30 April 2010

Caritas
AOTEAROA NEW ZEALAND
The Catholic Agency for Justice, Peace & Development

New Zealand Catholic Bishops Conference
Te Rūnanga o Te Hāhi Katorika Ki Aotearoa
Caritas Aotearoa New Zealand

Submission

to the

Ministry of Justice

on the

Foreshore and seabed consultation

To call for the acknowledgment of the land rights of people who have never surrendered those rights is not discrimination. Certainly, what has been done cannot be undone. But what can now be done to remedy the deeds of yesterday must not be put off till tomorrow.
Pope John Paul II: *Address at Alice Springs,* 1986

Summary of key points:

- **There are some strongly positive elements in the consultation document, including the recognition that the 2004 Act should be repealed, and that access to justice and customary title extinguished by the Act should be restored.**
- **However, the "public domain" proposal favoured by the government repeats the discrimination of the 2004 Act, by proposing to treat Māori property rights differently to those who already have private title in the foreshore and seabed.**
- **We are deeply concerned by indications that the government is seeking endorsement of its preferred option rather than genuine dialogue and consultation. The "longer conversation" is still needed to find a resolution, not another imposed solution.**

PO Box 12193
Thorndon
Wellington 6144
New Zealand

Level 1, Catholic Centre
22-30 Hill St
Thorndon
Wellington

TEL 64-4-496 1742
FAX 64-4-499 2519
FREEPHONE 0800 22 10 22
DONATION LINE 0900 4 11 11

EMAIL caritas@caritas.org.nz
WEB www.caritas.org.nz

Charities No: CC36055

Introduction

i. The government's proposals have been considered and discussed by the New Zealand Catholic Bishops Conference and two of its agencies: Te Rūnanga o Te Hāhi Katorika Ki Aotearoa, which is the National Catholic Māori advisory body for the Bishops, and Caritas Aotearoa New Zealand, the Catholic agency for justice, peace and development.

ii. Our reflection is guided by the principles of Catholic social teaching, which include the rights of indigenous peoples, the common good and the stewardship of resources entrusted by God to us. We have drawn on the study, discussions and dialogue which have taken place over the past six years since the 2004 Foreshore and Seabed Bill was introduced into Parliament.

iii. Our combined submission includes:
    a. A statement by the New Zealand Catholic Bishops Conference
    b. Guiding principles and some more detailed comments from the Bishops' agencies Caritas Aotearoa New Zealand and Te Rūnanga o Te Hāhi Katorika on the specific questions and options being considered in the consultation document.

Te Takutai Moana – the Foreshore and Seabed

A statement by the New Zealand Catholic Bishops Conference, April 2010

"The Crown is required by the Treaty of Waitangi to act in good faith towards Māori, which must mean honest dialogue with Māori when their rights to property are at stake."

Anglican and Catholic Bishops statement on the Foreshore and Seabed legislation, 2004

The 2004 Foreshore and Seabed Act was a considerable injustice to Māori, and was opposed at the time by the vast majority of the 4000 submitters to Parliament.

Catholic concern that the 2004 legislation was discriminatory was endorsed by investigations undertaken by the United Nations Human Rights Committee and the United Nations Special Rapporteur on the rights of indigenous people. This was because Māori property rights based on customary title were treated differently to all other private property rights.

We recognise indigenous people as the first occupiers of land, and we recognise also the rights and responsibilities which flow from that. These include both the right and the responsibility for kaitiakitanga or guardianship of the land. We recognise that Māori iwi and hapū are seeking certainty of title that recognises their traditional responsibility for kaitiakitanga.

We are delighted that the parties in the current Coalition government have worked together to review the 2004 legislation, and we welcome the positive aspects of the new proposals: particularly the recognition that the 2004 Act needs to be repealed; that customary rights extinguished under the 2004 Act need to be restored; and that access to courts to investigate customary title also needs to be restored.

