend to have lower staffing levels and higher incidences of violence than public prisons [Elizabeth Stanley Human Rights and Prisons: A Review to the

Human Rights Commission (Human Rights Commission, Auckland, July 2011)].

28. If this government continues to sanction privatised prisons, we suggest stricter transparency is required. Private contractors' performance, measured against their contractual Key Performance Indicators, should be made publicly available (as should the comparable performance of prisons run by the Department of Corrections). We would also advocate the introduction of a Private Prisons Information Act.

Attorney General s7 reports

29. These are not often done and there is no ability to review decision of the Attorney General not to do a report. There is no need for Government to take action as a result of a report where it is done. In these circumstances the reports become not a constitutional safeguard, but a box to be ticked on the way towards overriding peoples' rights.

Presumption of innocence

30. We support the planned review of the Misuse of Drugs Act 1975 and a careful examination of its provisions reversing the onus of proof onto the defendant in relation to possession of drugs for supply over a certain quantity.

Counter-terrorism measures: terrorism designations

31. Since 2010 New Zealand has designated 19 non-UN listed groups as terrorist entities. These designations and the provisions of the Terrorism Suppression Act ("**TSA**") spark a number of human rights concerns.

Broad powers of designation

32. Under s 22 the Prime Minister may designate a group as a terrorist entity if under reasonable grounds he or she believes it has committed at least one 'terrorist act'. The New Zealand Human Rights Commission noted the

definition of a 'terrorist act' in s5 had the potential to be applied very broadly by law enforcement and intelligence officials.[1]

33. The broad power the Act gives the Prime Minister to designate groups as terrorists has the potential to be misused—there are no adequate safeguards in place to prevent this.

Ambiguity over which actions by designated groups are criminalised

34. Some of groups designated by the New Zealand government are involved in a range of activities aside from political violence.

35. For example the Kurdistan Workers Party (PKK), designated since 2010, engages in bombings and other acts of violence against both military and civilian targets in Turkey. However, over the past year the PKK also fought ISIS and provided much needed aid to Kurdish communities in Iraq and Syria besieged by ISIS forces. In the Kurdish regions of Syria and Turkey the PKK organises and supports novel experiments in Kurdish self-governance and grassroots democracy to support the Kurdish people who have long been discriminated against by the region's states.

36. It is unclear under the current wording of the TSA if someone could be prosecuted for providing funds or other support to a designated terrorist entity intending that they be used for a purpose other than carrying out terrorist attacks.

37. Section 8(2A) of the Terrorism Suppression Act states:

> *"A person commits an offence who, directly or indirectly, wilfully and without lawful justification or reasonable excuse, provides or collects funds intending that they benefit, or knowing that they will benefit, an entity that the person knows is an entity that carries out, or participates in the carrying out of, 1 or more terrorist acts".*

[1] New Zealand Human Rights Commission *Operation 8: A Human Rights Analysis* (December 2013) at 79.

38. The Act expressly states: 'In a prosecution for financing of terrorism, it is not necessary for the prosecutor to prove that the funds collected or provided were actually used, in full or in part, to carry out a terrorist act'.[2]

39. Financing of terrorism is a serious offence that can result in a penalty of up to 14 years imprisonment.[3] Yet the ambiguous wording of this section creates confusion over what could be criminalised under this Act. The wording suggests someone providing donations to the PKK supporting their self-government initiatives aimed at ending discrimination against the Kurdish people could potentially face prosecution.

40. Avoidance of doubt clauses in sections 8(2) and 10(2) of the Act stating it was not an offence to provide funds, property or services to a group if it was intended to be used "or knowing it would be used for the purpose of advocating democratic government or the protection of human rights" were repealed by the Terrorism Suppression Amendment Act of 2007.

41. The repeal of these sections creates greater confusion as to what is covered or not covered by the TSA.

Designation papers link activists with terrorist groups

42. Each time an entity is designated, the Department of Prime Minister and Cabinet ("**DPMC**") release a paper making the legal case for the designation. These papers are publically available on the NZ Police website.

43. Many of the home countries of designated groups have poor human rights records. In these countries the authorities aim to discredit opposition political and social movements by accusing them of having links to terrorist or rebel groups. An anecdote from the 2010 FARC designation paper gives the impression this context was not fully understood when these papers were drafted by the DPMC.

[2] Terrorism Suppression Act 2002, s 8(3).
[3] Section 8(4).

44. The paper includes a paragraph entitled 'Regional presence/links with New Zealand citizens (para 78) which states[4]:

> *"The FARC has no known organisational links with New Zealand, Australia or Pacific countries. There are undoubtedly people in Australia and New Zealand who are sympathetic to FARC's cause. There are some tenuous indications of person-to-person links regarding the FARC and/or the social conditions which help underpin the FARC, but nothing concrete is known to exist. It has been recently reported that a Colombian woman who visited Australia in 2005 and 2007 as a representative of a farm workers' peak union body, has been charged in Bogota with "covert offshore fundraising" for the FARC".*

45. The Colombian woman referred to is Liliany Obando, a trade unionist and sociologist, who researched paramilitary and state violence against trade unionists in Colombia. Her arrest was considered by many Colombian and international human rights organisations to be politically motivated in order to smear opposition as supporters of the FARC-EP. In the UK over 100 Parliamentarians, senior lawyers and trade unionists petitioned Colombia's President Santos calling for Obando's release.[5]

46. Trade unionists in Colombia have been subject to state violence and arrest on charges based on accusations of links to rebel groups in Colombia. Some have questioned the legitimacy of these charges.

47. The designation paper's anecdote about Liliany Obando raises fears the New Zealand authorities may accept at face value accusations migrants resident in New Zealand or overseas visitors involved in activist causes are linked to designated terrorist groups, based on information from states with records of smearing opposition activists as supporters of rebel or terrorist groups.

[4] Available at http://www.police.govt.nz/sites/default/files/publications/statement-of-case-farc-terrorist-entity-10-feb-2010.pdf
[5] http://www.justiceforcolombia.org/downloads/Liliany-Obando-Petition-to-Colombian-President-Santos.pdf

Operation 8

48. For clarity we note that all search warrants were unlawful, and this should be stated clearly in the report. As it stands the message that the report seeks to give is that while there were errors the actions were necessary. At paragraph 64 it states that the Police Commissioner acknowledged that the way in which Police acted caused a loss of credibility and mana for the Iwi. The report should note the loss of faith in the Crown and the damage done to the relationship between Maori and the Crown.

49. Many of the individuals involved had their charges dismissed and are currently pursuing civil remedies for trespass to person and wrongful arrest.

50. The report makes no mention of the trauma inflicted upon people, particularly children, by the unlawful entry of the Police into their homes and vehicles. We are not aware of any counselling or similar program for the children affected.

51. The Terrorism Suppression Act was passed in the year following the attacks of September 11, 2001 ostensibly as part of New Zealand's response to Al-Qaeda and international terrorism. The Police's attempt to use this Act in a wholly domestic setting against those arrested in Operation 8 was a misuse of this legislation.

52. The apology to Tuhoe must be the first of a long series of actions to atone for the harm done to the relationship between the Crown and Maori.

Conclusion

53. We thank you again for the opportunity to comment on this draft report. Should any further information be required please do not hesitate to contact us.

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