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Submission to the Maori Affairs Committee
Marine and Coastal Area (Takutai Moana) Bill

19 November 2010

Overview

This submission provides a summary of our views on the Marine and Coastal Area (Takutai Moana) Bill 2010 (the Bill). 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 Marine and Coastal Area (Takutai Moana) Bill 2010, which has four sections:

a) Treaty of Waitangi and human rights breaches,

b) The inappropriateness of the tests in the Bill,

c) Crown ownership or "common marine and coastal area"?

d) The government's failure to give full effect to the views of hapu and iwi.

Part II: A fair and just way forward.

In summary, our view is that:

- the Foreshore and Seabed Act must be repealed,
- we do not support the other provisions of the Marine and Coastal Area (Takutai Moana) Bill 2010,
- we are deeply concerned about the government's failure to give effect to the views of hapu and iwi, and
- we recommend that a more positive way forward, which fully respects the guarantees in the Treaty of Waitangi and the rights of Maori, be set in place.

We wish to appear before the Committee to speak to our submission.

We appreciate this opportunity to comment on the Bill, 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 over two thousand members and supporters (including representatives of eighty-three peace, social justice, church, community, and human rights organisations).

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 (the Ministerial Review Panel) in 2009[2], on the 2010 consultation document 'Reviewing the Foreshore and Seabed Act 2004' (the consultation document)[3], and to United Nations (UN) human rights bodies including: the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in 2005[4]; the UN Committee on the Elimination of Racial Discrimination in 2007 (CERD)[5]; jointly with the Aotearoa Indigenous Rights Trust and others, to the UN Human Rights Council for New Zealand's Universal Periodic Review in 2008[6]; and to the UN Human Rights Committee in 2009[7] and 2010[8].

Part I: The Marine and Coastal Area (Takutai Moana) Bill 2010

We acknowledge the government has put some effort into drawing up legislation to repeal and replace the Foreshore and Seabed Act 2004 (FSA) and that the Bill perhaps represents some improvement in that it provides for the recognition of limited customary title and rights. However, the Bill is based on the same monocultural thinking that underlies the FSA, it too has been developed within a Pakeha legal framework, and overall it does not substantially improve on the regime imposed by the FSA.

The number of Treaty of Waitangi (the Treaty) and human rights breaches in the FSA was astounding; it is hard to identify any other legislation in recent times that involved such a range of substantive breaches of so many rights. Unfortunately, the Bill does not substantively correct these and therefore it will not provide either a just or a durable solution on the foreshore and seabed.

We include below a brief overview of the Treaty and human rights breaches based on our analysis of the initial foreshore and seabed policy in 2003[9], our submission to the Fisheries and other Sea Related Legislation Select Committee[10], to the Ministerial Review Panel[11], and on the 2010 consultation document[12]. The reason for referring to the FSA in this section and the section below is because the Treaty and human rights breaches inherent in the Bill are similar to those in the FSA.

a) Treaty of Waitangi and human rights breaches

As with the FSA, the Bill discriminates against Maori when compared with others - both in terms of what it provides, and in terms of the processes hapu and iwi will have to go through to gain even the limited "rights" contained in its provisions, processes that others are not required to go through to prove that something belongs to them.

The breaches of the Treaty, as detailed by the Waitangi Tribunal in relation to the foreshore and seabed policy in 2004 and in the Report of the Ministerial Review Panel in relation to the FSA in 2009, are not corrected in the Bill. We will not detail those breaches again here, but in summary, the Bill is not consistent with either the guarantee of the continuation of 'te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa' in Article II, or of the rights of all citizens to equal treatment under the law in Article III[13].

Similarly, the FSA involved a significant breach of the New Zealand Bill of Rights Act (NZBoRA) and the Human Rights Act in relation to the right to freedom from discrimination, and the Bill does not correct this.