However, a key element of the government's proposal – to create a new category of ownership called "public domain" – runs the risk of simply duplicating the discrimination of the 2004 Act, by continuing to treat Māori customary property rights differently to the 12499 private titles already granted, which would not be affected. Removing formal ownership from the foreshore and seabed could be a radical act for the common good – but only if all claims to property in the foreshore and seabed are treated in the same way. The government does not propose to do that.

However, there are already disturbing indications that the government is not seeking genuine consultation through this exercise, but endorsement only of its preferred option. Resolution of this issue deserves more than imposed solutions. We are confident that an outcome can be found that recognises both customary title and the public access to coastal areas that all New Zealanders value. Let us not cut the conversation short. Māori have promised access for all to coastal areas. A solution which discriminates between other Māori property rights and private property rights is not a solution at all.

New Zealand Catholic Bishops Conference, 30 April 2010

Response of Caritas Aotearoa New Zealand and Te Rūnanga o Te Hāhi Katorika to the specific matters raised in the Consultation document

Some guiding principles

iv. Catholic social teaching recognises the rights of indigenous people to land, and to the rights and responsibilities which flow from that. Pope John Paul II reminded us on his visit to Aotearoa New Zealand in 1986 that European and other recent settlers arriving here did not come to a desert, but to "a land already marked by a rich and ancient heritage". We recognise there have been considerable injustices against indigenous peoples' rights both here in Aotearoa New Zealand and internationally, and our generation is tasked with finding paths to restoration and reconciliation, rather than maintaining or duplicating injustices of the past.

v. The common good requires that the rights of individuals and groups – such as those to private property – are recognised within the context of the wellbeing of the whole community. This means organising society so all people are able to exercise their rights and responsibilities. For example, in the context of the foreshore and seabed, we wish to see protection of both customary title - recognised by common law and guaranteed by the Treaty of Waitangi - and also of appropriate public use of coastal areas. There are often many different ways that those broad goals can be met, and people of goodwill may differ on the application of Catholic social teaching in specific situations. However, the common good does not involve overriding the rights of one group in order to satisfy the preferences of another.

vi. We are all made as members of one human family, and Catholic social teaching rejects discrimination on the grounds of ethnicity. Equality of treatment does not always require uniformity of treatment, and positive discrimination can sometimes be justified when it addresses past injustices or disadvantages. But as Pope John Paul II said in 1986, calling for the acknowledgement of the land rights of people who have never surrendered those rights is not discrimination.

vii. We are all called to be stewards of God's creation, and to protect and care for the earth for the sake of other people and for future generations. The coastal areas of Aotearoa New Zealand are precious to all who live here. Different iwi and hapū have different responsibilities and rights for kaitiakitanga or stewardship of different places. The government also carries a responsibility to govern wisely for the benefit of all. Stewardship of natural resources usually occurs in an environment where a range of public and private rights and responsibilities are recognised and are operating. Neither nationalisation nor privatisation should be regarded as a pre-requisite to meeting our obligations to wise stewardship of the earth.

viii. The principle of solidarity asks us each to consider the good of others, and to be open to genuine dialogue and communication when significant decisions are being made for the good of all. Decisions about the future of the foreshore and seabed in 2004 did not sufficiently consider the willingness of Māori and many other New Zealanders to consider and to negotiate new solutions to the complex questions we are facing. The "longer conversation" recommended by the Waitangi Tribunal is still needed.

Overview of consultation document

ix. There are some strongly positive elements in the consultation document. We welcome the recognition that the 2004 Act was discriminatory; we welcome the indication that customary title extinguished by the 2004 Act would be restored, as would access to justice.

x. However, despite the acknowledgement that the 2004 Act was discriminatory, the government's proposal to replace crown ownership with "public domain" is discriminatory for the same reason that the 2004 Act was – because it treats Māori property rights differently to existing private titles.

xi. There needs to be recognition that Māori held title to the foreshore and seabed at the time of the arrival of new settlers and the signing of the Treaty of Waitangi, and that this has never been relinquished by Māori, and never formally taken by the government. Therefore, of the four options considered by the government, we consider a form of Māori title which is inalienable and which would include provision for negotiated public access would best recognise customary title and other interests. We note that there are other examples of private ownership which can provide for negotiated public access. We would like to see further consideration of the "Tipuna title" and other options proposed by the Iwi Leaders Group. Having acknowledged indigenous ownership, other matters concerning management of coastal areas can then be worked out.

