18 May 2009

Submission

to the

Ministerial Review Panel 2009

on the

Foreshore and Seabed Act 2004

The church submissions repeatedly state that the [Foreshore and Seabed Bill] should not be passed in the face of its overwhelming rejection by Maori, as indicated by the consultative hui in 2003, and the submissions to the Select Committee this year. The Crown is required by the Treaty of Waitangi to act in good faith towards Maori, which must mean honest dialogue with Maori when their rights to property are at stake.

New Zealand Catholic and Anglican Bishops, Foreshore and seabed statement, 2004

SUMMARY:

- **Caritas Aotearoa New Zealand restates its opposition to the Foreshore and Seabed Act 2004, and believes the Act should be repealed.**
- **The Act was a considerable injustice against Māori in 2004, and the greatest Treaty of Waitangi breach by our generation.**
- **If Māori are still generous enough to agree to the "longer conversation" proposed by the Waitangi Tribunal in 2004, we believe the best outcome would be negotiated settlements which recognise both customary title and ongoing public access.**
- **Respect and recognition of rights under the Treaty of Waitangi and internationally agreed Human Rights norms should be the most important principles considered by the Ministerial Review Panel in making recommendations for future action.**

INTRODUCTION

1. Caritas Aotearoa New Zealand is the Catholic agency for Justice, Peace and Development. We are mandated by the New Zealand Catholic Bishops Conference to work for the elimination of poverty and injustice through development and aid work internationally, and through advocacy and education for social justice in New Zealand.

2. Caritas opposed the Foreshore and Seabed Bill in 2004, and produced a booklet of submissions from Catholic organisations and individuals to help our wider community to better understand the issues. We enclose a copy of this for the benefit of the Review Panel.

3. The basis of our position on the 2004 legislation was Catholic social teaching, particularly relating to the rights of indigenous people, the rejection of racism, and the upholding of the human rights and dignity of all people.

4. In summary, we opposed the Bill because:
    - We did not believe the Bill was necessary to achieve the principle of access to beaches, which we thought could have been better achieved through the "longer conversation" proposed by the Waitangi Tribunal
    - We did not believe the Bill sufficiently protected customary rights by excluding the possibility of customary title
    - We did not believe that the principle of certainty required the overriding of other interests including the protection of customary rights. We believed the legislation contributed to a situation in which the most affected people felt very uncertain about the commitment of the government to protecting their human rights and access to justice.
    - We believed the Bill was discriminatory in that it distinguished between different kinds of claims to ownership of the foreshore and seabed, and Māori were the only losers. We did not accept the Attorney General's Bill of Rights assessment that such discrimination was justified in the circumstances.
    - The Bill was in breach of the Treaty of Waitangi, which should have provided us with precedents and processes for resolving these kind of grievances.
    - We found the Bill breached Catholic social teaching with respect to indigenous rights.

5. Many New Zealanders found the issues under consideration in the 2004 to be contentious and difficult. This was not assisted by a very difficult political environment, in which some politicians did not hesitate to use divisive rhetoric. Although Māori were initially the victims of that rhetoric, our experience is that this contributed to a wider intolerance against a number of cultural and ethnic groups. In addition, many New Zealanders who at heart wished to see reconciliation of historic injustices against Māori, became very anxious about the possibility of private ownership of beaches. This contributed to a situation in which many responses were based more on emotion than knowledge of the facts.

6. In retrospect, it becomes easier to see the scale of the injustice committed against Māori both in the denial of access to due process, and in the removal of property rights. It is also possible to better recognise the generosity of Māori in being willing to negotiate an outcome that potentially recognised both customary title and continued public access. We can also now have a better sense of clarity around the restraint shown by Māori who were committed to peaceful protest such as the

Foreshore and Seabed Hikoi and the use of the political parliamentary process in the face of the most recent events which alienated Iwi and Hapū from traditional lands.

7. As will be familiar to the members of the Ministerial Review Panel, these observations were confirmed by external human rights experts including:
    - The United Nations Committee for the Elimination of Racial Discrimination who commented in 2005: *"Bearing in mind the complexity of the issues involved, the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Maori, in particular in 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…"*
    - The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, who reported following his 2005 visit to New Zealand: *"In the view of the Special Rapporteur, the Act can be seen as a step backward for Maori in relation to the progressive recognition of their rights through the Treaty Settlement Process over recent years."* He recommended that the Act should be repealed or amended by Parliament, and that the Crown should engage in treaty settlement negotiations with Maori that would recognise their rights in the foreshore and seabed.