When introducing the Bill, the Attorney-General stated: "*This Bill, unlike the Foreshore and Seabed Act 2004 which it replaces, treats all New Zealanders including Maori without discrimination and recognises that we all have legitimate and longstanding interests in this part of our heritage.*"[14]

This is not only inaccurate because the Bill clearly does discriminate against Maori, but it also contradicts the Acting Attorney-General's analysis of the Bill in terms of its consistency with the NZBoRA: "*… it remains that the rights to land that they would otherwise enjoy are materially diminished by the requirement to yield to a broad range of activities by others while comparable freehold titles are unaffected. This is an inherent disadvantage and, for that reason, a prima facie issue of discrimination on the basis of race in terms of s 19.*"[15]

It should be noted that the issue of racial discrimination (along with breaches of the Treaty and of other human rights) was raised in the Waitangi Tribunal's Report on the foreshore and seabed policy in 2004[16], and that the FSA has been found to discriminate against Maori by CERD in 2005[17] and 2007[18], by the UN Human Rights Committee in 2010[19], and by the UN Special Rapporteur on the Rights of Indigenous Peoples in 2006[20] and 2010[21]. The Bill does not correct the fundamental issue of discrimination.

The Bill similarly does not correct other breaches of the NZBoRA, including the right of minorities to enjoy their own culture, the right to be secure from unreasonable seizure of property, and the right to justice.

With regard to other international human rights treaties and standards, the FSA and now the Bill denies Maori the right of self-determination[22] which is confirmed as a right for all peoples in the UN 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 (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Our analysis of the Bill leads to the conclusion that it also denies Maori other human rights specified in international treaties which New Zealand is a state party to, including (although not

limited to): the right to own property alone and in association with others and not be arbitrarily deprived of it[23], and the right to enjoy one's own culture[24]. Additionally, both the FSA and the Bill highlight 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 CERD's General Recommendation No. 23 and the Committee on Economic, Social and Cultural Rights (CESCR)'s General Comment No. 21, have not been met. The FSA clearly does not "*protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources"*[25] .

Nor has the government in any way met the requirement of ensuring *"effective participation by indigenous communities"*[26] in the formulation of policies that are directly related to their rights and interests.

Similarly, the government has not met the requirement *"that no decisions directly relating to [indigenous peoples] rights and interests are taken without their informed consent."*[27]

In fact, the government has deliberately rejected such an approach, as indicated in a footnote in the NZBoRA analysis: "*Some of the comments by United Nations authorities have suggested that such consultation must pursue prior informed consent, which has not occurred here and that principle is not accepted as applicable*".[28] The footnote includes references to CERD and the UN Human Rights Committee in connection with this - the Committees that respectively monitor compliance with the International Convention on the Elimination of Racial Discrimination and the ICCPR: human rights treaties to which New Zealand is a state party and which place legally binding obligations on the government.

It should be noted here that the CESCR's General Comment No. 21 stresses that state parties to the ICESCR (which New Zealand is) have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights set out in the ICESCR with immediate effect. Among the core obligations listed in relation to indigenous peoples is participation in the design and implementation of laws and policies that affect them, and: "*In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk*".[29]

In addition, there are other minimum international standards that have been developed, particularly by CERD and the UN Human Rights Committee 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 Bill: 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; and cultural values and belief systems are as defined by those in a particular culture, not by others. The Bill clearly falls far short of these standards too.

b) The inappropriateness of the tests in the Bill

In addition to the points raised in the section above, there is an additional reason why the provisions of the Bill are unjust. The Bill is based on a common law framework, which does not resolve either the Treaty or human rights breaches, and can itself be said to be discriminatory, in particular because it does not reflect tikanga Maori. Rather than being a solution, a common law approach is the problem because it does not provide for the full recognition of all Maori rights and interests in foreshore and seabed areas, but rather for a government defined and restricted version of what it thinks they should be.

Aside from the general issue that the Bill does not in any sense provide for the full recognition of all Maori rights and interests, the tests for "customary title" (that hapu or iwi hold the specified area in accordance with tikanga, and have exclusively used and occupied the specified area from 1840 to the present day without substantial interruption) and for a "customary right" (that it has been exercised since 1840 and continues to be exercised in a particular area in accordance with tikanga) are narrow and restrictive. The tests highlight the discriminatory nature of the Bill because such tests are not applied to others in relation to their property or their rights.

Furthermore, the tests make no allowance for those areas where such occupation or use was actually prevented by confiscation or other unjust measures taken by others - this comprises a double injustice.

c) Crown ownership or "common marine and coastal area"?

