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CONSIDERATION OF AOTEAROA NEW ZEALAND’S FIFTH PERIODIC REPORT ON IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

**Input from Te Puna Rangahau o te Wai Ariki | Aotearoa Centre for Indigenous Peoples and the Law**

# INTRODUCTION

* 1. Te Puna Rangahau o te Wai Ariki | Aotearoa Centre for Indigenous Peoples and the Law (Te Wai Ariki) welcomes the opportunity to provide information to inform the Aotearoa New Zealand’s fifth periodic report on implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
	2. Te Wai Ariki is a nationally leading centre on law and policy supportive of Indigenous peoples’ rights. Our work includes internationally published research, an array of courses, internships and scholarships, expert evidence submissions in legal proceedings, partnerships and collaborations with domestic and international organisations, including the United Nations and universities around the globe, and renowned scholars. We regularly contribute to public discourse in Aotearoa New Zealand and globally.
	3. This submission focuses on the insufficient constitutional protections of the ICESCR rights within Aotearoa New Zealand, and the disproportionate vulnerability of the economic, social and cultural rights for tāngata whenua.[[1]](#footnote-2) Our primary recommendation is that Aotearoa New Zealand must include economic, social and cultural rights in its constitution so that they are enforceable, including when legislation breaches them.

# CONSTITUTIONAL FRAMEWORK

Te Tiriti o Waitangi

* 1. Te Tiriti o Waitangi (te Tiriti) is Aotearoa New Zealand’s founding constitutional document. Te Tiriti is a key constitutional protection of human rights, particularly for tāngata whenua[[2]](#footnote-3) However, it cannot be enforced unless incorporated into legislation and, even when it is incorporated, is overridden when legislation breaching te Tiriti is enacted.
	2. Te Tiriti’s art 2 guarantee of tino rangatiratanga is a protection of many ICESCR rights for Māori, particularly the art 1 right to self-determination, and the art 15(1)(a) right to take part in cultural life. Māori tino rangatiratanga is not provided for in New Zealand’s constitution or law.[[3]](#footnote-4)
	3. Breaches of te Tiriti continue to occur and Māori have limited legal remedy or protection to prevent respective governments ongoing disregard for te Tiriti.
	4. The most obvious contemporary example of ongoing breaches is the Principles of the Treaty of Waitangi Bill, which the draft fifth periodic report does mention, and needs to.[[4]](#footnote-5) While the report acknowledges the findings of the Waitangi Tribunal that this Bill is unfair, discriminatory and inconsistent with te Tiriti itself, it fails to note that the Bill itself is harmful, regardless of whether it passes into law.
	5. The draft fifth periodic report also attempts to describe the Government’s plans to remove legislative references to the Treaty principles as an enhancement of te Tiriti’s legal effect, when it patently does the opposite.[[5]](#footnote-6) The report needs to be amended on this point.
	6. In its 2018 concluding remarks, the Committee raised concern “that the Treaty of Waitangi is still not legally enforceable nor referred to in the Constitution Act, and that the recommendations of the Waitangi Tribunal are not binding and are frequently ignored by the Government.”[[6]](#footnote-7) We recommend that New Zealand’s draft fifth periodic report be amended to recognise the primacy and foundational status of te Tiriti at [6].

CESCR rights and a lack of enforceability

* 1. Aotearoa New Zealand has a strong track record of entering international human rights treaties. However, as a dualist jurisdiction, its domestic incorporation of these standards and rights continues to be weak and, like te Tiriti, they cannot be enforced when Parliament, ruled by the government of the day, chooses to override them. Courts are limited to making declarations of inconsistency, which the Government must respond to,[[7]](#footnote-8) but is not required to repeal such legislation.
	2. While New Zealand’s draft fifth periodic report presents three main statutes as protecting human rights,[[8]](#footnote-9) these do not significantly protect economic, social and cultural rights. The ICESCR rights are only somewhat included in the Human Rights Act 1993 (HRA), and not at all in either the New Zealand Bill of Rights Act 1990 (NZBORA) or the Privacy Act 2020. The statutes can be amended by simple Parliamentary majority.
	3. New Zealand in its draft fifth periodic report outlines the protections available for human rights which enjoy constitutional protection, such as in the NZBORA, but neglects to adequately explain the serious consequences of the inability of New Zealanders to enforce those rights when inconsistent legislation is passed.[[9]](#footnote-10) It also fails to adequately highlight that this same level of protection – insufficient as it is – is not available for ICESCR rights.[[10]](#footnote-11) It should do so.
	4. New Zealand’s draft fifth periodic report should be amended at [10] to show that human rights are not truly indivisible within Aotearoa New Zealand’s constitution, with civil and political rights having primacy.
	5. South Africa provides an example of strong constitutional and judicially enforceable protection of economic, social and cultural rights.
	6. In addition, these rights also have soft protection through the South African Human Rights Commission.[[11]](#footnote-12) The Commission is empowered by the South African Constitution to require the state to provide information on measures taken to realise human rights, including economic, social and cultural rights.[[12]](#footnote-13) This is effectively a domestic version of the international reporting procedures created by conventions such as the ICESCR. The power of such domestic reporting is the facilitation of constructive dialogue between the state, the Human Rights Commission, and the public.[[13]](#footnote-14) This compulsory reporting would be an important development of Aotearoa New Zealand’s Human Rights Commission and we recommend that the government consider such an option and include it in its report to the CESCR.
	7. Te Wai Ariki recommends that the Government commit in its report to CESCR to the full and effective incorporation of ICESCR into New Zealand’s constitution to enable judicial enforcement of those rights.

