Peace Movement Aotearoa

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Submission on the government's 2010 consultation document 'Reviewing the Foreshore and Seabed Act 2004'

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Overview

This submission provides a summary of our views on the consultation document 'Reviewing the Foreshore and Seabed Act 2010'. It opens with some introductory remarks about Peace Movement Aotearoa and our involvement in the foreshore and seabed issue since 2003, and then has two main parts:

Part I: The Foreshore and Seabed Act, which has sections on:

a) Question 1: Should the Foreshore and Seabed Act 2004 be repealed?

b) Treaty of Waitangi and human rights breaches, and

c) The inappropriateness of the tests and procedures in the Act.

Part II: Ways forward, which has sections on:

a) The government's "new approach" proposal,

b) The process around the government's 2010 consultation, and

c) A fair and just way forward.

In summary, we are of the view that:

- the Foreshore and Seabed Act must be repealed,
- we do not support the government's "new approach" proposal,
- we are deeply concerned about the process around the government's 2010 consultation, and
- we recommend that a more positive way forward, that fully respects the guarantees in the Treaty of Waitangi and the rights of Maori, be set in place and suggest a process for doing this.

We appreciate this opportunity to comment on the consultation document, and thank you for your attention to our submission.

Introduction

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. As the realisation of human rights is integral to the creation and maintenance of peaceful societies, promoting respect for them is a particular focus of our work.

Our membership and networks mainly comprise Pakeha organisations and individuals; we currently have just under two thousand people (including representatives of eighty three peace, social justice, church, community, and human rights organisations) on our mailing list.

From the time of the Court of Appeal ruling, *Ngati Apa v Attorney General*[1], in June 2003, until the passage of the legislation in November 2004, the foreshore and seabed was the main focus of our work due to our members' deep concerns about the legislation and the lack of consideration given to alternatives by the government of the day. Since then, we have continued to work on this matter, among other things through submissions to the Foreshore and Seabed Act Ministerial Review Panel in 2009[2] and to United Nations human rights bodies - to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in 2005[3]; the United Nations Committee on the Elimination of Racial Discrimination in 2007[4]; jointly with the Aotearoa Indigenous Rights Trust and others, to the United Nations Human Rights Council for New Zealand's Universal Periodic Review in 2008[5]; and to the United Nations Human Rights Committee in 2009[6] and 2010[7].

Part I: The Foreshore and Seabed Act 2004

a) Question 1: Should the Foreshore and Seabed Act 2004 be repealed?

Yes, for the reasons outlined in sections b) and c) below.

b) Treaty of Waitangi and human rights breaches

The number of Treaty of Waitangi (the Treaty) and human rights breaches involved in the Foreshore and Seabed Act (FSA) is astounding, it is hard to identify any other legislation in recent times that involved such a range of substantive breaches of so many rights. The brief overview of such breaches provided below is based on our analysis[8] of the initial foreshore and seabed policy and our submission[9] to the Fisheries and other Sea Related Legislation Select Committee.

From the first government announcement on the foreshore and seabed in 2003, it was obvious that what was intended would involve substantive breaches of the Treaty. The Waitangi Tribunal[10] described the proposals on which the legislation was based as breaching the Treaty in *"fundamental and serious"* ways that give rise to *"serious prejudice"* to Maori. They also found that *"the policy fails in terms of wider norms of domestic and international law that underpin good government in a modern, democratic state."* The Tribunal did not seek to "*suggest changes to the details of the policy, as we think changes to details would not redeem it.*" Their *primary and strong* recommendation to the government was that they should "*go back to the drawing board and engage in proper negotiations [with Maori] about the way forward*."

Similarly, the legislation involved significant breaches of the New Zealand Bill of Rights Act including the right to freedom from discrimination, the right of minorities to enjoy their own culture, the right to be secure from unreasonable seizure of property, and the right to justice; and of the Human Rights Act, in relation to the right to freedom from discrimination.

With regard to international human rights treaties and standards, the legislation denied to Maori the right of self-determination[11] which is confirmed as a right for all peoples in the United Nations Charter, and which is linked to the right of all peoples to *"freely determine their political status and freely pursue their economic, social and cultural development"* in Article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights.