The concept of "common marine and coastal area" (similar to the notion of public domain, which was the basis of the last government's initial proposals for the foreshore and seabed), can at best be described as misleading. This is in part because the nature and extent of the "customary title" or "rights" available to hapu and iwi will be determined by the Crown, and also because regulatory responsibility will remain with central and local government - it is therefore difficult to see the "common marine and coastal area" as anything other than de facto Crown ownership.

d) The government's failure to give full effect to the views of hapu and iwi

In relation to the government's failure to give full effect to the views of hapu and iwi, we 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"[30] - a description that neatly sums up the situation brought about by the FSA. The Bill does not rectify the Crown's adverse possession as it does not satisfactorily restore what was taken, and its provisions were not drafted with the consent of hapu and iwi.

Although in the NZBoRA analysis, and elsewhere, government politicians have maintained that "*the Bill follows an extensive process of consultation with Maori*"[31], the Bill clearly does not reflect what hapu and iwi said in that process, except in relation to the repeal of the FSA. For example, the Te Puni Kokiri briefing to the Minister of Maori Affairs on the key issues raised at the consultation hui held in April states: "*While some hui attendees expressed their support of the government's proposals, most either did not support the proposals or expressed a desire for*

them to be modified"[32] and, "*Many submitters articulated their preference that the Treaty of Waitangi form the basis of discussions, and that a working party should be formed to discuss the issues*."[33]

Presentations to the consultation hui[34] clearly rejected the government's proposals on which the Bill is based, highlighting its similarities with the FSA, as have statements from hapu and iwi since the legislation was introduced[35].

Related to this is our deep concern about the 'take it or leave it' comments by some government politicians, suggesting that opposition to the Bill may result in no repeal of the FSA. Even before the consultation document was released, on 5 February 2010 for example, the Prime Minister commented that there would need to be "give and take" in the negotiations, and that if hapu and iwi are not prepared to do this, the FSA will remain in place[36]. 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 FSA.

As raised in our submission on the consultation document, we were, and remain, concerned about the bias in the way possible options for FSA replacement legislation were presented, in particular, the brief dismissal of option three ("Maori absolute title" [37]) - the option that came closest to a fair and just way forward. Even the heading of this option, "Maori absolute title", was misleading as that was, and is, not the only option for returning the foreshore and seabed areas to hapu and iwi to whom they rightfully belong. The alternatives put forward by Maori at the government's consultation meetings in 2003, the Waitangi Tribunal hearings in January 2004, and since - such as examples of existing models of Maori land under Maori / Crown co-management - and the repeated statements[38] by hapu and iwi representatives that covenants of access and non-saleability, consistent with tikanga, could be negotiated in their respective areas, readily meet all of the government's principles for the foreshore and seabed[39].

As with the government in 2003 / 2004, it seems the present government is simply not prepared to engage in proper consultation and negotiation with Maori, or to seek their full, prior and informed consent, to ensure that the FSA replacement legislation is just and fair and provides for full recognition of their rights and interests.

Part II: A fair and just way forward

The Prime Minister has said it is important for the country to settle the issue "so it does not remain as a weeping sore that would have to be addressed at some stage by a future government"[40]. Yet the discriminatory nature of the Bill ensures that, if it is enacted, this "weeping sore" will continue into the future, as it does not provide a just or durable way forward.

Therefore, the main point we wish to emphasise in this section is that the direction of the way forward should have, and now 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"*[41]. 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."*[42]

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 UN Declaration on the Rights of Indigenous Peoples (the Declaration) in the earlier section on human rights breaches, preferring to focus there instead on the government's legally binding obligations, this lack of reference should not be read in any way as minimising the crucial importance of the Declaration, the first international instrument elaborating the rights of indigenous peoples in the twenty-first century. Indeed, since its adoption by the General Assembly in 2007, the Declaration has become a measure of the minimum standards required of states in their relationships with indigenous peoples, and is increasingly used by the UN treaty monitoring bodies to monitor state parties compliance with their respective legally binding instruments. The resolution referred to above is also consistent with the rights articulated in the 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 and Submission to the Foreshore and Seabed Act Ministerial Review Panel, Peace Movement Aotearoa, 19 May 2009

[3] Submission on the government's 2010 consultation document 'Reviewing the Foreshore and Seabed Act 2004', Peace Movement Aotearoa, 30 April 2010

[4] Submission to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, 23 November 2005

[5] NGO Report to the Committee on the Elimination of Racial Discrimination, Peace Movement Aotearoa, 21 May 2007

[6] Indigenous Peoples' Rights and the Treaty of Waitangi, Joint submission to the Universal Periodic Review of New Zealand, 10 November 2008