OPTIONS IN THE MINISTERIAL REVIEW ISSUES PAPER

8. In response to the four options being considered by the Ministerial Review Panel, Caritas does not support options **i** or **ii** – that is, that the Foreshore and Seabed Act 2004 should be retained unchanged or amended. Caritas opposed the legislation in 2004, and we believe repeal is required to overcome the injustice experienced by Maori in relation to this Act.

9. In justice, we believe that the most appropriate response would be **iii** – that the legislation should be wholly repealed and the status quo after *Ngāti Apa* reverted to. In terms of the very significant and serious decision to override access to courts, we believe the original claimants have good grounds for asking for a return to the status quo.

10. However, we also acknowledge that public discourse generally has moved well beyond that point, and in 2004 there were clear indications from Iwi and Hapū that they were willing to reach an accommodation which recognised their property rights while preserving public access to beaches.

11. In 2004, we supported Option 1 of the Waitangi Tribunal's four recommendations, which they entitled "the longer conversation", explained in their report on the Foreshore and Seabed in this way: "*We must begin with the option that was urged on us by all claimant counsel. Māori really want the process to begin again. They want the opportunity to sit down with government and properly explore the options that are genuinely available. As we have said, they consider that they have not had that opportunity…"* We believe this is still the most appropriate way forward. This was also the recommendation of the United Nations Special Rapporteur in 2005.

12. In 2004 we found precedents for mutually acceptable solutions in the kinds of settlement that had been reached with Ngāti Tuwharetoa over Lake Taupo, and similar situations. Our opinion is that there are a number of precedents for partnership in inland water settlements which recognise the Catholic principle of subsidiarity, which provides for management by local groups. If solutions can be found in process that can be negotiated and legislated at this level, it is not acceptable for the Crown to consider State ownership to be the only solution.

13. If Māori are still willing to participate in the "longer conversation" as they were in 2004, then we would favour option **iv:** repealing the Foreshore and Seabed Act, but replacing it with something new. However, we also acknowledge that the generosity of Māori in being willing to discuss such alternatives in 2004 was not met with an equal generosity on the part of the Crown. We recognise that some Iwi and Hapū may now be seeking greater certainty of ownership and protection than can be provided through such a process.

14. It is our sincere hope that Iwi and Hapū would still be willing to participate in a "longer conversation" which would better respect both customary title and continued public access. Although Catholic social teaching recognises the right to private property, this is always balanced against the principles of Stewardship and the Universal Destination of Goods in which we understand that the goods of the earth were intended for the good of all people. Despite the fact that these principles do not necessarily operate in most private land ownership in New Zealand, if Māori are still willing to negotiate this, we believe that would best satisfy the concerns of most New Zealanders about access to beaches.

15. However, the "longer conversation" should not be imposed without consent. The process by which a unilateral solution was imposed by the majority on the indigenous minority in 2004 must not be repeated in 2009.

QUESTIONS IN THE MINISTERIAL REVIEW DISCUSSION PAPER

16. *Question 1: Principles:* We considered the Foreshore and Seabed Bill in 2004 in terms of the government's own principles of **access, regulation, protection and certainty** and reached the conclusion at that time that the Bill was not the best solution even under those principles.

17. We believe that key considerations should have been whether the Bill respected or breached the articles and principles of the Treaty of Waitangi, and whether it fulfilled or breached our obligations under internationally agreed Human Rights norms. We believed in both these circumstances, it was in breach. In particular, we cannot see how it can be argued that the legislation does not breach article 2 of the Treaty which includes protection of *"te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga"* in the Māori text, and the guarantee and confirmation of *"the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties"* in the English version.

18. In terms of the various Treaty of Waitangi principles established through the courts and Waitangi Tribunal, we see that the principle of *partnership* exercised in good faith was breached both in the process and the outcome of the legislation. In addition, the obligations of the Crown to actively protect Māori interests and to adequately consult were breached.

19. In addition, Caritas considered how well the Bill accorded with Catholic social teaching, particularly on the rights of indigenous people, and found it also failed by those criteria.

20. *Question 2: Are any principles more important than others?* We certainly believe that our Treaty and Human Rights obligations are significant and should never be disregarded for matters such as the fears of one section of New Zealanders. For example, we believe the principle of certainty was actually very important, but not in the narrow interpretation of the decision makers of 2004, who appeared to define this as having an expectation that the pre *Ngāti Apa* status quo would stand. For us there was a great deal of uncertainty experienced in the situation where the government was willing to legislate to remove access to courts, customary title and common law rights.

21. *Question 3: Should these principles be considered by the Panel?* We would prefer to see a Treaty and Human Rights basis to considering the overall issues, though we did find for ourselves some benefit in considering the legislation in terms of the government's own principles, as can be seen from our 2004 submission.