xii. Well-informed debate about the merits of the different proposed options is necessary and helpful in clarifying the issues. However, we are concerned that the Prime Minister has already indicated a strong preference for the "public domain" option, and has indicated that if this option is not endorsed by the consultation process, the status quo may remain.

xiii. The unwillingness to participate in genuine dialogue – the "longer conversation" proposed by the Waitangi Tribunal in 2004 – is one of the reasons that this issue remains unresolved. Since 2004, Church groups have called for negotiated solutions which recognise both customary title and public access to beaches. Once again, we are being faced with an imposed solution.

xiv. Words such as "sophisticated", "pragmatic" and "flexible" are some of the terms chosen in the text of the document to the describe the government's new proposed approach. We believe "just" and "enduring", as used by the Attorney-General in his foreword, are much more important principles which should be driving the resolution of past injustices. Unfortunately, the government's core proposal is pragmatic rather than just.

xv. There are considerable flaws in the design of this consultation process. Allowing only a month, which includes Easter and school holidays, for responses is inadequate given the complexity of the issue. Of greater concern is that the consultation document lists four options considered by the government in the main text of the document (page 23), but on the consultation questionnaire only contains questions about its preferred option, and not about the three options which the government has already indicated it does not favour.

Specific responses to Consultation document questions

1. ***Should the Foreshore and Seabed Act 2004 be repealed?*** Yes, Caritas was among the 94 percent of the 4000 submissions opposing the 2004 Act, and again part of the 95 percent of submissions to the Ministerial Review Panel in 2009 calling for repeal. The 2004 Act was such a significant injustice to Māori that repeal, rather than amendment, is required.

2. ***Do you support [the government] approach?*** No, we do not accept this proposal because Māori property rights are treated differently to private titles already held in the foreshore and seabed. Also, despite the change of vocabulary, there does not seem to be a substantial difference between the rights and responsibilities of the Crown in this new proposal and that being replaced. While not formally claiming "ownership" the Crown would effectively continue to operate control, with continued ownership of minerals and other resources, and maintain the right to regulate the use of coastal areas.

3. ***Proposed name of "public domain/takiwā iwi whānui":*** We do not accept that public domain is a valid option, unless it applies equally to all private interests in the foreshore and seabed. While other private titles are unaffected, we do not see "public domain" as a valid policy option.

4. ***Do you think coastal hapū/iwi should be able to negotiate with the Crown for recognition of their customary rights?*** Yes, the Ministerial Review recommended different options for negotiation and settlement, including both national and regional/local negotiations. Negotiated solutions for inland water settlements, such as that with Tūwharetoa over Lake Taupo, provide examples which are more likely to bring enduring solutions.

5. ***If customary interests are recognised through negotiation, should the awards be negotiated or should the awards be the same as those the government proposes to set out in legislation?*** The Crown should not limit the range of possible solutions that can be reached in different circumstances and with different iwi and hapū.

6. ***Do you think coastal hapū/iwi should be able to claim recognition of their customary interests through the courts?*** Yes, the recognition that access to justice needs to be restored is one of the strengths of the government's current response. If Ngāti Apa's case had been allowed to proceed, it would not have created more confusion than that produced by preventing the court from hearing the claim. The legal issues are complex, and many claims will be better determined in the courts than in an intensely political process. It is important that the costs of access to justice are also taken into account – Māori should not be left to bear the burden of this alone.

7. ***Should the Māori Land Court hear and determine claims?*** Yes, we believe the specialist knowledge and understanding of the Māori Land Court will be needed.

8. ***Should the High Court hear and determine claims?*** Yes, there are also wider principles of law at stake, and it is appropriate that the opportunity for High Court claims is available.

