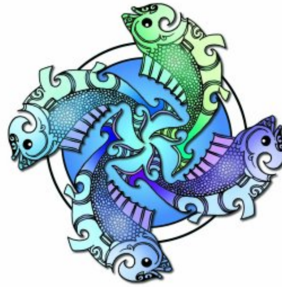

TREATY TRIBES COALITION

Submission on the

Marine and Coastal Area (Takutai Moana) Bill

to the

Māori Affairs Select Committee

16th November 2010

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EXECUTIVE SUMMARY

1. The Treaty Tribes Coalition (TTC) was encouraged by the leadership shown in the Ministerial Review of the Foreshore and Seabed Act 2004 (the 2004 Act), commends the intention to repeal and replace the 2004 Act, but with regret is convinced that the Marine and Coastal Area (Takutai Moana) Bill (the Bill) represents mere symbolism and sophistry, rather than substantive change.

2. TTC evaluated the Bill against four key criteria that we consider particularly relevant as follows:
    a. **The legal and practical differences between the 2004 Act and the Bill**—we consider it fundamental that any replacement to the 2004 Act creates material change in both legal and practical respects. In our assessment, the Bill creates nuanced legal changes and insignificant practical shifts, that amount to merely marginal change. We also emphasise that the most constructive elements of the Bill are still less than the full spectrum of outcomes negotiated agreements under the 2004 Act, which underscores our questioning of the practical value of the Bill;
    b. **The extent to which it cures the discriminatory effects of the 2004 Act**—the justification for the repeal and replacement has in large part turned on findings that the 2004 Act discriminated against Māori, and we therefore expected that an acceptable Bill would cure the discriminatory effects of the 2004 Act. The Attorney General's opinion on the Bill's consistency with the New Zealand Bill of Rights Act 1990 found that the Bill was, prima facie, discriminatory (on the same grounds as the 2004 Act) and that it was only consistent with the Bill of Rights as a 'reasonable' breach of non-discrimination standards because it is a 'workable compromise between these various, and sometimes necessarily conflicting, interests'. We strongly disagree with these findings, firmly view the Bill as unjustifiably discriminating against Māori and reiterate the position that we have tirelessly maintained: it is unacceptable to knowingly sacrifice the human rights of Māori for political expediency;
    c. **The extent to which it satisfies the Declaration on the Rights of Indigenous Peoples**—the Bill is inevitably the litmus test of the extent to which New Zealand is committed to the Declaration on the Rights of Indigenous Peoples (DRIP), as the most significant reform to follow New Zealand's accession to the DRIP. In our assessment, the Bill fails to meet the minimum standards set out in the DRIP, and we are disappointed by the apparent disregard for the DRIP, particularly within mere months of stating our national commitment to it in the international arena.
    d. **The extent to which it is consistent with the recommendations of successive bodies**—there has been extensive expert commentary on options for durable reform,

particularly from the Waitangi Tribunal in 2004 and the Ministerial Review Panel in 2009. We are surprised that the framework codified by the Bill does not appear to have been shaped by the preceding comments and recommendations, and consider it regrettable that expert advice has not been adopted.

3. We recommend that Select Committee:

    a. request a substantive analysis of the consistency of the Bill with the DRIP;

    b. request a substantive analysis of whether the test for customary title discriminates against Māori to the extent of divesting property rights, amounting to a regulatory taking;

    c. request a substantive analysis of the Bill's consistency with the recommendations of the Ministerial Review Panel; and

    d. recommend:

        i. that the Bill be abandoned; or

        ii. be amended so as to ensure consistency with the DRIP.

4. TTC also requests the opportunity to be heard by the Select Committee for oral submissions on the Bill.

TREATY TRIBES COALITION

5. TTC was formed in 1994 to represent iwi and advocate for the allocation of fisheries settlement assets on principled terms that reflected tikanga, the Treaty of Waitangi and the fisheries settlement itself.

6. The constituent members of TTC are: the Hauraki Māori Trust Board (representing the 12 iwi of Hauraki); Ngāti Kahungunu Iwi Incorporated; Ngāi Tamanuhiri Whānui Trust and Te Rūnanga o Ngāi Tahu. These iwi represent over 110,000 people and hold customary authority over 60 percent of New Zealand's coastline.

7. Each of the iwi of TTC consider themselves, fundamentally, to be a maritime people, for whom the principle of mana whenua, mana moana is central to tribal identity.

