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Expert Mechanism on the Rights of Indigenous Peoples

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Ngā mihi nui o te tau hōu | Greetings,

**Submission by the Human Rights Commission on the Expert Mechanisms’ Consultation on the Access to Justice**

1. The New Zealand Human Rights Commission (the Commission) appreciates the opportunity to contribute to the Expert Mechanism’s Study on Access to Justice for Indigenous Peoples.

1. The over-representation of indigenous people (Māori) in all levels of the criminal justice system in New Zealand remains an enduring issue, despite a range of promising initiatives to address it, and is a significant barrier to full realisation of the right to access to justice.

*Māori over-representation in the criminal justice system*

1. Ethnic inequalities in New Zealand’s criminal justice system – specifically, the disproportionate representation of Māori as well as Pasifika people – are entrenched, long-standing and complex, and have repeatedly drawn the attention of a range of commentators, lobby groups, and UN human rights bodies.
2. Despite representing around 12.5 per cent of the general population, Māori consistently make up over half of the male prison population and around 60 per cent of the female prison population. Māori are significantly overrepresented in youth justice statistics (making up 20 per cent of the youth population but 54 per cent of young people appearing in court). The rate of young Māori appearing in court is more than double the rate for all young people. Māori children are more likely to be among the 23,000 children who have a parent in prison, and are around seven times more likely than the general population to end up in prison themselves.[[1]](#footnote-1) [[2]](#footnote-2)
3. Initiated in 2008, the whole-of-government programme, *Addressing the Drivers of Crime*, focuses on prevention and early interventions for priority groups.[[3]](#footnote-3) Other initiatives, such as the Rangatahi Courts and Māori Focus Units in prisons, focus on individuals once they are already in the system. Substantial work remains to be done to address the monocultural nature of the justice system, providing support for locally-designed, developed and delivered programmes, and addressing the ethnic disparities at a number of ‘entry points’ into the system e.g. apprehensions, charging, and placement in a youth residence.

*Addressing the Drivers of Crime*

1. The whole-of-government approach to Addressing the Drivers of Crime (DOC) is particularly focussed on reducing the disproportionate number of Māori in the criminal justice system. The DOC work programme includes a focus on early intervention and prevention programmes in education and health, and the implementation of alcohol and other drug assessments and interventions.
2. The Ministry of Justice reports progress in improving frontline services to priority groups as a result of the DOC work programme. Examples include more participation by at-risk children and families in Well Child checks and parenting programmes; substantial increases in the percentage of school leavers attaining NCEA Level 2 since 2005, with growth highest among both Māori (87%) and Pacific (68%) from schools who draw their students from communities with the highest levels of disadvantage (deciles 1 and 2); and increased access for offenders to alcohol and other drug interventions, restorative justice conferences and pre-release prisoner reintegration services
3. A new crime and crash prevention strategy, *The Turning of the Tide*, has a bold vision: that all Māori will live full and prosperous lives, free from crime and road trauma.[[4]](#footnote-4) Significantly, the strategy has been produced by Police and Māori working together. It represents almost six years of work by the Commissioner’s National Māori Focus Forum and Police staff. It brings together many years of discussions with Māori leaders, as well as the contents of individual Iwi Crime and Crash Prevention Plans, into one national plan that will set the framework for local initiatives and interventions.

The Turning of the Tide sets the following targets to be reached by June 2018:

* 10 percent decrease in the proportion of first-time youth and adult offenders who are Māori.
* 20 percent decrease in the proportion of repeat youth and adult victims and offenders who are Māori.
* 25 percent decrease in police apprehensions of Māori that are resolved by prosecution.
* 20 percent reduction in the proportion of casualties in fatal and serious crashes who are Māori.