9. ***Should the applicant alone be responsible in court for proving a test for customary interests is met?*** No, the onus should be equally on the Crown to prove any assumptions about ownership. We need to get past the "terra nullius" approach in which the Crown or other settlers assume that land is "empty" and for the taking. The public domain proposal of "no ownership" unfortunately echoes rather than overturns the assumptions behind this colonial belief.

10. ***Should the applicant and the Crown share the responsibility in court for proving a test for customary interests is met?*** Yes, the Crown should also share responsibility for assisting to determine the background when matters are taken to court. This does not exclude other forms of settlement, including negotiation.

11. ***Should any new legislation set out the tests and awards or should these be left to the courts to develop?*** The courts must be left sufficient discretion to determine outcomes according to tikanga Māori and common law, as well as according to legislation approved by Parliament.

12. ***Do you agree that any new legislation should recognise two types of customary interests (non-territorial and territorial)?*** We recognise there is a continuum which ranges from customary title that is equivalent to freehold title, through to a simple recognition of customary use rights, and that different arrangements are likely to result from different circumstances of iwi and hapū. However, as the Ministerial Review Panel reported, it was customary **title**, rather than broader customary rights, which was most affected by the Act, and which must be restored. There will be circumstances in which recognition of customary rights which are less than customary title will not adequately recognise the rights and responsibilities that iwi and hapū have for kaitiakitanga. The government has too quickly discarded Option 3 – Māori absolute title - without taking the opportunity to consider other forms of title being put forward for consideration by the Iwi Leaders Group, such as inalienable Māori title, or Tipuna title.

13. ***Do you agree with each of the elements of the test for determining non-territorial interests proposed by the government?*** We do not agree with any proposal that requires continuous activity since 1840. As well as failing to take into account the Crown's own actions in disrupting customary activities through confiscation and other forms of land alienation, there is a risk of fossilising Māori tikanga into activities and practices of the past, and denying the opportunities of the future. Customary title includes the right to development. The Crown's desire to retain control of mineral resources and regulatory use of the foreshore and seabed seems likely to exclude some valid forms of Māori economic development.

14. ***Do you agree with each of the elements of the test for determining territorial interests proposed by the government?*** In our opinion, the most significant test required to prove customary title should be whether any action has extinguished the common law recognition of customary title which exists because Māori are the indigenous people of this land. There should not be an assumption of Crown ownership against which iwi and hapū must prove their case. The most objectionable element of the

proposed tests is that iwi and hapū are asked to prove "exclusive use and occupation" of relevant foreshore and seabed area. Except in some particular cases of wāhi tapu, Māori have never sought to prevent access to beaches, and they have continually sought to reassure all New Zealanders of that. However, it seems that their claim to customary rights would be strengthened by having obtained such "exclusive" use.

15. ***Do you agree that the awards to recognise proven customary interests should be a combination of property rights and input to environmental management processes?*** Yes, we agree that customary rights include property rights and environmental management. Customary title also should include any other benefits of property rights which are enjoyed by those already granted private titles in the foreshore and seabed.

16. ***Questions 16-27:*** The questions in the consultation document are increasingly from this point on framed around the details of how "public domain" might operate in practice. As we oppose the concept of public domain, these are irrelevant.

Conclusion

17. The government's preferred option of public domain can only be an acceptable option if all property rights in the foreshore and seabed are treated equally. That is not the case.

18. One of the main reasons for the widespread Church opposition to the 2004 Act was that it was discriminatory and Māori were the losers. The consultation document clearly recognises this. For example, on page 15 it quotes from two significant United Nations watchdogs who found there were discriminatory aspects against Māori in the legislation.

19. It is hard to understand, after the government has invested time and resources into the Ministerial Review Panel and now into this process, why its preferred option duplicates the discriminatory aspect of the 2004 Act by treating Māori property rights differently to other private property rights.

20. As the Bishops say, the public domain proposal could potentially be a radical act for the common good if it applied equally to all private titles and potential claims in the foreshore and seabed. However it does not do that. Therefore, it does not provide the "just and enduring" solution for which all people of Aotearoa New Zealand are hoping and praying.