8. TTC led the United Nations advocacy programme against the 2004 Act, and obtained the successive findings that the 2004 unjustifiably discriminated against Māori. An overview of the international advocacy programme is attached as Appendix I.

A SNAPSHOT ON THE CONTEXT

9. Iwi Māori have been asserting inherent rights over the foreshore and seabed since the 1860's. The barriers to these claims succeeding have included:
    a. Legislative intervention – such as the Native Land Act 1909 which declared customary title unenforceable against the Crown and the 2004 Act which improperly extinguished customary title;
    b. Customary title treated as non-justiciable—such as the Supreme Court decision in the *Ninety Mile* case, which found that customary title was unenforceable against the Crown;
    c. Jurisdiction exhausted—such as the Court of Appeal decision in the *Ninety Mile* case, which found that the Māori Land Court jurisdiction over the foreshore and seabed was exhausted once claims had been made to adjacent dry land; and
    d. Lesser rights granted in place of title—such as the various rights granted to fishing easements and the like.
10. Notably, customary title to the foreshore and seabed has not been disproven as existing, as a matter of law for over 150 years. Rather, various legal fictions were created so that customary title could not be asserted.
11. The *Ngati Apa* decision (2003) removed these legal barriers, and affirmed that customary title is inherent and remains extant – except where it has been explicitly extinguished by statute – which as a matter of fact is only likely to have occurred in narrow and discrete areas.

12. The Waitangi Tribunal, in 2004, presented findings on the probable nature and extent of customary title to the foreshore and seabed, according to three possible formulations (permissive, middle ground and restrictive), and found that it was likely that significant tracts of the foreshore and seabed remained, as a matter of law, subject to extant customary title.
13. The 2004 Act extinguished customary title as a matter of law, and created a framework for 'substituted' rights to be recognised. The rights recognition framework adopted was similar to the restrictive formula identified by the Waitangi Tribunal, but more restrictive in all respects and the awards for successful applicants (or negotiating groups) were similarly reductive.
14. Throughout the legal history, and particularly in the recent period, the popular emphasis has been on the legal status of property rights to the foreshore and seabed. In TTC's assessment, this has obscured the driving motivations for Iwi and hapū, which is the expression of customary authority over the foreshore and seabed. In our experience, property rights are, however, important for two reasons:
    a. The respect for the property rights of Māori (or lack thereof) reflects the political regard for Iwi Māori as citizens of New Zealand; and

b. The bundle of rights that attach to property rights are vehicles for the expression of customary authority, albeit a partial suite that does not fully provide for the expression of inherent mana and rangatiratanga.

LEGAL AND PRACTICAL DIFFERENCES—2004 ACT AND THE BILL

15. TTC considers that in order to be a genuine repeal and replacement, the Bill must make substantive changes to the regime established by the 2004 Act. Anything less, despite the rhetoric, merely constitutes marginal amendments to the 2004 Act. The following tables illustrate our assessment that this Bill is in most respects amounts to minor tweaks on the frame of the 2004 Act. In summary, we consider that:

    a. The change from explicit ownership to a 'non-ownership' regime is high legal sophistry: the Crown retains the full suite of powers over the foreshore and seabed (including those that attach to property interests), and therefore remains the owner in all but name;

    b. The change to the treatment of customary rights is immaterial; the 'substituted rights' under the 2004 Act and the 'statutorily codified rights' under the Bill are both defined by the Crown and reduce, restrict and fragment the ancestral relationship Iwi Māori have with the foreshore and seabed;

    c. Access to the Courts doesn't change in practice; under both schemes, Iwi have the right to litigate for Crown-defined rights without access to Legal Aid, which in practice will significantly reduce the actual accessibility of justice;

    d. The changes to the tests for customary title recognition are highly technical in nature and will make negligible difference to the amount of customary title that is recognised. We agree with the Attorney General that less that 10% of the coastline will be found to have customary title, and emphasise that is approximately the same as would have been found under the 2004 Act. We also emphasise that this is far less than the Waitangi Tribunal found would exist at law. Accordingly, we consider that the test for title recognition amounts to a de facto and veiled taking;

    e. The awards for customary title under the Bill are the only area where substantive change has occurred, and while we welcome the broader suite of awards, we are deeply frustrated that they will amount to no practical difference for two reasons: (1) the awards are only meaningful if Iwi and hapū can have title recognised, which most won't for the reasons noted above; and (2) the awards are less than the awards contained in the agreements negotiated under the 2004 Act, which makes it questionable whether any material change has occurred;

f. The provision for non-title customary rights (customary rights and automatic participation right in conservation processes) are a change from the 2004 Act, but will make little practical difference to Iwi and hapū.