*Kooti Rangatahi – youth courts that reflect indigenous justice systems*

1. Ten judicially-led Rangatahi Courts are now operating, along with two Pasifika Courts. The Courts, which are held on marae, are premised on the notion that reconnecting young Māori with their culture and encouraging the meaningful involvement of families and tribal groups in the youth justice process, will contribute to reduced risk of reoffending. An initial evaluation has found positive early outcomes and effective implementation of the courts, which are well supported by their respective marae and local communities.[[5]](#footnote-5) As at August 2012, 845 cases had been seen in either a Rangatahi or Pasifika Court. The sustainability of the Rangatahi and Pasifika Courts relies on ongoing collaboration across government, marae, government agencies and service providers, community and whānau.
2. A Mātāriki Court has been operating in Kaikohe since late February 2012. The Mātāriki Court is an adult court which offers all offenders an opportunity to have a section 27 Sentencing Act 2002 sentence hearing to hear any person(s) they call to speak, on the personal, family, whānau, community, and cultural background of the offender and the way in which that background may have related to the commission of the offence. The Court also facilitates offender access to wrap around services and alternative pathways to address the underlying causes of offending via section 25 of the Sentencing Act 2002. To date, the Court has held four section 27 hearings with a further four awaiting reports to be provided to the Judge before the scheduled sentence hearing date.

*Links between access to justice and other rights*

1. There is wide recognition, for example, in the Drivers of Crime programme, of the links between education and involvement in the justice system.
2. *Ka Hikitia – Managing for Success*: *The Māori Education Strategy 2008 - 2012* is a strategy that sets out specific outcomes, priorities for action and targets over the five-year period of 2008 to 2012 to realise Māori potential. It spans the entire education sector. *Ka Hikitia – Managing for Success* has identified four main focus areas where the evidence shows coordinated activity will have the most impact. They are:

* Foundation Years (early childhood education and the first years at school)
* Young People Engaged in Learning (particularly in years 9 and 10)
* Māori Language in Education (setting and resourcing priorities in Māori Language in Education.)
* Organisational Success (firstly for the Ministry of Education, and then, for the rest of the education sector).

1. The overarching strategic intent of *Ka Hikitia – Managing for Success*: The Māori Education Strategy 2008 - 2012 is: ‘Māori enjoying education success as Māori’.[[6]](#footnote-6)
2. While positive, greater promotion of the strategy is required, along with support and guidance on its implementation, and careful monitoring of its outcomes. The Education Review Office (ERO) has found thatthe strategy to date has been undermined by inconsistent implementation.[[7]](#footnote-7)   ERO identified a variable level of awareness and application of *Ka Hikitia* with some schools having implemented the strategy while others had not yet discussed it. Where the strategy had been considered and acted upon, ERO found that it had a positive impact: ‘secondary and primary schools that had made changes as a result of their consideration of *Ka Hikitia – Managing for Success* were more likely to have improved outcomes for Māori. The difference was statistically significant.’
3. ERO has made the success of Māori students at school a matter of national interest and priority. Reporting in its *Promoting Success for Māori Students* national evaluation in 2010, ERO Chief Review Officer Graham Stoop said “ERO does not consider any school to be high performing unless it can demonstrate that the majority of Māori learners are progressing well and succeeding as Māori.” This means that one of the key factors for a decision on the return timing for a school’s next ERO review will be how well the school is succeeding in improving the achievement of Māori students. ERO regards schools as high performing only when they can demonstrate that Māori learners are actively engaged in their learning, are progressing and achieving, and succeeding as Māori.

*Violence*

1. Māori remain disproportionately represented among victims of crime. The development of specific action programmes for violence in Māori whānau and Pacific families as part of the government’s taskforce for Action on Violence within families.[[8]](#footnote-8)

*Self-determination*

1. A feature of promising initiatives, such as the Rangatahi Courts noted above, is their recognition, to some extent at least, of indigenous self-determination.
2. In 2012 the Human Rights Commission published a discussion paper *A Fair Go For All? Addressing Structural Discrimination in Public Services[[9]](#footnote-9)*examining structural discrimination in the areas of health, education, justice and the public service, and case-studies of promising responses to structural discrimination in each of the four areas.
3. Analysing each of these promising responses, the Commission drew out the following common elements to addressing structural discrimination:

* Collaboration between and amongst government agencies in the design and implementation of policies and programmes
* Cultivating an organisational understanding of what structural discrimination is, and a commitment to developing initiatives to address it.
* Meaningful partnership and consultation with Māori, Pacific, and ethnic communities to develop and sustain effective interventions
* Use of targeted programmes with clear objectives
* Developing and sustaining evaluations processes to measure the impact of initiatives
* Adequate resourcing, both human and financial.

