

**AMNESTY**  
**INTERNATIONAL**  
*Aotearoa New Zealand*



**Amnesty International Aotearoa New Zealand's submission on  
the New Zealand Government's consultation document:**

***Reviewing the Foreshore and Seabed Act 2004***

30 April 2010

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**Amnesty International**, recognising that human rights are indivisible and interdependent, also works to promote all the human rights enshrined in the Universal Declaration of Human Rights and other international standards, through human rights education programs and campaigning for ratification of human rights treaties.

**Amnesty International's** New Zealand section has approximately 8,100 members and regular donors, and active members in some 30 local community groups, specialist groups and various action networks. At any one time its members are working on cases and issues in approximately 90 countries. The work of Amnesty International's New Zealand members is supported by paid staff and volunteers based in Auckland, and the movement's International Secretariat based in London.

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## Introduction

1. Amnesty International Aotearoa New Zealand (AIANZ) welcomes the opportunity to provide a submission on the New Zealand Government's consultation document *Reviewing the Foreshore and Seabed Act 2004*.

## The Government's objective

2. Amnesty supports the Government's objective of achieving a "just and enduring solution"<sup>1</sup> to the issue of interests in the foreshore and seabed. The Government's commitment to achieving an equitable balance between the interests of all New Zealanders in the foreshore and seabed and, in particular, its desire to redress "the discriminatory effect of the 2004 Act"<sup>2</sup> and its assurance of the "recognition of customary rights and interests,"<sup>3</sup> are welcomed by Amnesty and will contribute significantly to this objective.

## Addressing domestic and international concerns

3. As the consultation document highlights, the Government's review comes in the wake of widespread opposition to the Foreshore and Seabed Act 2004, both from the New Zealand public and the international community, including the United Nations Committee on the Elimination of Racial Discrimination (CERD) and the United Nations' Special Rapporteur on Indigenous Peoples. In particular, in 2005 the CERD Committee observed that "[the Foreshore and Seabed Act 2004] appears to the Committee, on balance, to contain discriminatory aspects against Maori, in particular its extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress."<sup>4</sup> Amnesty therefore takes this opportunity to congratulate the New Zealand Government for acknowledging the concerns of both the New Zealand public and the international community and undertaking this consultation process to address them.

## Guiding Principles

4. Amnesty welcomes the Government's assurance that any new legislation will be based on the following principles:
  - Treaty of Waitangi;
  - Good Faith;
  - Recognition and protection of interests;
  - Equity;
  - Access to justice;
  - Certainty; and
  - Efficiency.
5. Additionally, AIANZ welcomes the Government's recent, yet long overdue, endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Amnesty International takes this opportunity to emphasise that the UNDRIP does not create new rights, but rather is an elaboration of fundamental human rights that have existed and applied to all peoples for decades. The UNDRIP takes these rights and principles and adapts them to the specific circumstances of indigenous peoples, emphasising the collective nature of their rights, and their right to maintain their cultural distinctiveness.

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<sup>1</sup> *Reviewing the Foreshore and Seabed Act 2004*, page 1.

<sup>2</sup> *Reviewing the Foreshore and Seabed Act 2004*, page 9.

<sup>3</sup> *Reviewing the Foreshore and Seabed Act 2004*, page 7.

<sup>4</sup> United Nations Committee on the Elimination of Racial Discrimination "Decision on Foreshore and Seabed Act 2004 (11 March 2005) Decision 1 (66). New Zealand CERD/C/DEC/NZL/1, paragraph 6.

6. While the Declaration itself is not legally binding and does not create any new rights, it does place additional responsibilities on the Government and Amnesty International looks forward to observing how, through consultation with Māori, it implements the Declaration's principles in future policies and programs.
7. Following the New Zealand Government's endorsement of UNDRIP, therefore, a resolution process to the foreshore and seabed that fully realises the principles outlined by the Government, in particular the principles of good faith and recognition and protection of interests as provided for by Articles 19 and 27 of the UNDRIP,<sup>5</sup> is more than ever critical to achieving an enduring solution.