OWNERSHIP AND NATURE OF CUSTOMARY RIGHTS

The blanket/default ownership arrangement is important for the impact it has on whether customary rights are given effect to as inherent and pre-existing sovereignty and as have a proprietary nature

2004 Act

- Public foreshore and seabed explicitly vested in the Crown;
- Customary rights (TCRs and CROs) are substituted rights (that would have existed 'but for' the 2004 Act);
- As substituted rights, they are no longer inherent, rather they are in the nature of Crown grant;
- Customary rights are made 'non proprietary' in nature.

The Bill

- Public foreshore and seabed explicitly rendered incapable of being owned (public domain concept);
- Customary rights (title and use) are restored but given legal expression only through the provisions in the Bill (ie inherent but statutorily corralled);
- Customary title is recognised as amounting to an 'interest in land' but appears to be less than a full proprietary interest

Legal Difference

- It is questionable whether explicit ownership is legally distinct from the 'no ownership'/'public domain' created under the Bill. In our assessment, it is high legal sophistry. The Crown will remain the owner in all but name, as there have been no changes to the powers the Crown can and will exercise.
- The Crown will also have the power to resume full legal title by declaring foreshore and seabed land to be subject to the Conservation Act 1986.
- Customary rights are restored to being inherent, but will only be recognised to the extent they satisfy the high statutory hurdles.

Practical Difference

- Negligible.
- There is no practical difference from changing the formal legal ownership of the foreshore and seabed—it is a hollow symbolic gesture;
- There is no practical difference in restoring rights to being inherent, while recognising them only to the extent provided for in the Bill. In our assessment, 'substituted rights' and 'statutorily codified rights' have immaterial practical differences. Both have been defined by the Crown and reduce, restrict and fragment the ancestral relationship Iwi Māori have with the foreshore and seabed.

ACCESS TO THE COURTS

2004 Act

- Created right to access the courts for recognition of substituted rights;
- No access to Legal Aid, which as a matter of practice restricted access to the Courts.

The Bill

- Creates right to access the courts for recognition of statutorily-codified rights;
- No access to Legal Aid, which as a matter of practice restricts access to the Courts.

Legal Difference

- The legal difference is the nature of rights that can be pursued; statutorily-codified rights as opposed to substituted rights.

Practical Difference

- Negligible;
- Under both schemes, Iwi and hapū have the right to litigate for Crown-defined rights that bear little relationship to their ancestral relationship with the foreshore and seabed;
- Under both schemes, actual access to the Courts is limited due to the inability to access Legal Aid.

Tests for Customary Title

2004 Act

- Requires proof of exclusive use and occupation, without substantial interruption, and continuous title to contiguous land;
- Spiritual and cultural associations may not be used as proof of exclusive use and occupation

The Bill

- Requires proof that area is held under tikanga, and has been exclusively used and occupied since 1840 until the present day;
- Continuous title to contiguous land is a relevant (as opposed to mandatory) criteria.

Legal Difference

- The test is modified in 3 key respects: continuous title to contiguous land is reduced from being a mandatory to a relevant criteria; spiritual and cultural associations may be permissible for the Court to consider; and tikanga is expressly recognised as constituting the rights as opposed to being only impliedly recognised under the 2004 Act.

Practical Difference

- Negligible.
- The standard of ‘exclusive use and occupation without substantial interruption’ remains at the core of the test, and is a standard so high and alien to tikanga that the vast majority of Iwi and hapū will not be able to successfully claim title;
- The addition of tikanga as a cumulative element of the test is negated by other elements which are in conflict with tikanga;
- The test remains based on the common law, and a particularly oppressive and restrictive interpretation of the common law of overseas jurisdictions.

Awards for Customary Title

2004 Act

- A successful TCR application allows for the establishment of a foreshore and seabed reserve and other awards negotiated directly with the Crown;

The Bill

- Provides for a range of rights including; permission rights (RMA and conservation related); ownership of minerals (exempting minerals held under the Royal Prerogative); wāhi tapū protection rights, prima facie ownership of taonga tuturu and the ability to lodge a planning document.