# CONTINUED VULNERABILITY OF ICESCR RIGHTS FOR MĀORI SPECIFICALLY

* 1. Right to Self-Determination
		1. ICESCR affirms the right to self-determination.[[14]](#footnote-15) This provision should be read in conjunction with Aotearoa New Zealand’s obligations under the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP). For Aotearoa New Zealand to meet its international obligations to observe and promote the right to self-determination, it must uphold Māori tino rangatiratanga.
		2. The draft fifth periodic report mentions the Government’s agreement to develop a national plan of action to implement UNDRIP. As the report notes work on that plan has been deferred, yet it claims that the Government is progressing other targets to achieve improved results for Māori.[[15]](#footnote-16) This does not match up with this Government’s repeal of various initiatives which support Māori tino rangatiratanga, such as Te Aka Whai Ora.
		3. A further breach of the ICESCR right to self-determination is the Government’s failure to pay adequate regard to Māori participation in decision-making processes. While the Government notes in its draft fifth periodic report that various measures are in place to support participation,[[16]](#footnote-17) this participation is undermined by the government's disregard for Māori input into decision-making.
		4. For example, the draft CESCR report also fails to adequately account for the substantial threat posed by the Fast Track Approvals Bill to Māori participation in decision-making. Further, the report does not note the widespread opposition to the Bill by Māori.[[17]](#footnote-18) It should do so.
	2. Just and Favourable Conditions of Work
		1. Aotearoa New Zealand has somewhat protected the ICESCR rights to fair wages which at a minimum cover a decent living.[[18]](#footnote-19) However, these rights are not equally enjoyed by Māori.
		2. Continuing pay disparities, particularly with the 15% pay gap for Māori women when compared to all men,[[19]](#footnote-20) prevent enjoyment of the right to equal pay for equal work.[[20]](#footnote-21) While the Government does well to acknowledge this inequitable disparity, there is no plan outlined to address this.[[21]](#footnote-22)
		3. The Government should amend its report under the gender pay gap heading to include reference to the ongoing Kaupapa Inquiry conducted by the Waitangi Tribunal into Mana Wāhine, and should also commit to engaging the subsequent recommendations by the Tribunal.
		4. Further, there is a continuing gap between the statutory minimum wage, and the living wage for Aotearoa New Zealand, being the “income necessary to provide workers and their families with the basic necessities of life [and enable] workers to live with dignity and to participate as active citizens in society.”[[22]](#footnote-23) Māori suffer disproportionately. The report should acknowledge this and present a plan to address it.
	3. Health Outcomes
		1. Health outcomes for Māori continue to be disproportionately poor in comparison to other population groups, for example with Māori life expectancy falling approximately 7 years below non-Māori life expectancy.[[23]](#footnote-24) This demonstrates that Aotearoa New Zealand is not meeting its obligation to uphold the right to enjoyment of the highest attainable standard of physical and mental health[[24]](#footnote-25) without racial discrimination.[[25]](#footnote-26)
		2. The Government’s draft fifth periodic report acknowledges that Māori experience worse health outcomes, and that there is a need to address this.[[26]](#footnote-27) However, its main action to address this references is the Pae Ora (Healthy Futures) Act 2022.[[27]](#footnote-28) Yet the Government’s recent disestablishment of Te Aka Whai Ora[[28]](#footnote-29) jeopardises its ICESCR obligation to ensure medical services enabling realisation of Māori rights to health standards,[[29]](#footnote-30) as a comparable health institution or structure has not replaced it, despite Government assurances to the contrary.[[30]](#footnote-31) The Government justifies this saying that Te Aka Whai Ora was replaced with a new vision and plan for Māori health. However, to date, such a vision and plan have not been developed. Te Aka Whai Ora was disestablished before an alternative was presented, and no alternative has been presented which works on the same scale to affirm tino rangatiratanga and directly support Māori health outcomes in the same way.
		3. The Waitangi Tribunal[[31]](#footnote-32) has investigated Māori health inequities and provided recommendations for the Government to address them, particularly in the areas of hospital services, health services and outcomes, COVID-19 response and the disestablishment of Te Aka Whai Ora.[[32]](#footnote-33) The Government has not implemented many of the Tribunal’s recommendations. It should commit to doing so in its report to CESCR.
	4. Poverty and Housing
		1. Social and economic outcomes for Māori remain far below outcomes for the general population, illustrating a failure to realise of the ICESCR right to an adequate standard of living with respect to food, housing and living conditions.[[33]](#footnote-34)
		2. The Waitangi Tribunal has investigated Māori homelessness, finding that the Government failed to consult with Māori concerning the definition of homelessness, failed to collect data on homelessness, inequitably provided inadequate housing for Māori in terms of security, failed to implement or monitor progress with its own housing policy of He Whare Āhuru, and failed to protect the particularly vulnerable group of young Māori.[[34]](#footnote-35) The Government has not substantively addressed the Tribunal’s findings. It should note this in its draft fifth periodic report when it analyses the Government’s housing strategy alignment with te Tiriti.[[35]](#footnote-36)

