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Justice Committee,
Parliament Buildings, Wellington.

15 October 2024

Submission: Marine and Coastal Area Amendment Bill 2024

Thank you for the opportunity to make a submission on the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill 2024 (the Bill)[1]. The Bill covers issues that we have worked on for the past two decades because they are a matter of considerable concern for Peace Movement Aotearoa[2] and our members and supporters.

From the time of the Court of Appeal ruling, Ngāti Apa v Attorney General, in June 2003 until the passage of the Foreshore and Seabed Act 2004, issues around the foreshore and seabed were 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 to the Foreshore and Seabed Act Ministerial Review Panel (the Ministerial Review Panel) in 2009, on the 2010 consultation document 'Reviewing the Foreshore and Seabed Act 2004', and the Marine and Coastal Area (Takutai Moana) Bill in 2010. Since then, we have followed the painfully slow progress for whānau, hapū and iwi to secure their rights as defined in the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) via direct negotiation with the Crown and through the Courts.

Due to other commitments during the limited time allocated for written public submissions, we have provided a brief outline of some of our concerns in the first three of the four sections below:

A. The context of this Bill
B. Te Tiriti o Waitangi obligations
C. Human rights obligations
D. Recommendations

We are opposed to this Bill and we recommend it does not proceed. We wish to speak with the Committee about our concerns and recommendations

A. The context of this Bill

We are deeply concerned that this Bill has been introduced in the context of a government that seems intent on removing any trace of progress made in recent years towards honouring Te Tiriti o Waitangi, and towards respecting the individual and collective rights of Māori.

The Bill was introduced as a consequence of the coalition agreement between National and New Zealand First, as pointed out in the less than satisfactory New Zealand Bill of Rights Act 1990 consistency analysis by the Attorney-General[3] as though that somehow gives it legitimacy which it does not. As outlined in the sections below, the Bill clearly breaches Te Tiriti o Waitangi in multiple ways, and does not meet even the minimal standards that the international human rights treaty monitoring bodies require of states' relationships with Indigenous peoples.

As with the FSA and MACA, there was no negotiation or even proper consultation about this Bill with whānau, hapū and iwi who were presented with what Cabinet had already decided on 25 July 2024 and given three weeks "to provide feedback"[4]. Even though the proposals were unanimously rejected[5], the government nevertheless proceeded with what it had already decided to do.

Again, as with the introduction of the legislation that became the FSA, the Bill overrides Court processes that are currently underway simply because the government of the day dislikes the direction the Courts may (or may not be, that remains to be seen) be going in - a gross injustice and egregious abuse of power.

This has been cloaked in assorted statements along the lines of the Bill being needed to ensure the customary marine title test in MACA *"is interpreted consistently with Parliament's original intent"*[6], but MACA was introduced in 2010 precisely to *"provide a framework for recognising interests and rights in the marine and coastal area that is fairer and more durable than its predecessor"*[7].

It was clearly Parliament's intent to reinstate access to the Courts (and an alternative path of direct negotiation with the Crown) for whānau, hapū and iwi to establish 'customary marine title' and 'protected customary rights' - and that is precisely the process that has been underway since 2011. It was never stated that Parliament's intent was for a subsequent government to override legal processes simply because it decided it does not like where the Courts may be heading.

If this legislation is enacted, it will be an extreme injustice for whānau, hapū and iwi; and New Zealand's international reputation in relation to its performance on human rights, especially Indigenous peoples' rights, will be diminished as it was with the FSA and MACA.

B. Te Tiriti o Waitangi obligations

The multiple breaches of Te Tiriti inherent in the approach of successive governments to the positive possibilities presented by the Court of Appeal's Ngāti Apa v Attorney General ruling in 2003 have been well documented in Waitangi Tribunal Reports since then. The Committee will have access to all of those, so we will not detail the breaches here. However, in case Committee members have not taken the opportunity to inform themselves of the Tribunal's findings in relation to this Bill, we include here the summary of breaches that are detailed in the Marine and Coastal Area (Takutai Moana) Act Coalition Changes Urgent Inquiry Report:

- *A dismissal of official advice, and important steps not taken in the policy development process, resulted in the Crown breaching the principle of good government.*