*Whānau Ora*

1. Of particular note, is Whānau Ora, a cross-agency initiative to try and address structural discrimination, particularly in respect of Māori whānau (families). Initiated after the 2008 election, as part of the new National-led government’s confidence and supply agreement with the Māori party, Whānau Ora is still a relatively new programme. However it represents a systematic attempt to tackle inequalities, particularly for Māori.
2. The Whānau Ora programme informed by the 2010 report of the Taskforce on Whānau-Centred Initiatives,[[10]](#footnote-10) asks Government agencies to “commit to a new way of working with whānau that includes an outcomes focus and working with other agencies.” The premise of Whānau Ora is to overcome structural barriers by tying social services together so that they can be accessed more easily for whānau in need, while at the same time empowering whānau to provide for their own development.
3. The following factors can be identified as key to the programme’s potential:

* Whānau Ora is intended to be community-led, with support from Government agencies
* There is a clear expectation that the voice of whānau is not lost as Whānau Ora develops. Whānau Ora asks government agencies to adopt the ‘default setting’ of asking “what difference will this make for whānau?”
* Government agency leadership is engaged with community leadership. The Governance Board consists of government agency Chief Executives and community leaders, allowing for efficient flow of ideas
* Although Whānau Ora is a national programme, it also allows for strong regional direction. Whānau circumstances vary across the country. Regional Leadership Groups reflect Māori leadership in each region and will help ensure Whānau Ora services are developed to reflect the circumstances in each region.

*Waitangi Tribunal*

1. The Waitangi Tribunal was established in 1975 by the Treaty of Waitangi Act 1975. The Tribunal is a permanent commission of inquiry charged with making recommendations on claims brought by Maori relating to actions or omissions of the Crown that breach the promises made in the Treaty of Waitangi. Waitangi Tribunal recommendations remain non-binding in the majority of situations. Binding recommendations can be made for the return of certain lands to Māori.
2. When available prior to negotiations, the Tribunal’s findings and recommendations for district inquiries are considered by the Office of Treaty settlements in settlement negotiations. The Government’s response to kaupapa (generic or nationwide) claims is inconsistent, with the Government at times choosing to respond publicly, and at other times neither accepting nor rejecting the Tribunal’s recommendations.
3. The three most significant kaupapa reports issued by the Tribunal in 2011 and 2012 were *Mautia Rautia: Report on the Kōhanga Reo Claim* (2012);[[11]](#footnote-11) *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (2011),[[12]](#footnote-12) and the *Interim Report on the National Freshwater and Geothermal Resources Claim* (2012).[[13]](#footnote-13)
4. The Tribunal’s most recent report on Freshwater and Geothermal Resources made two recommendations. It recommended that the Crown urgently convene a national hui, in conjunction with iwi leaders, the NZ Māori Council and the parties that asserted an interest in the claim to determine a way forward. In response, the Government undertook a consultation with selected iwi whom it considered were likely to be affected. The Tribunal also recommended that the sale be delayed while the Treaty partners negotiate a solution. During the Waitangi Tribunal hearing, the Prime Minister stated publicly that the Tribunal’s recommendations were not binding on the Government and that he would go ahead with partial privatisation regardless of whether the Tribunal found in favour of Māori. Since the Tribunal decision, judicial review issues have been considered by the High Court. Issues are currently before the Supreme Court. *Matua Rautia* and *Ko Aotearoa Tēnei* both made recommendations, which the Government has neither accepted or rejected.
5. In its 2011 report *Ko Aoteroa Tēnei*, the Waitangi Tribunal concluded that New Zealand was at a crossroads in terms of the Treaty partnership, and offered a series of recommendations as to how New Zealand could more truly reflect its bicultural origins.[[14]](#footnote-14) The Tribunal concluded that:

The path that embraces partnership recognises and values Māori culture as one of New Zealand’s founding cultures. In so doing, it provides Maori with a positive platform from which they can address social issues and contribute to national prosperity; it moves the Crown-Māori relationship from one based on grievance and negativity to one based on mutual advantage; and it provides the basis for future in which all New Zealanders can look forward with optimism to a shared future. It is, the Tribunal says, time to perfect that partnership.