[7] 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

[8] 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

[9] Government foreshore and seabed policy breaches basic human rights, Peace Movement Aotearoa, December 2003

[10] Submission on the Foreshore and Seabed Bill 2004, Peace Movement Aotearoa, July 2004

[11] Report of the Foreshore and Seabed Act 2004 Ministerial Review Panel, June 2009

[12] Reviewing the Foreshore and Seabed Act 2004 Consultation Document, 31 March 2010

[13] WAI 1071: Report on the Crown's Foreshore and Seabed Policy, Waitangi Tribunal, March 2004, Chapter 5: Findings and recommendations

[14] 'Marine and Coastal Area Bill introduced - guarantees public access', Christopher Finlayson, 6 September 2010

[15] Marine and Coastal Area (Takutai Moana) Bill: Consistency with the New Zealand Bill of Rights Act 1990, Opinion of the Acting Attorney-General Hon Simon Power, 2 September 2010, paras 23 and 24

[16] As at note 13

[17] Decision 1 (66): New Zealand, Committee on the Elimination of Racial Discrimination, 11 March 2005, CERD/C/DEC/NZL/1

[18] Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand, 15 August 2007, CERD/C/NZL/CO/17

[19] Concluding Observations of the Human Rights Committee: New Zealand, 25 March 2010, CCPR/C/NZL/CO/5

[20] 'Mission to New Zealand' - Report of Rodolfo Stavenhagen, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, 13 March 2006, E/CN.4/2006/78/Add.3

[21] Preliminary note on the mission to New Zealand (18 to 24 July 2010), James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, 26 August 2010, A/HRC/15/37/Add.9

[22] UN Charter; International Covenant on Civil and Political Rights (ICCPR), Article 1; and the International Covenant on Economic, Social and Cultural Rights, Article 1

[23] Universal Declaration of Human Rights, Article 17; International Convention on the Elimination of All Forms of Racial Discrimination, Article 5; and NZBoRA Section 21

[24] ICCPR, Article 27, and NZBoRA, Section 20. See also General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights): Committee on Economic, Social and Cultural Rights, 21 December 2009, E/C.12/GC/21

[25] General Recommendation No. 23: Indigenous Peoples, Committee on the Elimination of Racial Discrimination, 18 August 1997, para 5, and General Comment No. 21, at note above, para 36

[26] See for example Committee on the Elimination of Racial Discrimination; Decision 2(54) on Australia, 18 March. CERD A/54/18, and Committee on Economic, Social and Cultural Rights, at note 25, para 55 (e)

[27] As at notes 24 and 25, General comment No. 21, paras 37 and 55 (e), and General Recommendation No. 23, para 5

[28] As at note 15, footnote 14

[29] As at note 24, General Comment No. 21, para 55 (e)

[30] As at note 12, p 46

[31] As at note 15, para 30.3

[32] Briefing to the Minister of Maori Affairs, Te Puni Kokiri , 4 May 2010 (obtained under the Official Information Act), paras 8 and 9

[33] As at note above, para 18

[34] See, for example, 'A statement by Ngati Kahungunu on the government consultation document 'Reviewing the Foreshore and Seabed Act 2004'', April 2010

[35] See, for example, the recent interview with Mark Solomon and Anake Goodall at http://www.tekaraka.co.nz/Blog/?page_id=1585 'Foreshore and seabed caution to Maori Party leaders', Ngati Kahungunu Iwi Inc, 29 October 2010; 'Foreshore bill slammed', Wairarapa Times-Age, 5 November 2010; and 'Iwi Leaders confirm reservations about Marine Bill', Waatea News, 15 November 2010

[36] See, for example, 'PM warns Maori about foreshore', Radio New Zealand, 5 February 2010

[37] As at note 12, p 23

[38] See for example: Statement by Ngati Kahungunu on the government proposals on the foreshore and seabed, 12 September 2003, Te Runanga-Iwi o Ngati Kahu Media Release, 21 April 2004, and more recently, 'A statement by Ngati Kahungunu on the government consultation document 'Reviewing the Foreshore and Seabed Act 2004'', as at note 34 above

[39] As at note 12, p 20

[40] See, for example, 'Foreshore plan opens door to Maori claims', NZ Herald, 15 June 2010

[41] As at note 13, p 139

[42] As at note 13, p 138