Legal Difference

- The Bill creates a broader suite of awards attaching to a finding of customary title;
- The real legal question is the extent to which the awards amount to expressions of proprietary interests.

Practical Difference

- The awards are the only substantive change from the 2004 Act, however, we emphasise that all the awards are derived from agreements reached under the 2004 Act (and we note are less than the full content of those agreements);
- We also emphasise that there will only be practical differences if Iwi and hapū can actually satisfy the tests to have customary title recognised, which as above we consider will not be possible for the vast majority.

Non-Title Customary Rights

2004 Act	The Bill
• Provides for Customary Rights Orders (CROs), which requires proof that the practices are integral to tikanga Māori, has been continued without substantial interruption since 1840, has not been extinguished and does not include a set of customary practices explicitly excluded. The ensuing award is legal protection to continue that practice; • Excludes rights in relation to fishing, flora and fauna (including marine mammals).	• Provides legal protection for customary rights to be exercised, where those rights are constituted in tikanga Māori and have continued to be exercised since 1840; • The same exclusions apply; • Provides for automatic participation in conservation activities.
Legal Difference	**Practical Difference**
• Creation of automatic participation right in conservation processes; • Test for customary rights is slightly less onerous.	• Automatic participation right merely codifies extant practices and standards; • A slightly broader range of customary rights may be recognised, but there is limited incentive for Iwi and hapū to seek recognition for a right that has limited efficacy.

16. In our assessment, the Bill makes inconsequential changes to the 2004 Act;
    a. The majority of Iwi and hapū will not be able to successfully assert customary title, which amounts to a de facto taking of Māori property rights;
    b. The only real benefits from the Bill are in the awards that attach to title, but most Iwi/hapū will not be able to obtain these benefits;
    c. The awards for customary interests (title, rights and automatic recognition) merely codify pre-existing instruments and approaches and so fail to be creative; and
    d. The nuanced legalities of changing the ownership arrangements are symbolically but not practically relevant.

DISCRIMINATORY EFFECT

17. In our assessment, the Bill discriminates against Māori in precisely the same way as the 2004 Act;
    a. Māori property rights are treated differently to non-Māori property rights;
    b. The differential treatment creates material disadvantage for Māori;
    c. Māori have not consented to the disadvantage experienced;
    d. There has been no compensation for the disadvantage; and

e. The disadvantage cannot be reasonably justified.

18. We note that the Attorney General's opinion on consistency of the Bill with the Bill of Rights Act concedes that the Bill discriminates against Māori:

> *Because customary interests can be held only by Māori and because the Bill treats those interests differently from other categories of interest in land, notably private freehold titles, the Bill indirectly draws a distinction based on race or ethnic origin. As that distinction involves greater, but also lesser, relative rights, it gives rise to a* prima facie *limit on the right to be free from discrimination under s 19 of the Bill of Rights Act.*

19. The Attorney General however concludes that the discrimination can be demonstrably justified on the grounds that it is a:

> *workable compromise between these various, and sometimes necessarily conflicting, interests. The question of justification ultimately comes down to whether in light of all the circumstances, including the ongoing process of consultation and the various rights accorded to customary interests, the public and third parties, that compromise is reasonable:*

20. TTC disagrees with the finding that the discrimination against Māori is justifiable on the following grounds:
    a. That the de facto taking of Māori property rights (by virtue of the oppressive test for customary title) is a form of discrimination that the Attorney General has failed to consider; and
    b. The grounds of justification are flawed and fail to reach the standard of 'demonstrably justified'.

De facto taking as discrimination

21. TTC considers that the test for customary title is an impermissible regulatory taking that discriminates against Māori.
22. The test for customary title has the following effect:
    a. Property rights (albeit constrained) will only be recognised as extant where they meet a test drawn from some overseas aboriginal title jurisprudence;
    b. Property rights that exist under alternative legal formulas of which there are many (see the Waitangi Tribunal report of 2004) will be extinguished in one of two ways: (1) there will be no jurisdiction for them to be asserted (which is tantamount to extinguishment given the inchoate nature of customary title); (2) they will be extinguished by necessary implication of failing to satisfy the test in the Bill.