1. While the Tribunal has produced a number of important reports over the past year, the Tribunal’s recommendations remain non-binding on Government and the response is variable.

*Conclusion*

1. The Commission considers that the effective realisation of the right to access to justice remains hampered by the entrenched inequalities experienced by Māori. There are a range of promising initiatives aimed at addressing these inequalities. Key features of these promising initiatives are the recognition of the links between economic, social and cultural rights and access to justice, and the attempt to recognise to some extent, the self-determination and meaningful involvement of indigenous families and communities.

Nāku noa, nā

Karen Johansen

Commissioner

Kaihautū

1. Pillars, (2011), Causes of and solutions to inter-generational crime: the final report of the study of the children of prisoners. Available at: <http://pillars.org.nz/images/stories/2nd-research-report.pdf> [↑](#footnote-ref-1)
2. Te Puni Kōkiri, (2011), *A Study of the Children of Prisoners: Findings from Māori data June 2011*. Available at: <http://www.tpk.govt.nz/en/in-print/our-publications/publications/a-study-of-the-children-of-prisoners-findings-from-maori-data/download/tpk-childrenofprisonersdata-2011.pdf> [↑](#footnote-ref-2)
3. See: <http://justice.govt.nz/justice-sector/drivers-of-crime> [↑](#footnote-ref-3)
4. NZ Police, (2012), Turning of the Tide: a Whānau Ora Crime and Crash Prevention Strategy, available at: <http://www.police.govt.nz/sites/default/files/resources/the-turning-of-the-tide-strategy.pdf> [↑](#footnote-ref-4)
5. Ministry of Justice, (2012), *Evaluation of the Early Outcomes of Ngā Kōti Rangatahi*, available at:

   <http://www.justice.govt.nz/publications/global-publications/r/rangatahi-court-evaluation-of-the-early-outcomes-of-te-kooti-rangatahi/publication> [↑](#footnote-ref-5)
6. See: <http://www.minedu.govt.nz/theMinistry/PolicyAndStrategy/KaHikitia.aspx> [↑](#footnote-ref-6)
7. Education Review Office, (2010), *Promoting Success for Māori Students: Schools’ Progress*, Wellington: ERO. [↑](#footnote-ref-7)
8. See: <http://www.msd.govt.nz/about-msd-and-our-work/work-programmes/initiatives/action-family-violence/> [↑](#footnote-ref-8)
9. Human Rights Commission, (2012), available at: <http://www.hrc.co.nz/race-relations/structural-discrimination-a-fair-go-for-all> [↑](#footnote-ref-9)
10. Available at: <http://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/planning-strategy/whanau-ora/whanau-ora-taskforce-report.pdf> [↑](#footnote-ref-10)
11. Waitangi Tribunal, (2012), *Matua Rautia: The report on the Kōhanga Reo claim*, Wai 2336, Wellington: Waitangi Tribunal. [↑](#footnote-ref-11)
12. Waitangi Tribunal, (2011), *Ko Aotearoa Tēnei: A report into claims concerning New Zealand law and policy affecting Māori culture and identity*, Wai 262, Wellington: Waitangi Tribunal. [↑](#footnote-ref-12)
13. Waitangi Tribunal, (2012), *Interim Report on the Freshwater and Geothermal Resources Claim*. Available at <http://www.waitangi-tribunal.govt.nz/doclibrary/public/reports/generic/Wai2358/Wai2358W.pdf> [↑](#footnote-ref-13)
14. Waitangi Tribunal, (2011). *Ko Aotearoa Tēnei A Report into Claims Concerning New Zealand Laws and Policies Affecting Māori Culture and Identity. Te Taumata Tuatahi*, Available at [http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/262/52823D9E-6BD4-465E-86EE-8A917BAE12D1.pdf](http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/262/52823D9E-6BD4-465E-86EE-8A917BAE12D1.pdf%20). [↑](#footnote-ref-14)