- *The Crown failed to consult with Māori during the development of the proposed amendments, despite repeated advice from officials; it offered to consult with Māori only after decisions were made; and it reduced that limited offer of consultation even further to suit its own deadline to amend the Act before the end of 2024. This is a breach of the principle of partnership.*
- *The Crown has breached the principle of tino rangatiratanga by exercising kāwanatanga over Māori rights and interests in te takutai moana without providing any evidence for one of its key justifications - namely, that the public's rights and interests require further protection beyond what is already provided by the Act. The Crown also failed to inform itself of Māori interests.*
- *The Crown's consultation with commercial fishing interests (which already have statutory protection) prior to finalising the proposed amendments, while failing to consult with Māori, is a further breach of the principle of good government.*
- *The Crown has breached the principle of active protection and the principle of good government by failing to demonstrate how it arrived at its understanding of 'Parliament's original intent' and by seeking to amend the Takutai Moana Act before the Supreme Court can hear the matter.*
- *The Crown has breached the principles of active protection and good government by proposing amendments that are applied retrospectively (from 25 July 2024 onwards). As a result, applicants will be forced to have their cases reheard, burdening them emotionally and financially through no fault of their own, and placing further strain on whanaungatanga. Retrospectivity also means that some applicants who would have been granted customary marine title under the old test might find themselves unable to meet the standards of a new test.*[8]

Furthermore, *"The Tribunal says the approach to policy development was [instead] characterised by ideology and blind adherence to pre-existing political commitments at the expense of whānau, hapū, and iwi. Due to this, the Tribunal finds that the Crown has failed to meet the high standard it should set for itself with its Treaty partner"*. The Tribunal concluded: *"At present, the Crown's actions are such a gross breach of the Treaty that, if it proceeds, these amendments would be an illegitimate exercise of kāwanatanga"*.[9]

C. Human rights obligations

We note that the 'Consistency with New Zealand's international obligations' section of the Departmental Disclosure Statement[10] stated a detailed analysis of compliance with international obligations has not been undertaken, but that the Bill is potentially inconsistent with the UN Declaration on the Rights of Indigenous Peoples and Article 27 of the International Covenant on Civil and Political Rights.

If a detailed analysis had been undertaken, it would have found that at the very least the provisions of this Bill also breach the right of self-determination of all peoples articulated in the shared Article One of both International Covenants (the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights), and rights articulated in the International Convention on the Elimination of All Forms of Racial Discrimination - all of which New Zealand is a state party to.

Furthermore, the minimum standard applied by the human rights monitoring bodies (including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of Racial Discrimination which monitor state parties' compliance with their obligations under those treaties) to states' relationships with Indigenous peoples - that no decisions affecting their rights and interests are to be taken without their free, prior and informed consent - is also breached by the Bill.

Each of those Committees have raised concerns about New Zealand's approach to Indigenous peoples' rights generally, and in relation to the FSA and MACA, in their Concluding Observations on New Zealand's performance since 2004, as have UN Special Rapporteurs. In addition, the FSA was specifically raised as an issue in New Zealand's first Universal Periodic Review in 2009, and its less than satisfactory approach to Indigenous peoples' rights and the lack of constitutional protection for the collective rights of Māori has been raised in all four Universal Periodic Reviews (2009, 2014, 2019 and 2024).

D. Recommendations

The issues we have raised above should be of concern to members of this Committee, and indeed to all Members of Parliament, and we recommend that the Bill does not proceed any further. The obvious and positive way to move forward is not by legislating over decisions of the Courts, but instead to follow the recommendations of the Waitangi Tribunal, namely:

- to begin a genuine process of meaningful engagement with whānau, hapū and iwi; and
- to focus this engagement on the perceived issues of permissions for resource consents, rather than interrupting the process of awarding customary marine title.

Thank you for your consideration of our comments, and we welcome the opportunity to speak with you.

References

[1] Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill 2024
[2] Peace Movement Aotearoa is the national networking peace organisation, established in 1981 and registered as an Incorporated Society in 1982. Our purpose is networking and providing information and resources on peace, humanitarian disarmament, justice and human rights issues. We have extensive national networks which include more than one hundred and fifty contacts for national or local peace, disarmament, human rights, justice, faith-based and community organisations, and more than seven thousand individuals. We regularly provide information to UN human rights treaty monitoring bodies, and to Special Procedures and mechanisms of the Human Rights Council, on a range of issues impacting Aotearoa New Zealand.
[3] Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill - Consistency with the New Zealand Bill of Rights Act 1990, Attorney-General, 22 September 2024
[4] Takutai Moana Pānui: Proposed amendments to the Takutai Moana Act - Effective from today, Te Arawhiti, 25 July 2024
[5] Regulatory Impact Statement: Clarifying Section 58 of the Marine and Coastal Area Takutai Moana Act 2011, Te Arawhiti, 19 September 2024 (released 3 October 2024), Appendix 1
[6] See, for example, Departmental Disclosure Statement: Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill, Te Arawhiti, 19 September 2024
[7] 'Marine and Coastal Area Bill introduced', Attorney-General, 6 September 2010
[8] 'Tribunal releases report on the Takutai Moana Act 2011', Waitangi Tribunal, 25 September 2024
[9] As at note above
[10] Departmental Disclosure Statement, as above