23. The codification of the test results in the government divesting Iwi and hapū of their inherent property rights. The test retrospectively imposes higher standards than would have otherwise applied—the law in New Zealand since the establishment of the Native Land Courts has required customary title to be proved solely according to the standards of whether the land was held according to tikanga Māori. It is improper for the government to rewrite the standards for customary title recognition over 150 years later. By way of analogy, we do not see any material difference between the test for customary title, and a requirement that owners of freehold land having to produce evidence that every transfer of the land has been bona fide, otherwise the Crown will assume that that parcel of land falls into the public domain.
24. We are convinced that the way the test is constructed is known to divest Iwi and hapū of significant tracts of foreshore and seabed held under customary title, and we encourage the Select Committee to seek a substantive opinion on the discriminatory effect of the equivalent of a regulatory taking under New Zealand law.

Differential treatment as discrimination

25. TTC strongly disagrees with the Attorney General's finding that the prima facie discrimination is justifiable, on the basis that the grounds of justification are flawed and fail to reach the legally required standard of 'demonstrably justified'.
26. The specific grounds of reasonableness relied upon in the Attorney General's opinion are:
    a. The Bill creates both greater and lesser rights for Māori customary title holders as compared with holders of freehold title (the greater rights being in respect of RMA processes);
    b. Rendering customary title inalienable is acceptable because inalienability is an inherent characteristic of customary title (and therefore no differential treatment arises);
    c. The Bill seeks to reduce legal uncertainty; and
    d. The Bill seeks to provide a durable and balanced response to 'extensive discord' over recent years.
27. TTC refutes each of the grounds as follows:
    a. Greater and lesser rights for Māori customary title holders—the proper question is whether the powers attaching to customary title differ in any way from the powers that attach to all other property rights in land. We consider that the only greater power is the presumptive ownership of taonga tuturu. All other powers awarded with customary title are less than those that go with property rights. For example, the permission right in conservation and RMA processes is a lesser version of the rights to exclude and control under standard property rights. It is lesser because all other property rights also entail the right to compensation for encumbrances on the rights, whereas

customary title does not (except to the extent of the negotiating powers of the holder);

b. Inalienability is an inherent characteristic of customary title (and therefore no differential treatment arises)—this assertion is patently erroneous. Historically, customary title was alienable initially only to the Crown and was subsequently made alienable to wider public once transmuted into the Torrens system. We consider this is a creative but untenable rationale for customary title being inalienable, notwithstanding that many Iwi have expressed support for the concept of inalienability;

c. Seeks to reduce legal uncertainty—as extensively commented on the in Waitangi Tribunal report of 2004, uncertainty is principally reduced for non-Māori seeking to develop the foreshore and seabed, whereas Iwi and hapū have the burden of expending resources to research whether they have title claims that are tenable within the framework of the Bill or the undesirable certainty that their ancestral relationship with the foreshore and seabed has been legally severed and their customary authority disenfranchised;

d. The Bill seeks to provide a durable and balanced response—the proper question is whether the Bill strikes a balance that is any different to the 'balance' struck in 2004. In our assessment, this Bill makes no material change to the outcomes of the 2004 Act and is therefore as unconscionable as the 2004 Act was found repeatedly to be.

28. In summary, we emphasise that the 2004 Act was widely condemned as discriminatory, and we see no reason that this Bill will be treated any differently under New Zealand or international human rights law.

CONSISTENCY WITH THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

29. The DRIP elucidates the minimum human rights standards for Indigenous Peoples individual and collective dignity. It does not create new human rights standards, rather it interprets existing standards at international law as they specifically apply to Indigenous Peoples.
30. Given New Zealand's recent accession to the DRIP, we consider the Bill to represent the litmus test of New Zealand's actual commitment to upholding this significant international instrument.
31. The DRIP specifies a number of rights, the most pertinent of which we consider to be:

    a. Article 11 (2)—right to redress for property rights taken from Indigenous Peoples without their free, prior and informed consent;

b. Article 19—right of Indigenous People to exercise free, prior and informed consent over legislative and administrative measures that affect them;

c. Article 26—right of Indigenous Peoples to their lands, territories and resources, and the requirement that States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned;

d. Article 27— states shall establish and implement, in conjunction with Indigenous Peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous Peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous Peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used;

e. Article 28—the right of Indigenous People to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. Unless otherwise freely agreed upon by the Peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress;

f. Article 37—the right of Indigenous Peoples to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

32. We interpret these articles as requiring a DRIP-consistent approach to have the following minimum elements:

    a. That Iwi and hapū consent to the framework;

    b. That the relationship and rights Iwi, hapū and whānau have with the foreshore and seabed is recognised, and due recognition is given to the tikanga Māori land tenure system and the Treaty of Waitangi;

    c. That any historical takings of the foreshore and seabed that were not obtained with free, prior and informed consent will be fairly accommodated.