# CONCLUSORY RECOMMENDATIONS

In sum, New Zealand’s report to the CESCR must emphasise clearly that:

# Positive action is required from the Government of Aotearoa New Zealand to meet its obligations to uphold the ICESCR rights for all people in this country. The economic, social and cultural rights of Māori are particularly vulnerable. This vulnerability is significantly attributable to the ICESCR rights being largely unincorporated within Aotearoa New Zealand’s constitution.

## Along with better protection of te Tiriti, that economic, social and cultural rights must be fully incorporated within Aotearoa New Zealand’s constitution. These rights must be legally enforceable for everyone in Aotearoa New Zealand, which requires constitutional entrenchment.

1. Tāngata whenua refers to Māori as the Indigenous people of Aotearoa New Zealand. [↑](#footnote-ref-2)
2. Art 2. [↑](#footnote-ref-3)
3. New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [43]. [↑](#footnote-ref-4)
4. New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [45]. [↑](#footnote-ref-5)
5. New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [46]. [↑](#footnote-ref-6)
6. Committee on Economic, Social and Cultural Rights Concluding observations on the fourth periodic report of New Zealand UN Doc E/C.12/NZL/CO/4 (1 May 2018) at [8]. [↑](#footnote-ref-7)
7. New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022. [↑](#footnote-ref-8)
8. New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [6]. [↑](#footnote-ref-9)
9. See New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [11]. [↑](#footnote-ref-10)
10. New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [14]. [↑](#footnote-ref-11)
11. Christof Heyns and Danie Brand “Introduction to socio-economic rights in the South African Constitution” Law, Democracy and Development 153 at 155-156. [↑](#footnote-ref-12)
12. South African Constitution, s 184(3). [↑](#footnote-ref-13)
13. Christof Heyns and Danie Brand “Introduction to socio-economic rights in the South African Constitution” Law, Democracy and Development 153 at 166. [↑](#footnote-ref-14)
14. Art 1. [↑](#footnote-ref-15)
15. New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [50]-[51]. [↑](#footnote-ref-16)
16. New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [52]. [↑](#footnote-ref-17)
17. New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [63]. [↑](#footnote-ref-18)
18. Art 7(a). [↑](#footnote-ref-19)
19. Manatū Wāhine | Ministry for Women “Report: Wāhine Māori and the Gender Pay Gap” <www.women.govt.nz/gender-pay-gaps/new-zealands-gender-pay-gap/ethnicity/report-wahine-maori-and-gender-pay-gap>. [↑](#footnote-ref-20)
20. Art 7(a)(i). [↑](#footnote-ref-21)
21. New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [91]. [↑](#footnote-ref-22)
22. Living Wage Aotearoa New Zealand “About Us” <www.livingwage.org.nz/about>. [↑](#footnote-ref-23)
23. Ministry of Health Tatau Kahukura: Māori Health Chart Book 2024 (4th ed, Te Kāwanatanga o Aotearoa | New Zealand Government, Wellington, 2024) at 27. [↑](#footnote-ref-24)
24. Art 12(1). [↑](#footnote-ref-25)
25. Art 2(2). [↑](#footnote-ref-26)
26. New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [233]-[234]. [↑](#footnote-ref-27)
27. New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [234]. [↑](#footnote-ref-28)
28. The Māori Health Authority was created in 2022 as an additional body to oversee health systems, with a particular focus on a kaupapa Māori framework to respond to disparities in Māori health outcomes while upholding tino rangatiratanga. [↑](#footnote-ref-29)
29. Art 12(2)(d). [↑](#footnote-ref-30)
30. (27 Feb 2024) 773 NZPD 1532. [↑](#footnote-ref-31)
31. A permanent commission of inquiry into the Crown’s breaches of its obligations under te Tiriti. The Tribunal’s recommendations are generally not binding on the Government. [↑](#footnote-ref-32)
32. Waitangi Tribunal The Napier Hospital and Health Services Report (Wai 692, 2001); Waitangi Tribunal Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry (Wai 2575, 2019); Waitangi Tribunal Haumaru: The COVID-19 Priority Report (Wai 2575, 2023); Waitangi Tribunal Hautupua: Te Aka Whai Ora (Maaori Health Authority) Priority Report, Part 1 (Wai 2575, 2024). [↑](#footnote-ref-33)
33. Art 11(1). [↑](#footnote-ref-34)
34. Waitangi Tribunal Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness (Wai 2750, 2024) at 192–193. [↑](#footnote-ref-35)
35. New Zealand DRAFT Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic report submitted by States parties under articles 16 and 17 of the Covenant (12 December 2024) at [193]. [↑](#footnote-ref-36)