



May 2009

## A SUBMISSION ON THE FORESHORE AND SEABED ACT 2004 TO THE MINISTERIAL FORESHORE AND SEABED REVIEW PANEL

**“If you cannot touch the soil and know that it is yours and if cannot make decisions about the soil that you know is yours - then you are not well.”**

*Moana Jackson HCA National Hui 2009,  
Whangaehu Marae - Te rohe o Ngati Apa*

### **Pepeha o Health Care Aotearoa**

***“transforming social inequalities through community inspired health services”***

Health Care Aotearoa is a Treaty based national network of 65 community-driven and governed primary health care services, including Māori, Pacific, Union, Community Health and Youth services. Since our establishment in 1993, we have been at the forefront of supporting affordable and appropriate access to primary health care through community-responsive services that are committed to addressing current inequalities in health status.

### **Executive summary**

HCA believes that the Foreshore and Seabed Act 2004 should be repealed or amended by Parliament. The Crown should engage in Treaty settlement negotiations with Māori that would recognise customary rights of Māori in the foreshore and seabed and begin a process of constitutional reform.

The current legislation:

- does not adequately maintain and enhance mana whenua, or ensure that both customary and public interest in the coastal marine area are recognised and provided for.
- extinguishes Māori rights to the foreshore and seabed that are recognised in tikanga, Te Tiriti o Waitangi and common law
- breaches international human rights norms
- threatens whanau ora, Māori health and well-being
- demonstrates continued erosion of trust in Crown responsibility as a partner in Te Tiriti o Waitangi

### **Introduction**

The Foreshore and Seabed Act 2004 is arguably the most significant piece of legislation affecting Māori in recent history. The issue saw over 25,000 people march on Parliament, and ninety five per cent of written submissions opposing the act.

The core principles of the act – access, regulation, protection and certainty – work against Māori, denying them the capacity to protect themselves and their customary rights, and the certainty of being heard within judicial process accorded to all New Zealanders.

In particular, Health Care Aotearoa objects to:

- Part 1: Preliminary Provisions Section 3- states that the object of the act 'is to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all the people of New Zealand, including the protection of the association of whanau, hapu and iwi with areas of the public foreshore and seabed'.
- Part 1: Preliminary Provisions Section 4(a)- gives effect to the object of the act by 'vesting the full legal and beneficial ownership of the public foreshore and seabed in the Crown'.

Both sections clearly breach Article Two of the Treaty as well as standard common law rules about property, undermining Māori tino rangatiratanga over the foreshore and seabed.

Reference to the 'public foreshore', excludes areas that are already privately owned, most of which are in non-Māori hands. In other words, the rights of Māori are taken away, while the property rights of non-Māori are not.

By protecting non-Māori but not Māori rights, the act also breaches international human rights norms such as the Convention on the Elimination of All Forms of Racial Discrimination, to which New Zealand is a signatory.

#### **Human and indigenous rights approach to the Foreshore and Seabed Act 2004**

A number of national and international organisations have raised concerns about the Foreshore and Seabed Act, including:

- the Waitangi Tribunal, who recommended that the Crown have a further 'conversation' with Māori about the legislation;
- Rangatira from iwi about the tikanga pertaining to the foreshore;
- United Nations Committee on the Elimination of Racial Discrimination.

On his visit to New Zealand in 2005 Rodolfo Stavenhagen, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, noted:

'Particularly troubling to Māori at the present time is the Foreshore and Seabed Act, which according to numerous legal scholars and practitioners, would extinguish the customary rights of Māori communities that have traditionally used coastal resources for subsistence. The United Nations committee which monitors how countries implement the Convention on the Elimination of All Forms of Racial Discrimination, to which New Zealand is a party, has expressed concern over the way the Act is framed, the undue haste by which it was enacted and the insufficient prior consultations with Māori themselves, all of which may have discriminatory impact on Māori.'

The UN report<sup>1</sup> paragraph 92, recommends that the act:

'should be repealed or amended...and the Crown should engage in treaty settlement negotiations...that would recognise the inherent rights of Māori...and establish regulatory mechanisms allowing for the full and free access by the general public... without discrimination'.

#### **The Foreshore and Seabed Act 2004 - is a health issue**

"Individual and population vulnerability to disease, disability, and the ultimate outcome once ill (death), is inextricably linked, and in fact dependent upon, respect for human rights and dignity."<sup>2</sup>

<sup>1</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Ruldolf Stavenhagen. Addendum MISSION TO NEW ZEALAND

<sup>2</sup> Timothy Holtz, Professor at the Institute of Human Rights, Emory University, Atlanta

A number of international and national organisations and agreements recognise the close relationship between health and human rights.

The World Health Organisation definition of health (which has not been amended since 1948) is 'a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity'. The right to health involves, not just the provision of timely and appropriate health care, but access to the underlying social and economic determinants of health, and civil and political rights.

1. The Ottawa Charter affirms the following elements are required for effective public health
  - building healthy public policy
  - creating supportive environments
  - strengthening community action
  - develop personal skills through information and education
  - reorient health care services toward prevention of illness and promotion of health  
*(The Ottawa Charter is a universally –accepted document developed in 1986 by the World Health Organisation)*
  
2. The Whakakotahi Declaration, developed in 2008 by Health Care Aotearoa, acknowledges that wellness is achieved when:
  - The environment is **socially inclusive free from discrimination and poverty**
  - where people and communities have an adequate and sustainable **income**,
  - when there is adequate **education, housing, safe water** and proper **nutrition** and
  - when **injustices** of the **past** and **present** are addressed to realise the vision of our ancestors in signing Te Tiriti o Waitangi.

In New Zealand, Māori health models address the collective, spiritual and environmental aspects of health, for example, Mason Durie's Te Whare Tapa Wha. The foreshore and seabed issue, and the process of enactment, has cut across Māori rights (Treaty rights, human rights, indigenous rights) which affects their physical, social, mental and spiritual wellbeing.

- Taha Tinana - the gathering of seafood in the traditional manner from traditional beds is a healthy, physical activity, and the food gathered is healthy, low-fat, full of nutrients and relatively unpolluted.
- Taha whanau - gathering seafood occurs in groups of family and friends, and the food is prominent in important social rituals such as feasts, hakari or for tangi.
- Taha hinengaro - the link between physical exercise and mental health is understood, and the link to traditional practice strengthens identification with the family and ancestors, giving a stronger sense of place for an individual.
- Taha wairua , the gathering of seafood in Māori terms connects to Tangaroa, god of the sea, and Papatuanuku, the earth goddess. This spirituality co-exists with some spiritual beliefs of Christianity.

### **Conclusion**

Race relations in NZ over the past three decades has moved away from an assimilationist model (that undermined Māori cultural identity and governance structures) to a new bicultural approach based on Te Tiriti o Waitangi principles and the partnership between the Crown and Māori.

Grievances about the Foreshore and Seabed Act 2004 link to wider constitutional and societal issues and need to be debated responsibly and democratically because their solution will determine the kind of society New Zealand will be in the future. Let us not legislate against continued Māori renaissance.

By working with Māori, through a judicial process, foreshore and seabed access for all New Zealanders could be protected and regulation could be more effective.

**“We are all citizens under Te Tiriti o Waitangi and share a common path for wellness and mauri ora for our people, mauritangata and the return of justice for all”**

*Huirangi Waikerepuru 2008*

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