33. Our assessment for each is as follows:

    a. Consent—as is becoming increasingly clear, there is sustained opposition to this Bill;

b. Due recognition for the tikanga Māori land tenure system and the Treaty of Waitangi—while the tests ostensibly recognise tikanga Māori, the subsequent layering of common law standards effectively nullifies tikanga. Tikanga and common law are so normatively different that they cannot be superimposed. For example, tikanga principles of manaaki prescribe hosting responsibilities that are entirely inconsistent with the common law requirement of exclusivity. The result is that the common law elements of the test effectively 'trump' tikanga. The value of the incorporation of tikanga is therefore nominal, and does not, in our assessment, amount to the level of respect required to tikanga by the DRIP. We also emphasise that the way the Treaty partnership is provided for in the Bill is inadequate. The 'Treaty clause' provides for the Treaty to be recognised **through** the customary interests provisions. This is a significant reduction in the application of the Treaty and displaces entirely the notion of partnership, as well as ignoring the applicability of Treaty jurisprudence to the assessment of customary rights;

c. Redress for historical takings of the foreshore and seabed—this Bill, instead of seeking to redress historical takings, subjects Iwi and hapū to having historical injustice revisited upon them. The test assumes that historical takings will extinguish customary title, and therefore, precludes the successful assertion of title where historical wrongs have occurred.

34. In summary, the Bill does not meet the minimum standards in the DRIP, which we consider deeply regrettable given the proximity of this Bill to New Zealand affirming our commitment to the DRIP.

35. We urge the Select Committee to seek a substantive analysis of the Bill's consistency with the DRIP.

CONSISTENCY WITH EXPERT BODY RECOMMENDATIONS

36. The contemporary foreshore and seabed issue has now been debated in public forum for seven years, supported by over 150 years of sporadic legal commentary, and has attracted comprehensive commentary from a number of expert bodies including the Waitangi Tribunal, the Ministerial Review Panel, the Special Rapporteur on the Rights of Indigenous Peoples, academics and many Iwi, hapū and Māori academics and opinion leaders.

37. These commentaries, in addition to condemning the 2004 Act, have proposed a range of creative and principled options for resolving the foreshore and seabed issue. We are disappointed that these recommendations do not appear to have been taken on board in the policy development preceding this Bill.

38. We encourage the Select Committee to seek an analysis of the Bill according to the recommendations of the Ministerial Review Panel, which we consider particularly applicable to designing a replacement framework.

REQUEST TO BE HEARD

39. TTC request the opportunity to present oral submissions to the Select Committee.

RECOMMENDATIONS

40. We recommend that Select Committee:

    a. request a substantive analysis from an independent international expert on the consistency of the Bill with the DRIP;

    b. request a substantive analysis from an independent expert on whether the test for customary title discriminates against Māori as a way of divesting property rights, amounting to a regulatory taking;

    c. request a substantive analysis from an independent expert on the Bill's consistency with the recommendations of the Ministerial Review Panel.

41. We further recommend that the Bill be **either** abandoned **or** amended so as to ensure consistency with the DRIP.

APPENDIX ONE—UNITED NATIONS ADVOCACY

42. TTC initiated an international advocacy strategy in May 2003 that remains ongoing, until such a time as the Act has been repealed and a fair, just and principled alternative regime is put in its place.

