Peace Movement Aotearoa

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Ministerial Review Panel: Foreshore and Seabed Act 2004
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Thank you for the opportunity to speak with you today. This presentation covers two main areas: the first is about the level and nature of principled Pakeha opposition to the foreshore and seabed legislation, and the second outlines what we see as crucial points for the way forward.

To begin, 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. We are a primarily Pakeha organisation and currently have just under two thousand individuals (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 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 (both separately, and jointly with the Aotearoa Indigenous Rights Trust) to United Nations human rights bodies - to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in 2005, the United Nations Committee for the Elimination of Racial Discrimination in 2007, and to the United Nations Human Rights Council for New Zealand's Universal Periodic Review in 2008.

As a primarily Pakeha organisation, our work on the foreshore and seabed has been within the context of the wider Pakeha Treaty educators' network, and our comments which follow are based on our own experience and that of others involved in this network. From the time of the first government announcement in response to the Court of Appeal ruling, we were contacted by many Pakeha individuals and organisations seeking more information, and telling us of their concerns about what the government was proposing to do. We have not experienced such a high level of contact - both by Peace Movement Aotearoa members and by people previously unknown to us - in the past decade, except in the weeks immediately following the September 11 attacks in New York and Washington.

The concerns expressed by the people contacting us about the foreshore and seabed can be summarised as encompassing four main areas:

- firstly, that the government’s reaction to the Court of Appeal ruling was over-hasty, ill conceived and ill informed. Among other things, there was no consideration of other alternatives, for example, statements by hapu and iwi representatives of their willingness to provide covenants of inalienability and access consistent with tikanga in their respective rohe were not taken into account, nor examples of existing models of Maori owned land under Maori / Crown co-management;

- secondly, that the legislation was a major injustice to Maori, it involved substantial breaches of the Treaty of Waitangi, of human rights protected in domestic legislation and international law, and it removed the possibility of common law recognition, inadequate though that might be, of the full extent of Maori rights and interests in the foreshore and seabed areas;

- thirdly, that the government's overriding of the Court’s ruling would be a source of conflict and justified grievance into the future; and

- fourthly, that a durable and just resolution would not be achieved by the legislation, nor by any other hasty quick-fix approach.

There was huge concern about the racist scare mongering fomented by government Ministers and others in the days following the Ngati Apa decision, and by their creation of fear about access to the beaches, when there was in fact no threat to that.

From our experience of working with Pakeha on Treaty and related matters, if accurate information and historical context is provided, the issues are readily understood and any fear is dispelled. Politicians could have chosen to react calmly and responsibly and provide accurate information about the Court of Appeal ruling, but they did not. By way of contrast, when vesting title in the Te Arawa lake beds, the government published a series of web pages explaining what they were doing, and how public and business access would be protected under the terms of that settlement. This indicates that there is a capability to educate and inform when it suits a government - we consider it a tragedy that this capability was not applied in their reaction to the Court of Appeal ruling on the foreshore and seabed.

During that time a misleading impression was created by Ministers of the Crown, other politicians, and the mainstream media that there was united Pakeha support for action, and thus the legislation. Even if that had been accurate, which we know from our experience it was not, it would not have justified the denial of the rights of Maori.

The government's own publication analysing the submissions on the initial foreshore and seabed proposals included statements such as: "Almost all Maori and many non-Maori considered that the principles and related proposals constituted a major breach of the Treaty of Waitangi"; "Many respondents were strongly opposed to the four principles, including almost all Maori and many non-Maori"; and "Many were concerned that the principles and related proposals had been developed without the

participation of Maori and accordingly represented a very mono-cultural perspective on the issues and possible solutions".[1] It is clear even from this one example that there was considerable opposition from Pakeha to what the government was doing.

To return for a moment to the denial of the rights of Maori - one of the key concerns of our members and others - the legislation involved multiple Treaty breaches, and it also denied Maori other human rights protected by domestic legislation and international law including, but not limited to: the right of self-determination[2], the right of access to and protection of the law[3]; the right to own property alone and in association with others, and not be arbitrarily deprived of it[4]; the right to freedom from racial discrimination[5]; and the right to enjoy one's own culture[6].

