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Foreshore and Seabed Review
Ministry of Justice
By email foreshoreseabedreview@justice.govt.nz

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Submission to the Foreshore and Seabed Review

We appreciate this opportunity to contribute to the Foreshore and Seabed Review, and thank you for your attention to our comments. For any clarification of the points below, or further information, please contact Aotearoa Indigenous Rights Charitable Trust, email aotearoaindigenoustrust@gmail.com

Aotearoa Indigenous Rights Charitable Trust (AIR Trust) is a non-governmental organisation made up of Māori individuals, all of who are active in their hapū and iwi and Māori politics more generally. We seek to support the indigenous peoples' rights movement internationally and domestically. AIR Trust representatives have consistently attended, and played a role in United Nations (UN) fora relevant to indigenous peoples including: in negotiations on the UN Declaration on the Rights of Indigenous Peoples (the Declaration); before the UN Working Group on Indigenous Populations; the UN Expert Mechanism on the Rights of Indigenous Peoples; the UN Permanent Forum on Indigenous Issues; various expert UN meetings; the UN Committee on the Elimination of Racial Discrimination (CERD); the UN Human Rights Committee; the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur on Indigenous Peoples) and the Human Rights Council.

We have also disseminated information to Māori about developments regarding indigenous peoples' rights at the international level.

Members have also represented a number of tribes, pan-Māori organisations and indigenous peoples' organisations in UN fora, such as before CERD and the Human Rights Council.

Consultation

NZ should take the necessary time to fully consult with Māori in order to obtain their free, prior and informed consent to proposed measures dealing with their rights in the foreshore and seabed (consistently with the Declaration, the recommendations of CERD, the Special Rapporteur on Indigenous Peoples and the recent concluding observations of the Human Rights Committee). If this review process draws criticism from Maori in relation to its timeframe, then the consultation period should be extended.

Recently the Human Rights Committee¹ commented on the consultation process stating:

The State party should increase its efforts for effective consultation of representatives of all Māori groups with regard to the current review of the Foreshore and Seabed Act 2004, with a view to amending or repealing it. In particular, the public consultation period should be sufficiently long so as to enable all Māori groups to have their views heard. Furthermore, in light of the Committee's General Comment No. 23 (1994) on article 27 (the rights of minorities), special attention should be paid to the cultural and religious significance of access to the foreshore and seabed for the Māori.

The Human Rights Committee has also requested that NZ provide, within one year, relevant information on its implementation of the Committee's above recommendation.

Our position

We are of the view that the *Ngati Apa* decision should be the minimum standard from which Māori rights in the foreshore and seabed are considered. Coupled with this is our belief that the underlying assumption, based on "adverse possession", should be that Māori own the foreshore and seabed *unless* there is clear evidence that the title was taken away legally and justly by the Crown. That means that Māori shouldn't even have to prove their interests (in the Māori Land Court or elsewhere) as the assumption should be that it belongs to Māori. The Crown, on the other hand, would have to prove a legitimate and just taking. Property interests would be regulated by iwi and hapū according to customary law. We therefore support option 3 as outlined in the consultation document.

The issue of access could be legislatively provided for - in a way that doesn't undermine Māori ownership of the foreshore and seabed.

We support option 3 because this option of all the options is the most consistent with the rights set out in the Treaty of Waitangi as well as with international law including the Declaration, general comments by the CERD, and the Human Rights Committee and the Universal Periodic Review report of the Human Rights Council.

¹ UN document CCPR/C/NZL/CO/5 found at <http://www2.ohchr.org/english/bodies/hrc/hrcs98.htm>

The legal framework for considering Māori rights in the foreshore and seabed must as a minimum include the Treaty of Waitangi and the rights guaranteed therein and Māori customary law as well as international law as referred to in the preceding paragraph.

Articles 2 and 3 of the Declaration are relevant. These articles relate to indigenous peoples right to be free from discrimination in the exercise of their rights and the right of self determination. Both sets of rights go to the core of the foreshore and seabed review.

Articles 25 – 30 and 32 of the Declaration, and especially article 26, must also be considered. These articles relate to Indigenous peoples' lands, territories and resources and provide for indigenous peoples' rights to: protection of their distinct spiritual relationship with their lands, territories and resources; have their rights to the lands, territories and resources they possess legally recognised; and provide their free prior and informed consent to exploitative developments. If resources are taken from indigenous peoples, the Declaration also provides standards as to how just and fair redress is to be provided, especially restitution, as well as measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impacts. These articles all have a direct bearing on Māori rights in the foreshore and seabed and provide a robust and effective framework for protecting indigenous peoples' rights.

Our view is that options 1, 2 and 4 of the consultation document fall far short of recognising Maori rights in the foreshore and seabed and will continue the discrimination that Maori have faced since the passing of the Foreshore and Seabed Act, recognised by the CERD in its 2005 decision on the foreshore and seabed and in the report of the UN Special Rapporteur on Indigenous Peoples.

Yours sincerely

Tracey Castro Whare
Trustee