17 March 2009

Caritas
Aotearoa New Zealand

Submission

to the

Ministry of Foreign Affairs and Trade

on the

Draft New Zealand National Universal Periodic Review Report

Summary of main points

- **Caritas recommends that further work needs to be done to clarify in this report the place of the Treaty of Waitangi within New Zealand's constitutional framework. Despite the draft report's optimistic view of the influence of the Treaty, in fact the Treaty is easily able to be disregarded by the government's decision making processes.**
- **The report does not appear to reflect possible changes in emphasis and direction in both social spending and overseas development assistance under the present administration.**
- **Caritas has concerns that the Bill of Rights assessment has not been a sufficiently robust process to satisfy Church and wider society concerns that legislation which limits human rights is still able to be passed, such as the Foreshore and Seabed Act in 2004 and the Immigration Bill which is expected to be passed shortly.**

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. We contributed a submission to this Review last year, which was based on:
   - Our experience in working with poor and vulnerable communities in Aotearoa New Zealand and internationally.
   - The human rights considerations we have taken into account when making submissions on legislation through the New Zealand Government Select Committee process.
   - Catholic social teaching on human rights, in particular that relating to natural justice.

3. In the submission we made in 2008, we limited our comment to matters on which we had made submissions on Government legislation in the past four years. In this submission we will comment specifically on statements in the Government's draft report.

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Overview

4. We believe the report gives a general overview of the New Zealand situation which will be helpful to the committee. However, the overall tone of this report is optimistic and self-congratulatory, and areas requiring improvement are generally passed over lightly. While we can be proud of many aspects of our human rights record, there also are many areas of concern.

5. For example, the comment in section 3.3 that although outcomes for children are *"generally positive and are improving, there are still challenges that need to be addressed, including poverty, abuse and neglect, disparities in health and educational outcomes for Māori, Pacific, disabled and new migrant children, suicide, bullying and discrimination"*. These challenges seem substantial, and we would add "children's employment concerns" to the list.

6. It would be more useful to add some facts to this statement, so the Human Rights Committee can see the substance of what is being discussed, for example:
   - Although overall child poverty rates have dropped from 27 to 20 percent, poverty rates for children in families with no adult in paid employment remain at 60 percent. (Ministry of Social Development: *Household incomes in New Zealand, trends in indicators of inequality and hardship 1982-2007,* June 2008)
   - There are disparities between Māori and European outcomes for almost all areas followed by the Social Report produced by the Ministry of Social Development, with particular concerns for indicators of Economic standard of living and Health. (Ministry of Social Development: *Social Report 2007)*
   - There is a 10 year disparity in life expectancy rates between Māori and non-Māori New Zealanders (University of Otago medical school)

7. In general, the aspects of this report which concern Māori and the Treaty of Waitangi seem poorly considered and written. The single worst example is the phrase (in section 3.1): *"New Zealand has one of the largest and most dynamic indigenous people – the Māori – in the world"* – this seems at best patronising, and it is hard to understand what is being said here. Numerically Māori are not among the world's largest indigenous groups, being less than 0.2% of the estimated 350 million indigenous people worldwide.

8. The statements about the place of the Treaty of Waitangi in New Zealand's "constitution" also do not seem to be well considered. The statement that the Treaty *"...**aimed** to protect the rights and properties of Māori"* should be changed to reflect the words in both versions of the Treaty of Waitangi. This included 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. The use of the word "aim" in the draft report is very dismissive of these promises and the subsequent issues that have arisen from the failure to meet them.

9. The report does not appear to reflect possible changes in emphasis and direction in both social spending and overseas development assistance under the present administration. Our understanding is that the National government is not committed to proceeding with the *Pathways*

to Partnership programme (as outlined in section 3.3) and the goals of NZAID are currently under review (section 2.4). We would expect that these and other matters in which there is a change of direction as a result of the change of government will be clarified for the purposes of this report.

Constitutional issues/The Treaty of Waitangi

10. The explanation that the Treaty of Waitangi was a Treaty *"between the Government and the indigenous Māori tribes"* is incorrect. The parties to the Treaty were actually Māori and the British Crown. The Chiefs of the Confederation of the United Tribes of New Zealand had in 1835 declared independence, and were sovereign at the time of the signing of the Treaty. The Māori version of the Treaty provided for Kawanatanga/governorship by the British, and promised Tino Rangatiratanga/sovereignty to Māori. The first Catholic bishop in New Zealand, Jean-Baptiste Pompallier, recorded in his diary that he was told by Catholic Maori leaders: *that New Zealand is like a ship, the ownership of which should remain with the New Zealanders (Maori) and the helm in the lands of the Colonial authorities.*

11. While the Catholic Church certainly recognizes the Treaty of Waitangi as a covenant and the moral basis for the presence of all other peoples in Aotearoa-New Zealand, it could not be said that at this point in time it has been fully incorporated into "New Zealand's constitutional framework". Except for isolated instances in specific pieces of legislation, the Treaty is able to be ignored or overlooked whenever it is convenient to the government. The Foreshore and Seabed Act of 2004 was passed without any reference to the Treaty of Waitangi being made in it at all.