The number of Treaty and human rights breaches involved in the foreshore and seabed legislation is astounding - it would be hard to come up with any other legislation in recent times that involved so many substantive breaches of so many rights.

Beyond that, in the detail of the statutory tests for hapu and iwi to be able to gain the less than substantial rights the legislation provides, is a double injustice. The provision that hapu and iwi have to prove that a customary right existed in 1840, and has been exercised substantially uninterrupted, in the same manner since that time, ignores the reality of historical and ongoing colonisation - the exercise of rights may in fact have been substantially interrupted by confiscation or other unjust measures.

Furthermore, it involves an unacceptable fossilising and codification of culture. 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 something that is not amenable to codification. If the government was of the view that they simply must define culture, then the 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.

The process leading to the legislation, and the Act itself, failed to meet the minimum requirement on states, now well established in international jurisprudence, with regard to the necessity of obtaining free, prior and informed consent of indigenous peoples on matters affecting their rights and interests.

There are other minimum standards too 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 International Conventions to indigenous peoples and their rights. Some of the themes which emerge in the jurisprudence of those two Committees are particularly 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 foreshore and seabed legislation clearly falls far short of all of these standards.

It will come as no surprise to you that we are of the opinion that the foreshore and seabed legislation should be repealed and a more positive way forward, that fully respects the rights of Maori, must be set in place.

The main point we wish to emphasise 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.

Currently it seems to us that there are two possible ways forward.

One is that the legislation should be repealed and the process that it interrupted should continue, that is, the matter should go to the Maori Land Court for the nature and extent of rights and title in foreshore and seabed areas to be determined. But this way forward should only be followed if it is clear that this is how hapu and iwi wish to proceed.

However, we are not convinced that a satisfactory resolution will be found within the confines of the law as it currently exists, because it 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"[7]. 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."[8]

That, in our opinion, is the only resolution that would be consistent with the Treaty, and beyond that, with the government's obligations under international law.

Further, there is the wider context in which the foreshore and seabed legislation occurred, that is, the ongoing failure of successive governments to honour the Treaty and the associated need for constitutional change to give full effect to its provisions. The foreshore and seabed legislation is an example of the urgency of this need. The only way to ensure full respect for, and protection of, the rights of Maori from the whims of the government of the day is through constitutional arrangements which reflect those laid out in the Treaty.

While appreciating the Review Panel is constrained by its terms of reference, we are nevertheless hoping that your report will place the foreshore and seabed within this wider context.

And finally, while bearing in mind the time constraints of the Review, it is crucially important that the Panel speaks directly with hapu and iwi to ascertain their views on the ways forward. We are somewhat concerned by the list of those considered to be nationally significant interest groups - at the low proportion of Maori organisations included generally, and specifically at the absence of hapu and iwi representatives. The outcome of this Review is unlikely to be acceptable or fair if, as happened during 2003 and 2004, hapu and iwi representatives are merely included in the public submissions process rather than being accorded the respect they are entitled to as parties to the Treaty.

If there is not already a process underway to ensure full and proper consultation with hapu and iwi, then we urge that this be done as a matter of urgency. If the time constraints on the Review are likely to limit this, then a process of full and proper consultation with hapu and iwi should be the primary recommendation of the Review report. It would be most unfortunate if the haste with which the foreshore and seabed legislation was enacted is mirrored in the Review process. There is no reason to proceed with unseemly haste, but there is every reason to ensure that this time around sufficient time is taken to ensure a just and durable resolution is reached.

Again, thank you for this opportunity to speak with you.

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[1] 'Analysis of submissions on the proposals for the foreshore and seabed', NZ Government, December 2003, 17.
[2] UN Charter, International Covenant on Civil and Political Rights (ICCPR) Article 1, and the International Covenant on Economic, Social and Cultural Rights Article 1.
[3] 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.
[4] UDHR Article 17, and ICERD Article 5; Right to be secure against unreasonable seizure, BORA Section 21.
[5] UDHR Article 2, ICCPR Article 2, and ICERD Article 2; BORA Section 19, and NZ Human Rights Act 2001.
[6] ICCPR Article 27; BORA Section 20.
[7] Report on the Crown's Foreshore and Seabed Policy, WAI 1071, 139 .
[8] Report on the Crown's Foreshore and Seabed Policy, WAI 1071, 138.