### Consultation

8. Amnesty International believes that the length of time allocated by the Government for public consultation over the review of the Foreshore and Seabed Act 2004 is insufficient to allow the New Zealand public to thoroughly consider, discuss and develop submissions on an issue as legally complicated and politically controversial as the Foreshore and Seabed Act 2004.
9. The right of people to participate in decisions which may affect their rights is grounded in international human rights law and standards. In particular, Article 21 of the Universal Declaration of Human Rights (UDHR) specifies that "everyone has the right to take part in the government of his [or her] country."<sup>6</sup> Similarly, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that "every citizen shall have the right and the opportunity [...] to take part in the conduct of public affairs."<sup>7</sup> Elaborating on these rights in relation to indigenous peoples, the UNDRIP prescribes that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."<sup>8</sup> Access to comprehensive, accurate and timely information is a necessary requirement to ensure that those whose human rights may be affected are able to participate meaningfully in the decision-making process.
10. Additionally, while the Government's consultation document, *Reviewing the Foreshore and Seabed Act 2004*, was developed through consideration of the Independent Ministerial Review Panel's report, *Pakia ki uta pakia ki tai: Report of the Ministerial Review Panel*, as well as engagement with interested parties,<sup>9</sup> the four options it outlines have not been the result of broad public consultation.

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<sup>5</sup> Article 19 of the UNDRIP prescribes that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Article 27 of the UNDRIP prescribes that "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. Indigenous peoples shall have the right to participate in this process. United Nations Declaration on the Rights of Indigenous Peoples, Article 19 and 27.

<sup>6</sup> Article 21 of the Universal Declaration of Human Rights.

<sup>7</sup> Article 25 (a) of the International Covenant on Civil and Political Rights.

<sup>8</sup> Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

<sup>9</sup> *Reviewing the Foreshore and Seabed Act 2004*, page 17.

11. Amnesty International believes that, in order to enable fully informed and thus meaningful consultation over the review of the Foreshore and Seabed Act 2004, the Government should outline each of the four options presented in the consultation document in sufficient and equal detail in order to enable those engaged in the consultation process to impartially compare the four options. While the Government does provide details of option 4 ‘public domain/takiwā iwi whānui,’ its preferred option, it fails to provide comparable sufficient detail on either of options 1, 2 or 3. By not outlining ‘Crown notional title’, ‘Crown absolute title’ or ‘Maori absolute title’ in similar detail to ‘public domain/takiwā iwi whānui’, the Government restricts those involved in the consultation process from making a fully informed decision on which option they would prefer and in so doing significantly restricts their ability to participate meaningfully in the consultation process.

#### **‘Public domain/takiwā iwi whānui’ and customary rights**

12. Despite the concerns raised in paragraph 10 concerning a lack of broad public consultation, Amnesty International believes that the mode of recognising Maori property rights relating to the foreshore and seabed is a matter to be agreed between Maori, hapu and iwi and the New Zealand Government.
13. Notwithstanding this, Amnesty International believes that as a minimum and in line with New Zealand’s domestic and international obligations, Maori should not be deprived of their right to access the courts to seek redress.<sup>10</sup> The Government’s obligations are articulated in both Article 8 of the UDHR and Article 2 of the ICCPR which provide that “everyone has the right to an effective remedy.”<sup>11</sup>
14. The UNDRIP provides valuable normative guidance on this issue – together with domestic principles and rights,<sup>12</sup> including the Treaty of Waitangi. The UNDRIP places significant emphasis on dialogue between states and indigenous peoples and particularly the right of Indigenous peoples to give their free, prior and informed

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<sup>10</sup> The right to be immune from the arbitrary deprivation of property is enshrined in Article 17(2) of the UDHR which declares that “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.” Article 2 of the UDHR provides that any rights in the UDHR are not to be applied with distinction, including that which is based on race. Additionally, Article 26 of the UNDRIP states “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” The CERD Committee has also noted with concern that the Act fails to provide a guaranteed “right of redress” in breach of Article 6 of CERD which provides that “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.” Committee on the Elimination of Racial Discrimination, Decision 1 (66) New Zealand Foreshore and Seabed Act 2004, CERD/C/66/NZL/Dec.1, 21 February – 11 March 2005, paragraph 6. Finally, the former Attorney-General, in her advice on the Foreshore and Seabed Bill acknowledged that “the absence of a guaranteed right of redress” in the Bill gives rise to prima facie discrimination. Attorney-General *Foreshore and Seabed Bill* 6 May 2004, at paragraph 79.