43. The advocacy programme consisted of communicating breaches of international human rights standards to monitoring bodies of the United Nations, seeking findings and recommendations from these reputable bodies. The bodies that we have accessed to date include:

    a. The Committee on the Elimination of Racial Discrimination (CERD), which is the monitoring body responsible for and constituted by the Convention on the Elimination of Racial Discrimination. CERD was accessed under two procedures; the early warning procedure to hear acute breaches of the Convention (accessed in 2004) and the country examination process which provides for a comprehensive review of implementation of the Convention (completed in 2007). We also contributed to a further follow up procedure to the country report in 2009. The early warning procedure was of particular significance, because it is a discretionary procedure that the Committee will only invoke where there is: an acute rights breach, pre-existing and escalating pattern of racial tension; and no domestic mechanism available to address the rights breach. Arguably, the simple fact that the procedure was invoked is an indictment on New Zealand;

    b. The Special Rapporteur on the fundamental freedoms and human rights of Indigenous Peoples (Special Rapporteur), who is an independent expert appointed to address the specific situation of indigenous peoples by conducting country visits, reporting on issues of particular interest and hearing complaints from Indigenous Peoples. The Special Rapporteur conducted country visits to New Zealand in 2005 and 2010.

    c. The Universal Periodic Reporting process is conducted by a committee of the Human Rights Council, and consists of a comprehensive review of the human rights situation in each country across all international human rights standards, in which we participated in 2009.

44. The rationale for conducting this programme of international advocacy included that:

    a. There were no domestic mechanisms available to address the rights breaches caused by the Act. From the time that the government announced its intention to legislate there was no legally enforceable mechanism within the domestic arena able

to pronounce on either the nature and extent of Māori rights in the foreshore and seabed, or the legitimacy of the Act itself.

b. Human rights standards held the potential to positively reframe the divisive polarization of national opinion. TTC hoped that inserting human rights discourse into our national debate could support the moral legitimacy of the rights of Māori, and provide a less politicized framework than the Treaty of Waitangi, given the political climate;

c. International advocacy could lead to international diplomatic pressure being applied to New Zealand, particularly given our national presence in the international arena as a human rights champion and global leader in the recognition and protection of the rights of Indigenous Peoples. It was our hope, although not expectation, that New Zealand could effectively be embarrassed into capitulating from the positions in the Act and the Act itself; and

d. International advocacy was part of establishing a record of opposition to be relied upon should any future opportunities arise for repeal or reform of the Act. This objective has been described as "putting in pou for our mokopuna" to rely upon as they continue to object to the Act.

45. The TTC advocacy programme was built on assertions the 2004 Act breached a number of rights protected by international human rights Conventions, including:

    a. Equality and freedom from discrimination;

    b. Right to culture;

    c. Right to development;

    d. Right to property;

    e. Right to a remedy.

46. The primary breach we identified was of the right to equality and freedom from discrimination, as protected under Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2(1)(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and Article 2 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

47. Whether a breach of the right to freedom from discrimination has occurred, turns on the following limbs:

    a. The presence of distinction causing disadvantage;

    b. The distinction deriving from a prohibited ground; and

    c. Whether the disadvantage can be justified.

48. TTC asserted that each of these grounds were legally satisfied on the basis that:

   a. The distinction created was between Māori and other property rights, in that exclusively Māori property and customary rights were extinguished, whereas all other rights were unaffected by the Act. The disadvantage caused to Māori included:

      i. The simple fact of rights breach constituted disadvantage;

      ii. The failure of the Crown to seek consent from Māori or provide compensation for the extinguishment amounted to a practical disadvantage; and

      iii. The negative impact of dislocating iwi from their culture and ancestral inheritance.

   b. The distinction was based on the prohibited ground of 'race' because it affected property rights exclusively held by a racial grouping within New Zealand; and

   c. The discrimination, constituted by the distinction causing disadvantage, was not justifiable on the basis of:

      i. The failure to provide compensation;

      ii. The lack of acute or necessitating domestic conditions requiring the Act; and

      iii. The Act not providing an appropriate substitution, because of its prohibitive terms and ineffective orders.

Ko Te Ihi o Te Tiriti o Waitangi. Ko Manawhenua. Manamoana

49. CERD found that the Act was unjustifiably in breach of the right to equality and freedom from discrimination:

> *the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Māori, in particular in its extinguishment of the possibility of establishing Māori customary title over the foreshore and seabed and its failure to provide a guaranteed right of redress*

50. The Special Rapporteur echoed this finding:

> *the Act clearly extinguishes the inherent property rights of Maori to the foreshore and seabed without sufficient redress or compensation, but excludes certain properties already held in individual freehold*

51. The right to culture provides that all Peoples have the right to those things that are necessary for their cultural survival, and the right to express, perpetuate and transmit those things. It is protected under Article 27 of the ICCPR and the various elements are expressly provided for under the DRIP. TTC contends that the Act and the Bill breaches this right on the following grounds:

a. They attempt to codify the ancestral and cultural relationship between Iwi and the foreshore and seabed and in doing so, precludes Iwi from retaining autonomy over the nature and manifestation of that relationship;

b. Through their prescriptive tests, they redefine, reduce and fragment deeply embedded cultural traditions and associations which are holistic in nature and constituted by mana whenua, mana moana; and

c. They fossilise cultural traditions and associations.