Human rights protections and assessment

12. As the report itself notes under Section 2.6, it has previously been observed by the UN Human Rights Committee that it is possible to enact legislation incompatible with the New Zealand Bill of Rights Act, and in our opinion, that is significantly more so in the case of the Treaty of Waitangi. We agree that New Zealand needs an *"over-arching or entrenched constitution that protects the human rights of New Zealanders"* as stated in the draft report. Māori and the Crown would need to agree on how the Treaty of Waitangi would be incorporated as a living document that guaranteed rights.

13. Although the Executive requires a statement on the human rights implications in all Cabinet papers, and Bills referred to Select Committee also require a formal Bill of Rights assessment by the Ministry of Justice, we are concerned at how many times these processes find that an apparent breach of rights is considered justified in the circumstances.

14. Two examples are the Bill of Rights assessments of the Foreshore and Seabed Act and the Immigration Bill. In both of these cases, there have been ongoing human rights concerns expressed by Churches and wider civil society, including the Human Rights Commission. This indicates that the Bill of Rights assessment process has not been sufficiently robust as to deal with all of the human rights implications and concerns before legislation is implemented. These are also two issues with which we have further comments to make on the content of this Draft Report

Foreshore and Seabed Act

15. As we said in our previous UPR submission, the Foreshore and Seabed Act is discriminatory because it removed property rights from only one group of New Zealanders, as Māori are the only people who can claim customary title to land. Despite the stated concern being protection of the right of all New Zealanders to have access to beaches, property rights belonging to those who had fee simple title to coastal areas of New Zealand were not affected by this legislation. The only losers were Māori.

16. Section 3.1 is misleading in that it appears to say that the dialogue taking place with several Māori groups concerning the recognition of their customary rights under the Act satisfies the recommendation of the CERD Committee for renewed dialogue between the Government and Māori. The dialogue that is being referred to in this report is only what is provided for under the legislation itself in considering particular claims. However we understand the CERD reference is to something more substantial, like the "wider conversation" recommended at that time by the Waitangi Tribunal - a recommendation for consultation and negotiation with Māori about customary rights before any action was taken to extinguish them

17. We are happy that this issue is now being belatedly addressed through the recently announced review of the Foreshore and Seabed Act. However, our experience of this legislation is that none of the safeguards mentioned in this report, including the Waitangi Tribunal, the Courts, the Bill of Rights and the Human Rights Commission were able to alter a discriminatory law if the Cabinet was determined to pass it. Neither human rights standards nor the Treaty of Waitangi proved able to protect the rights of a minority cultural group against the fears of the majority.

United Nations Special Procedures mandate holders

18. The "open invitation" to all United Nations Special Procedures mandate holders also looks very different from our perspective. The 2006 report by Rodolfo Stavenhagen was dismissed by the government as being unbalanced and interfering, and then Deputy Prime Minister Michael Cullen said it would be ignored: *"It will be widely read and no doubt widely discussed and then nothing much will happen".* Current Leader of the House of Parliament Gerry Brownlee said at the time it should be thrown in the rubbish, adding: "*New Zealanders don't need to be told by the UN what it means to be a Kiwi. Fairminded Kiwis will rejects these statements outright."*

19. New Zealand is clearly not in the same category for human rights abuses as many other countries, but that does not mean that we never make mistakes, have nothing to learn, and cannot take advice from the expertise available to us through UN processes. We are surprised to see the "invitation" to UN Special Procedures mandate holders shown as an example of "best practice" considering how dismissive both Government and major Opposition parties were of the report.

Immigration Bill

20. We are pleased that New Zealand remains one of the countries still committed to accepting UNHCR mandated refugees under the refugee quota. We recognise also that New Zealand has made a substantial commitment to provide a national settlement plan for refugees resettled in

New Zealand. However, this has to be measured against increasing restrictions on asylum seekers in both current practice and under the content of the new Immigration Bill.