<sup>11</sup> Article 8 of the Universal Declaration of Human Rights and Article 2 (3) (a) of the International Covenant on Civil and Political Rights.

<sup>12</sup> Including, but not limited to, the right not to be discriminated against, the right not to be arbitrarily deprived of property, the right to a remedy, the right to be treated equally before the law, and the right to participated in government. See the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights for further information.

consent<sup>13</sup> to measures that will impact on Indigenous communities. Drafted over twenty years of negotiations between Indigenous peoples and states, the Declaration provides a clear, authoritative statement of the human rights of Indigenous peoples.

15. Additionally, Amnesty International is concerned by the Government's indication that, in all four options outlined in the consultation document, "privately owned foreshore and seabed would not be affected."<sup>14</sup> Article 2 of the UDHR stipulates that "everyone is entitled to all rights and freedoms set forth in this Declaration, [including the right not to be "arbitrarily deprived of his [or her] property,"]<sup>15</sup> without distinction of any kind, such as race, colour [...]"<sup>16</sup> Article 7 of the UDHR goes on to declare that "all are equal before the law [...] All are entitled to equal protection against any discrimination,"<sup>17</sup> Noting these rights, the Government's intention to treat Maori customary interests and 'privately owned foreshore and seabed' differently is at risk of continuing the discriminatory approach implemented by the Foreshore and Seabed Act 2004 and does not adequately address the CERD Committee's concern of discrimination against Maori.<sup>18</sup>
16. Amnesty takes this opportunity to encourage the New Zealand Government to make a declaration in support of Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination and in so doing enable an individual or a group of persons claiming to be the victim of racial discrimination to lodge a complaint with the Committee on the Elimination of Racial Discrimination.

#### **Test for establishing customary interests:**

17. Amnesty International believes that, ultimately, the evidential standards for establishing Maori interests in the foreshore and seabed are a matter for agreement between the Government and Maori.
18. AIANZ observes that the evidential standards for establishing customary title in the Foreshore and Seabed Act 2004 were a major source of criticism for academics with expertise in this area. See, for example, *Maori Property Rights and the Foreshore and Seabed: The Last Frontier*, in particular the chapters by Kent McNeil, Shaunnagh Dorsett and Richard Boast.<sup>19</sup> Additionally, the United Nations' Special Rapporteur critically observed that "[under the Foreshore and Seabed Act 2004] Crown extinguished all Maori extant rights to the foreshore and seabed in the name of the public interest and at the same time opened the possibility for the recognition by the Government of customary use and practices through complicated and restrictive judicial and administrative procedures."<sup>20</sup>

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<sup>13</sup> Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

<sup>14</sup> *Reviewing the Foreshore and Seabed Act 2004*, page 25, see also 24.

<sup>15</sup> Article 17 of the Universal Declaration of Human Rights.

<sup>16</sup> Article 2 of the Universal Declaration of Human Rights.

<sup>17</sup> Article 7 of the Universal Declaration of Human Rights.

<sup>18</sup> United Nations Committee on the Elimination of Racial Discrimination "Decision on Foreshore and Seabed Act 2004 (11 March 2005) Decision 1 (66). New Zealand CERD/C/DEC/NZL/1, paragraph 6.

<sup>19</sup> Clair Charters and Andrew Erueti 2007, *Maori Property Rights and the Foreshore and Seabed: The Last Frontier*. Victoria University Press, 9-30 and 58-118.

<sup>20</sup> 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rudolfo Stavenhagen, on his Mission to New Zealand' (16 to 25 November 2005), paragraph 79.

