

III. RIGHTS OF INDIGENOUS PEOPLES'

(ARTICLE 1 – RIGHT TO CULTURAL DEVELOPMENT,
ARTICLE 2 – RIGHT TO NON DISCRIMINATION, AND ARTICLE 15 – RIGHT TO TAKE
PART IN CULTURAL LIFE)

Non-discrimination and equality are fundamental components of international human rights law and a cross-cutting obligation under the Covenant.¹⁰ While the right to non-discrimination is one of the few Covenant rights contained in the BORA, the historic and ongoing breach of this and other Covenant rights of Maori has lead to their extreme socio-economic disadvantage¹¹ and has resulted in entrenched inequalities in health, education, employment, justice and housing in New Zealand – the main indicators of ESC rights.¹²

Amnesty International welcomes New Zealand's recent efforts to protect the right to non-discrimination, the right to culture and the right to cultural development through the significant decision to endorse the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Amnesty also welcomes the New Zealand Government's efforts to settle the historical claims of Maori under the Treaty of Waitangi.

Nevertheless, progress in New Zealand towards the recognition of indigenous rights and in particular, the ESC rights of indigenous peoples, has not been consistent. In 2003 the Judiciary recognised the right to claim indigenous land rights in *Ngāti Apa v Attorney General*,¹³ whereby it was held that Maori could apply to the Maori Land Court to determine whether areas of the foreshore and seabed constituted Maori customary land. The Court of Appeal held, in a unanimous decision, that the Maori Land Court had jurisdiction under the Te Ture Whenua Maori Act 1993 to determine such claims.

The Foreshore and Seabed Act 2004 (the 2004 Act) was supported by the New Zealand Government and passed by parliament in response to the decision in *Ngāti Apa v Attorney General*. The 2004 Act was deemed, on balance, to contain discriminatory aspects against Maori by the Committee on the Elimination of Racial Discrimination, in particular by extinguishing the possibility of establishing customary Maori property rights to the foreshore

¹⁰ General Comment No.20 (E/C.12/GC/20).

¹¹ Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, *The Situation of Maori Peoples in New Zealand* (2011) page 2.

¹² New Zealand Human Rights Commission "Tūi Tūi Tuituiā Race Relations in 2010" (2010) <http://www.hrc.co.nz/wp-content/uploads/2011/03/RaceRelationsReport_2011_final.pdf>.

¹³ *Ngāti Apa v Attorney General* 3 NZLR 643.

and seabed and by its failure to provide a guaranteed right of redress.¹⁴ Many voiced their concerns about these breaches, including Maori, the Special Rapporteur on the rights of indigenous peoples' and Amnesty International.¹⁵

The subsequent Government review, consultation and proposed repeal of the 2004 Act in 2009 was welcomed by Amnesty International. While Amnesty International acknowledges that this issue is a complex one and commends the Government's efforts to find an enduring solution to it, it remains concerned that the replacement for the 2004 Act, the Marine and Coastal Area (Takutai Moana) Act (the 2011 Act) does not adequately address the discriminatory effect of the 2004 Act and is not consistent with international human rights standards that seek to protect indigenous rights.¹⁶

The 2011 Act continues to discriminate against Maori by virtue of the fact that customary interests cannot include the right to exclusive occupation, unlike specified freehold title which gives the title holder exclusive occupation rights.¹⁷

Amnesty International believes the 2011 Act's imposition of a time limit for customary interest applications is also discriminatory to Maori, as justice for breaches of human rights should not be time-bound.¹⁸ These breaches have a knock-on effect, in that decisions made under the 2011 Act will violate Maori rights to non-discrimination and their customary land, which is fundamental to their cultural identity, as well as breaching their right to cultural development.¹⁹

Further, Amnesty International believes the tests for establishing protected customary rights and customary marine titles should not be codified in the 2011 Act, but instead left to the courts to develop in accordance with New Zealand's international obligations.²⁰

¹⁴ Committee on the Elimination of Racial Discrimination, Sixty-sixth session (2005) Decision 1 (66) New Zealand Foreshore and Seabed Act 2004 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/414/09/PDF/G0541409.pdf?OpenElement>>.

¹⁵ Amnesty International Aotearoa New Zealand's submission on the New Zealand Government's consultation document: Reviewing the Foreshore and Seabed Act 2004 (2010) <<http://www.amnesty.org.nz/files/100429-FSA-review-submission.pdf>>.

¹⁶ Including, but not limited to, Article 8 of the United Nations Declaration on the rights of Indigenous Peoples.

¹⁷ Amnesty International Aotearoa New Zealand's submission on the Marine and Coastal Area (Takuta - Moana) Bill <<http://www.amnesty.org.nz/files/101119-AIANZ-submission-Marine-and-Coastal-Area-Takutai-Moana-Bill.pdf>> pages 7-8.

¹⁸ Amnesty International Aotearoa New Zealand's submission on the Marine and Coastal Area (Takuta - Moana) Bill <<http://www.amnesty.org.nz/files/101119-AIANZ-submission-Marine-and-Coastal-Area-Takutai-Moana-Bill.pdf>> page 10.

¹⁹ Article 1(1) of the Covenant.

²⁰ Amnesty International Aotearoa New Zealand's submission on the Marine and Coastal Area (Takuta -

Amnesty International believes the 2011 Act should be amended to take better account of New Zealand's obligations under the Covenant, and other domestic and international human rights instruments,²¹ to ensure that Maori are not discriminated against and that their Covenant rights are upheld.

Discussion of how to give effect to indigenous rights within New Zealand's constitutional framework during the upcoming constitutional review is an opportune time to ensure that the Covenant rights of Maori as indigenous people of New Zealand are adequately protected in the future and that New Zealand's obligations under the Covenant are met.

Aliquam erat volutpat. Class aptent taciti sociosqu ad litora torquent per conubia nostra, per inceptos hymenaeos. Curabitur mollis molestie enim. Sed magna quam, tempus quis, laoreet

RECOMMENDATIONS

Amnesty International recommends that the Government of New Zealand:

- **amend the Marine and Coastal Area (Takutai Moana) Act so that it upholds the rights of Maori to non-discrimination, culture and cultural development.**

Moana) Bill <<http://www.amnesty.org.nz/files/101119-AIANZ-submission-Marine-and-Coastal-Area-Takutai-Moana-Bill.pdf>>page 9.

²¹ **These instruments include the Treaty of Waitangi, the United Nations Declaration on the Rights of Indigenous Peoples and the International Convention on the Elimination of All Forms of Racial Discrimination.**

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