Our analysis of the legislation led to the conclusion that it also denied Maori other human rights specified in international treaties which New Zealand is a state party to, including (although not limited to): the right of access to and the protection of the law[12]; the right to own property alone and in association with others and not be arbitrarily deprived of it[13]; the right to freedom from racial discrimination[14]; and the right to enjoy one's own culture[15]. Additionally, the FSA highlighted an ongoing violation of all of the international human rights treaties with respect to the right to an effective remedy by a competent national tribunal when one or more human rights have been violated.

Furthermore, the obligations on state parties with regard to the particular measures required to ensure the human rights of indigenous peoples are protected, as articulated for example in the United Nations Committee on the Elimination of Racial Discrimination's General Recommendation No. 23, were not met. The FSA clearly does not "*protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources"*[16] .

Nor did the government in any way meet the requirement of ensuring *"effective participation by indigenous communities"*[17] in the formulation of policies that are directly related to their rights and interests. There was no opportunity for effective participation by Maori because the consultation process followed by Ministers of the Crown was not the two-way dialogue that genuine consultation necessarily involves. Instead, the foreshore and seabed policy was presented to Maori after it had been formulated, and their responses to it were essentially ignored.

Similarly, the government did not in any sense meet the requirement *"that no decisions directly relating to [indigenous peoples] rights and interests are taken without their informed consent."*[18]

There was an overwhelming and unambiguous rejection by Maori of the foreshore and seabed framework and policy on which the legislation was based, and of the legislation itself - at each of the government's 'consultation' meetings, in the statements from the national meetings organised by Maori, in petitions and submissions, in the foreshore and seabed hikoi when more than 30,000 Maori traveled to parliament from all over the country to protest about the denial of their rights, and in their submissions to the Select Committee considering the Foreshore and Seabed Bill.[19]

In addition, there are other minimum international standards which have been developed, particularly by the United Nations Human Rights Committee and the Committee on the Elimination of Racial Discrimination when applying their respective human rights treaties to indigenous peoples and their rights. Some of the themes that emerge in the jurisprudence of those two Committees are especially relevant to the foreshore and seabed legislation: it is not acceptable to provide certainty for the majority at the expense of an indigenous minority; solutions must be found which are acceptable to indigenous peoples; current developments must be considered in the context of historical inequities; cultural values and belief systems are as defined by those in a particular culture, not by others; and that protection for the traditional means of livelihood of indigenous peoples does not mean they are restricted to traditional ways of doing things. The FSA clearly falls far short of these standards too.

The alternatives put forward by Maori at the government's 'consultation' meetings in 2003, the Waitangi Tribunal hearings in January 2004, and in their submissions were ignored by the government. Among those alternatives were examples of existing models of Maori land under Maori / Crown co-management; and the repeated statements[20] by hapu and iwi representatives that covenants of access and non-saleability, consistent with tikanga, could be negotiated in their respective areas if, as stated, the government's primary concerns were the protection of public access and the need to prevent the sale of foreshore and seabed areas. The government at that time was simply not prepared to engage in negotiation with Maori that might have lead to a fair and just outcome and the full recognition of their rights.

c) The inappropriateness of the tests and procedures in the Act

In addition to the points raised in the section above, there is an additional reason why the FSA must be repealed. Aside from the general issue that the FSA does not in any sense provide for the full recognition of all Maori rights and interests in foreshore and seabed areas, the requirement that whanau, hapu and iwi will have to prove that a customary right existed in 1840, and has been exercised substantially uninterrupted, in the same manner, to the present day is an unacceptable fossilising of rights and represents an archaic view of culture. Furthermore, that this provision has to apply regardless of whether or not the exercise of that right was actually prevented by confiscation or other unjust measures taken by others is a double injustice.

Cultural beliefs, customs and practices do not freeze and remain unchanged through time. This kind of restrictive test would simply not be acceptable to, nor inflicted on, anyone else. It simply does not make sense. It is also contrary to the Treaty and to international human rights jurisprudence - as referred to in the section above, one of the themes in the latter is that cultural values and belief systems are as defined by those in a particular culture, not by others.

It is difficult to see how culture can ever be adequately defined by statute, or by politicians - culture is not owned by them in any instance; and certainly they have no authority to define tikanga Maori. Culture is constantly evolving; it is qualitative, not quantitative; it is not something that is amenable to codification. If the government was of the view that they simply had to try and codify culture, then the current test in Te Ture Whenua Maori Act - *"held in accordance with tikanga Maori"* - would have been adequate, and there was no need for further restrictive definition.