19. These observations, amongst others, stress the difficulties indigenous peoples often encounter in establishing their customary interests in land and sea. In this regard, Amnesty welcomes the Government's acknowledgment that the "complicated, restrictive judicial and administrative procedure"<sup>21</sup> provided for by the Foreshore and Seabed Act 2004 is a key issue the review seeks to redress.
20. In line with this acknowledgement by the Government, it is critical that any new mechanism for recognising Maori interests in the foreshore and seabed does not repeat the mistakes of the Foreshore and Seabed Act 2004 by continuing to set significant evidential obstacles to Maori securing recognition of their property rights. Due consideration of the CERD Committee's decision on the Foreshore and Seabed Act 2004 would be particularly pertinent to ensuring appropriate evidential standards in the future.<sup>22</sup>
21. Amnesty notes that there is now a useful body of commentary by experts that provide practical guidance on this issue. It is Amnesty's view that the standards proposed in the consultation document remain unduly restrictive. There must be greater recognition of the impacts of colonisation and settlement on Maori communities, particularly their displacement from their lands, and the stress placed on their communities. In addition, there should be care not to impose common law principles of property ownership on Maori, such as the notion of exclusive occupation. The proposal to shift the evidential burden is a move in the right direction, as is the recognition of Tikanga Maori.<sup>23</sup>
22. In addition, concerns over the evidential burdens imposed on Maori would indicate a preference for option 3, 'Maori absolute title,' though as previously noted Amnesty seeks further information on what that option would entail.

### **Recommendations**

Amnesty International makes the following recommendations to the New Zealand Government as it undertakes its review of the Foreshore and Seabed Act 2004:

23. Amnesty welcomes the Government's objective of achieving a just and enduring solution; to achieving an equitable balance of the interests of all New Zealanders in the foreshore and seabed; to redressing the discriminatory effect of the 2004 Act; and its assurance of the recognition of customary rights and interest.
24. Amnesty congratulates the New Zealand Government for acknowledging the concerns of both the New Zealand public and the international community over the Foreshore and Seabed Act 2004 and undertaking this consultation process to address them.
25. Amnesty welcomes the Government's assurance that any new legislation will be based on the principles outlined in its consultation document.
26. Amnesty congratulates the Government for its endorsement of the United Nations Declaration on the Rights of Indigenous Peoples and believes it should underpin the process of resolving the issue of the foreshore and seabed, together with the principles outlined by the Government in its consultation document.
27. Amnesty recommends the consultation process be extended and that additional information be provided on 'Crown notional title', 'Crown absolute title' and 'Maori absolute title'.

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<sup>21</sup> *Reviewing the Foreshore and Seabed Act 2004*, page 9.

<sup>22</sup> United Nations Committee on the Elimination of Racial Discrimination "Decision on Foreshore and Seabed Act 2004 (11 March 2005) Decision 1 (66). New Zealand CERD/C/DEC/NZL/1.

<sup>23</sup> *Reviewing the Foreshore and Seabed Act 2004*, page 33-39.

28. Amnesty International believes that the mode of recognising Maori property rights relating to the foreshore and seabed is a matter to be agreed between Maori, hapu and iwi and the New Zealand Government.
29. Notwithstanding this, Amnesty International believes that as a minimum and in line with New Zealand's domestic and international obligations, Maori should not be deprived of their right to access the courts to seek redress.
30. Amnesty International recommends the Government review its position, that privately owned foreshore and seabed will not be affected by any replacement to the Foreshore and Seabed Act 2004, so as to ensure it does not discriminate against Maori.
31. Amnesty encourages the New Zealand Government to make a declaration in support of Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination.
32. Amnesty International believes that the evidential standards for establishing Maori interests in the foreshore and seabed are a matter for agreement between the Government and Maori.
33. Finally, Amnesty recommends that any mechanism for recognising Maori interests in the foreshore and seabed does not repeat the mistakes of the Foreshore and Seabed Act 2004 by continuing to set significant evidential obstacles to Maori securing recognition of their property rights.