52. The right to development is provided for the in the United Nations Declaration on Development and the DRIP. The right is considered to be an umbrella right that integrates all other human rights. It expresses the right of all Peoples to participate in development affecting their interests and to pursue development in all spheres, including civil, political, social, cultural and economic. TTC contends that the Act and the Bill breach this right by:

    a. Denying Iwi an effective participatory role in the development of the Act and the Bill; and

    b. Precluding Iwi from evolving and developing as Peoples, as they fossilizes the nature and extent of rights held as 1840.

53. The right to property protects the right to hold property free from arbitrary interference, individually and in association with others, and is stated in the Universal Declaration of Human Rights. TTC contends that the Act and the Bill are openly and, in our opinion undeniably, arbitrary extinguishments of the property and customary rights of Iwi that cannot be justified by any means.

54. The right to a remedy is designed to ensure that human rights protections are legally respected, and provides that where a breach of rights has occurred, there is a domestic administrative or judicial mechanism to provide a remedy. TTC contends that the Act and the Bill are powerful illustrations of our enduring domestic failure to create any mechanisms that provide Māori remedies for historical and contemporary rights breaches. The Act could be passed because of the lack of such a domestic mechanism and if the Bill is passed, it will be due to the same lack. The Act and the Bill also perpetuate a further removal of access to remedies, because both remove the right of Māori to access the courts to have their rights fully recognised, and are products of a breach of the rule of law. These breaches are in themselves, breaches to the right to due process and administration of the Courts.

55. The United Nations successively recommended that the government review the Act, with the intention of lessening the rights breaches it perpetuated. CERD, under the early warning procedure stated:

> *the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Māori, in particular in its extinguishment of the possibility of*

establishing Māori customary title over the foreshore and seabed and its failure to provide a guaranteed right of redress.

[The Committee] urges the State party, in a spirit of goodwill and in accordance with the ideals of the Waitangi Treaty, to resume a dialogue with the Māori community with regard to the legislation in order to seek ways of lessening its discriminatory effects, including where necessary through legislative amendment.

56. CERD, in its 2007 country report, stated:

    The Committee reiterates its recommendations that a renewed dialogue between the State party and the Māori community take place with regard to the Foreshore and Seabed Act 2004, in order to seek ways of mitigating its discriminatory effects, including through legislative amendment where necessary; that the State party continue monitoring closely the implementation of the Act; and that it take steps to minimize any negative effects, especially by way of a flexible application of the legislation and by broadening the scope of redress available to the Māori.

57. More recently, in the follow up procedure to the country report, CERD stated that:

    The Committee reiterates that an ongoing dialogue with the Māori community is of the utmost importance for a just and fair implementation of the Foreshore and Seabed Act.

58. The Special Rapporteur stated:

    The Foreshore and Seabed Act should be repealed or amended by Parliament and the Crown should engage in treaty settlement negotiation with Māori that would recognize the inherent rights of Māori in the foreshore and seabed and establish regulatory mechanisms allowing for the free and full access by the general public to the country's beaches and coastal area without discrimination of any kind

59. TTC also share the view recently expressed in the Universal Periodic Report by Turkey, who stated that they welcomed the review of the Foreshore and Seabed Act 2004 and hoped that the Review Panel would contribute to finding a durable solution taking into account all interests. The Bill, however, suggests those hopes were misplaced.

60. We also note that organs of the United Nations will maintain a watching brief on developments concerning the Act and the Bill, as exemplified by the following request by CERD that New Zealand will need to reply to in their next periodic report to the Committee:

The Committee invites the State party to provide information on:

- *Recent progress made in ongoing negotiations;*
- *The status of the dialogue held with tribes who oppose the act;*

- *Land rights granted to tribes in accordance with the Foreshore and Seabed Act;*
- *The realization of the right to access justice through a fair and equitable process, e.g. in the case of Te Whānau a Apanui.*