Part II: Ways forward

a) The government's "new approach" proposal

We do not support the government's "new approach" as outlined in the consultation document because it is based on the same monocultural thinking that underlies the FSA, it too has been developed within a Pakeha legal framework, and it does not substantially improve on the regime imposed by that legislation.

We have noted with interest the description of adverse possession in the consultation document as "possession of property by dispossessing the owner without his or her consent"[21] - a description which neatly sums up the situation brought about by the FSA. The "new approach" does not rectify the Crown's adverse possession as it does not satisfactorily restore what was taken.

The notion of public domain, which was also the basis of the last government's initial proposals for the foreshore and seabed, can at best be described as misleading because it obscures the fact that regulatory responsibility will remain with the Crown and local government. It is therefore difficult to see this as anything other than de facto Crown ownership.

Furthermore, the "new approach" does not fully resolve the Treaty and human rights breaches inherent in the FSA, as outlined above, and thus does not provide a fair or just way forward.

b) The process around the government's 2010 consultation

We are deeply concerned by the process around the government's 2010 consultation for three main reasons.

First and foremost, there does not appear to have been full consultation with hapu and iwi before the consultation document was published and there is therefore considerable doubt as to the extent to which it reflects their views on ways forward. It is demeaning for hapu and iwi to be lumped together with everyone else in the public submissions process, rather than being accorded the respect they are entitled to as parties to the Treaty. Beyond the constitutional issue of how the government relates to hapu and iwi, lies one of simple justice - the foreshore and seabed areas were taken from hapu and iwi, not other New Zealanders, and it is therefore hapu and iwi who should determine the way forward.

Secondly, we are concerned about the bias in the consultation document - the focus on the government's "new approach", and, in particular, the brief dismissal of option three which we note could readily meet all of the government's principles for the foreshore and seabed[22]. It should also be noted that option three - the option that comes closest to a fair and just way forward - has the heading "Maori absolute title"[23], which is itself misleading as that is not the only option for returning the foreshore and seabed areas to hapu and iwi to whom they rightfully belong.

Thirdly, we are concerned by the comments by some government politicians, suggesting that the FSA may not be repealed. For example, on 5 February 2010 the Prime Minister commented that there would need to be "give and take" in the negotiations, and that if hapu and iwi Maori are not prepared to do this, the Act will remain as it is[24]. As the government was responsible for

taking away foreshore and seabed areas from hapu and iwi, it is somewhat difficult to imagine what exactly they are expected to give, or to reconcile this kind of threatening statement with the need for a fair solution which will reverse the unjust effects of the legislation.

c) A fair and just way forward

The main point we wish to emphasise in this section is that the direction of the way forward must come from hapu and iwi. The process going forward should be the reverse of what has occurred to date, that is, it must be based on the assumption that the foreshore and seabed areas belong to hapu and iwi, rather than on an assumption of Crown ownership. No other New Zealanders are required to go to court (and bear the human and financial costs of such action) to prove that something belongs to them. The burden of proof thus should be on the Crown, not on hapu and iwi to prove what is theirs.

We are not convinced that a satisfactory resolution can be found within the confines of 'the law' as it currently exists, because it does not and cannot adequately represent or respect the collective rights of Maori.

We are therefore of the view that the way forward lies in what the Waitangi Tribunal referred to as *"the full restoration of te tino rangatiratanga over the foreshore and seabed"*[25]. As stated in WAI 1071:

> *... "a government whose intention was to give full expression to Maori rights under the Treaty [in 2004] would recognise that where Maori did not give up ownership of the foreshore and seabed, they should now be confirmed as its owners."*[26]

That is the only resolution that would be consistent with the Treaty, with domestic human rights legislation, and beyond that, with the government's obligations under international law.

While we did not refer to the United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration) in the earlier section on human rights breaches, preferring to focus there instead on the government's legally binding obligations, since its adoption by the General Assembly in 2007 the UN Declaration has come to be seen as a measure of the minimum standards for governments in their relationships with indigenous peoples. This resolution would also be consistent with the UN Declaration.

Furthermore, we emphasise that it is only hapu and iwi who can determine how the full restoration of te tino rangatiratanga over the foreshore and seabed can be achieved, because it can only be done within a tikanga Maori framework. It is therefore our view that the only fair and just way forward is a process of full and proper negotiation with hapu and iwi to achieve such restoration.