22. *Question 4: Do you agree with the Crown owning the coastal marine area? If not, who do you think should own the coastal marine area?* The Waitangi Tribunal considered in 2004 that Māori title had not been extinguished by the Crown, and in those circumstances Māori deserved to have title confirmed in specific situations. We believe that most New Zealanders, both Māori and all other ethnicities, wish to see continued public access to beaches, and the protection given through regulation of coastal activities. We do not believe Crown ownership is the sole way of providing that access and regulation.

23. *Question 5: Sale of coastal marine area:* Our general preference is to see customary title of Maori recognised in a way which does not necessarily have to transfer into fee simple title. We believe most New Zealanders do not wish to see the private sale and exclusive use of beaches, beyond what has already been provided for, given that fee simple title has already been given in a large number of coastal situations. In 2004 we commented that we saw better protection of the coastal marine area in inalienable Māori ownership than we did in Crown ownership which was able to be sold through a vote of Parliament, given our experience of privatization of State assets in the 1990s.

24. *Questions 6-8: Access and navigation rights within the coastal marine area:* The Waitangi Tribunal found substantial agreement between Iwi and Hapū and the Crown on the matter of access rights,

and if Māori are still willing to take part in the "longer conversation" we see no reason why these rights cannot be negotiated for the benefit of all New Zealanders, noting that some areas of special significance to Māori may still need specific protection which may restrict access, as is the case with other sacred sites which are not in the coastal marine area.

25. *Questions 9-11: Customary rights:* Many New Zealanders believe that coastal marine land should be inalienable (unable to be sold), whether in State or private ownership. Caritas understands that perspective, and we believe that given the attachment that New Zealanders of all ethnicities and cultures hold for coastal areas, this could be a worthy goal. However, our understanding in 2004 was that in fact fee simple title exists in a number of situations already in the coastal marine area. It was because this private ownership of coastal land was not affected by the Foreshore and Seabed Act 2004, while claims for ownership based on customary rights were, that we found the Act discriminatory. Only Māori land owners or potential land owners were affected – no other cultural group can claim customary rights.

26. Our understanding is that the difficulty of obtaining recognition for customary rights in the coastal marine area was the reason the *Ngāti Apa* case was taken in the first place, so it is not clear that processes prior to 2004 were adequate for dealing with this kind of land claim. We would be happy to see this process clarified, so it was understood clearly what type of ownership or protection was guaranteed by customary title.

27. *Questions 12-14: Recognition of activities, uses or practices in the coastal marine area:* We were unhappy that the Foreshore and Seabed Act removed the right to seek customary title, reducing the relationship of tangata whenua to their land to being one only of customary use rights. We recognise there are a wide range of other possible uses of coastal marine areas that may need protection, ranging from environmental concerns to activities of cultural and ethnic groups other than Māori. We are not sure that the Foreshore and Seabed Act is the best place to consider these wider issues, which may be best dealt with under Resource Management Act processes.

28. *Question 15: Customary rights orders:* While noting that we do not have any experience or knowledge of how this has worked in practice since 2004, we do not agree in principle with the legal tests for customary rights orders. These appear to require that Māori are fossilized into customs or practices which have operated without change or venue since 1840. Catholic social teaching recognises the rights of indigenous peoples both to **preserve** and to **develop** their own culture (Pope John Paul II, Message for the World Day of Peace #7, 1989). It recognises that land use and ownership is bound to change, and that indigenous people should not be bound only to the past. (Pontifical Council for Justice and Peace, Towards a Better Distribution of Land, #39, 1988)

29. When we consider how our own Church celebrations and practices have developed since 1840, or the way that other aspects of our society have changed since that time, it seems ludicrous to

recognise only distinctive cultural practices that have been unchanged in over 150 years. To us, that would be like saying that farmers no longer owned their land if they had changed farming practices since their forebears first obtained the land, or Catholic Churches could be assumed as State property because we changed our liturgical practices after the Second Vatican Council.

30. In addition, the test particularly fails those Māori communities who suffered the greatest injustices under colonisation – those whose coastal lands were confiscated. While these groups may have been unlikely to benefit from the *Ngāti Apa* decision to the same extent as Iwi who had maintained a continuous connection with their lands, the legal tests do not provide any ability to recognise special or significant sites from which Māori were alienated as a result of historic injustices.

31. *Questions 17-18: Limiting access to wāhi tapu or sites of significance:* It seems appropriate to us that if Māori are generous enough to negotiate continued public access to most coastal land, that the New Zealand public should be able to be equally generous about respecting specific sacred or significant sites.

32. *Questions 19-26: Territorial customary rights:* We do not have any specific knowledge or experience to contribute to these considerations.