21. We agree with the concern expressed in the submission of the Human Rights Commission that the practice of interdiction has meant that fewer asylum seekers reach New Zealand, and that there is increasing use of detention for those who do arrive here.

22. However, our most serious concerns in the Immigration Bill are about the removal of natural justice, particularly in relation to the right to a fair hearing. In our opinion measures such as the extension of the use of undisclosed, classified information, and the limiting of communication between a defendant and a special advocate, very much limit the rights recognised under Article 10 of the Universal Declaration of Human Rights and Article 14 of the Covenant on Civil and Political Rights.

23. Again the specific protection provided for natural justice in New Zealand's own Bill of Rights has not proved to be an effective remedy. As with the Foreshore and Seabed legislation, the Immigration Bill also underwent a formal Bill of Rights assessment by the Ministry of Justice, who said "*It is possible to argue that the failure to disclose all information constitutes a prima facie breach of section 27(1) of the Bill of Rights Act*". However, once again they also concluded that the changes were justified in the circumstances.

24. We are also concerned that the Human Rights Commission is unable to assist in matters relating to immigration. We would strongly recommend that Section 4.1.1 be expanded to give a fuller picture of legislative changes which will impact on the human rights of people within our Immigration system.

Social and economic rights, and Children's rights

25. We agree with the Child Poverty Action Group that a key cause of the enduring poverty which continues to affect many New Zealand children, is the discriminatory intent of the In-Work tax credit, which is a payment made to the parents of children in need, but only if they are in paid employment. Once again we are concerned that although the Human Rights Tribunal found that this payment was discriminatory and causes real and substantial disadvantage to 200,000 children, we understand it also found that it was justified in the circumstances that it provided an incentive for working parents. We believe all children, regardless of their parents' employment status, have the right to adequate income to ensure they do not live in poverty.

26. We are very supportive of the 2002 Agenda for Children, which intended that the effect of any decision on children needed to be considered at the time it was being made. However, it is necessary also to inform the Committee that organizations overseeing children's rights have repeatedly called for the Agenda for Children to be implemented (for example see the comment of NGO Action for Children and Youth Aotearoa at http://www.acya.org.nz/?t=105). Our experience in 2005 with the Citizenship Bill (which removed citizenship rights from New Zealand born children whose parents did not have residence in New Zealand) was that both politicians and officials overseeing this legislation were completely unfamiliar with the "whole child approach" to legislation proposed in the Agenda for Children.

27. We are concerned that despite the relative prosperity that New Zealanders have experienced in recent years, the living standards of the poorest New Zealanders continued to decline, even in the face of increased social spending. For example, an internal Ministry of Social Development 2007 report released last year showed that for some families, income was as low as 30 percent of median equivalised household income. As the effects of the current economic crisis start to have an impact on even middle-income households, we are extremely concerned about the situation of families who were struggling even before the economic crisis began.

28. The delivery of economic and social rights have also been undermined by a fundamental change to our understanding of social security, which was made in the Social Security Amendment Bill 2007. This moved the purpose of social security from meeting people's needs to moving people into employment. While we see assisting people into employment as a valid and worthy goal, employment alone is not a path out of poverty for all people. We are deeply concerned that as unemployment rises with the economic crisis, many New Zealanders will find that the welfare safety net no longer supports them.

Declaration on the Rights of Indigenous Peoples

29. The New Zealand Catholic Bishops Conference and Caritas Aotearoa New Zealand were among the civil society groups referred to in the final paragraph of 3.1 as being critical of the Government's stance on the Declaration. The Catholic Bishops called for New Zealand to support the Declaration on Human Rights Day (10 December 2008). Their statement concluded: "*New Zealand is one of four settler nations who voted against the adoption of the Declaration. Alongside the United States, Canada and Australia - countries with very similar colonial histories to our own - our representatives allowed domestic politics to override our country's usually principled stand on human rights issues....We call on the government to enhance our country's proud record of leadership in human rights by supporting the Declaration on the Rights of Indigenous Peoples.*"

Conclusion

30. There are many areas in which New Zealand is justifiably proud of our human rights record. However, there are also serious concerns about areas in which we have not done well in recent years. We hope this draft report can be rewritten to include:
    - A more accurate representation of the place of the Treaty of Waitangi in New Zealand's constitutional framework;
    - More detail of social and economic outcomes to help the Human Rights Committee have a better appreciation of the achievements and challenges;
    - A fuller picture of legislative changes and practices which are affecting asylum seekers and others in the Immigration system;
    - Detail of changes in emphasis and direction of social spending and overseas development assistance under the current administration.