Again, thank you for your attention to our submission.

References

[1] *Ngati Apa v Attorney General*, [2003] 3 NZLR 643
[2] Ministerial Review Panel: Foreshore and Seabed Act 2004, Peace Movement Aotearoa Presentation on 7 April 2009 at http://www.converge.org.nz/pma/fsrpma0409.pdf and Submission to the Foreshore and Seabed Act Ministerial Review Panel, Peace Movement Aotearoa, 19 May 2009 at http://www.converge.org.nz/pma/fsrpma.pdf
[3] Submission to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, 23 November 2005 at http://www.converge.org.nz/pma/CERD71-PMA1.pdf
[4] NGO Report to the Committee on the Elimination of Racial Discrimination, Peace Movement Aotearoa, 21 May 2007 at http://www.converge.org.nz/pma/CERD71-PMA.pdf
[5] Indigenous Peoples' Rights and the Treaty of Waitangi, Joint submission to the Universal Periodic Review of New Zealand, 10 November 2008 at http://www.converge.org.nz/pma/towupr09.pdf
[6] NGO information to the Human Rights Committee: For consideration when compiling the List of Issues on the Fifth Periodic Report of New Zealand under the International Covenant on Civil and Political Rights, Peace Movement Aotearoa, 8 June 2009 at http://www.converge.org.nz/pma/ccpr-pma09.pdf
[7] Additional NGO information to the Human Rights Committee: Fifth Periodic Report of New Zealand under the International Covenant on Civil and Political Rights, Peace Movement Aotearoa, 5 March 2010 at http://www.converge.org.nz/pma/ccpr-pma10.pdf
[8] Government foreshore and seabed policy breaches basic human rights, Peace Movement Aotearoa, December 2003 at http://www.converge.org.nz/pma/fs231203.htm
[9] Submission on the Foreshore and Seabed Bill 2004, Peace Movement Aotearoa, July 2004 at http://www.converge.org.nz/pma/fspma.doc
[10] WAI 1071: Report on the Urgent Hearings into the Crown's Foreshore and Seabed Policy, Waitangi Tribunal, March 2004
[11] UN Charter, International Covenant on Civil and Political Rights (ICCPR) Article 1, and the International Covenant on Economic, Social and Cultural Rights Article 1
[12] Universal Declaration of Human Rights (UDHR) Article 7, ICCPR Article 26, and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Article 5; Right to justice, NZ Bill of Rights Act (BORA) 1990, Section 27
[13] UDHR Article 17, and ICERD Article 5; Right to be secure against unreasonable seizure, BORA Section 21
[14] UDHR Article 2, ICCPR Article 2, and ICERD Article 2; BORA Section 19, and NZ Human Rights Act 2001
[15] ICCPR Article 27; BORA Section 20
[16] Committee on the Elimination of Racial Discrimination General Recommendation No. 23: Indigenous Peoples, 5 at www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument
[17] See for example Committee on the Elimination of Racial Discrimination; Decision 2(54) on Australia, 18 March. CERD A/54/18
[18] Committee on the Elimination of Racial Discrimination GR 23, 5
[19] It should be noted that there was also substantial opposition from non-Maori individuals and organisations to the foreshore and seabed framework, policy and legislation; this is detailed in, for example, Peace Movement Aotearoa's submission to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples (at note 2 above), sections B and C, pp 4-7
[20] See for example: Statement by Ngati Kahungunu on the government proposals on the foreshore and seabed, 12 September 2003 at http://www.converge.org.nz/pma/in120903.htm Te Runanga-Iwi o Ngati Kahu Media Release, 21 April 2004 at http://www.converge.org.nz/pma/fs210404a.doc
and more recently, A statement by Ngati Kahungunu on the government consultation document 'Reviewing the Foreshore and Seabed Act 2004', April 2010 at http://www.converge.org.nz/pma/nkfsa042010.pdf
[21] Reviewing the Foreshore and Seabed Act 2010, p 46
[22] As at note above, p 20
[23] As at note 21, p 23
[24] See, for example, PM warns Maori about foreshore, Radio New Zealand, 5 February 2010, at http://www.radionz.co.nz/audio/national/ckpt/2010/02/05/pm_warns_maori_about_foreshore
[25] As at note 10, p 139
[26] As at note 10, p 138