SUBMISSION on the Marine and Coastal Area (Takutai Moana) Bill

To the Māori Affairs Committee

Introduction

1. This submission is made by the Treaty Relationships Groups of the Religious Society of Friends, Te Hāhi Tūhauwiri (Quakers).

2. We wish to appear before the Committee to speak to our submission. Our contacts are Murray Short and Douglas Wilson.

3. Quakers are traditionally committed to peace, justice and non-violence, and in accord with these testimonies we also practice mediation and conflict resolution. This means that though we do not support the Bill, we also make some specific suggestions that may alleviate conflict even though they do not remedy the basic injustice that this Bill sustains. We acknowledge the place of Māori as tangata whenua, the indigenous people of this country, and recognise the Treaty of Waitangi (Te Tiriti o Waitangi) as a living document fundamental to the life of this nation. We recognise that it is the Treaty that provides the basis for citizenship for all peoples who are not indigenous to this land.

Summary

4. We recognise the historical significance of this Bill, it is the first time that an Act that was unacceptable to Maori opinion will completely be repealed; we congratulate the Maori Party in achieving this, and acknowledge courage of the National Party in holding extensive consultations and proceeding with the Bill. Regretfully we cannot support the intent of this Bill because it makes very few changes of any significance to the Foreshore and Seabed Act that it replaces. As a consequence, it compounds the injustices it purports to right.

5. The Bill represents some improvement in that it does restore the right of iwi and hapū to have their case for customary title heard in Court and ensures that customary title is inalienable. It also contains some concepts, for example mana tuku iho, which may provide a basis for further progress.

6. However, it does not remove the most discriminatory elements of the Foreshore and Seabed Act and many of the points we made to the Ministerial Review Panel regarding that Act are therefore relevant to this Bill. Some of those are included amongst the following comments.

Specific comments

7. We see little difference between the concept of "common marine and coastal area" introduced by the Bill, and Crown ownership which was imposed by the Foreshore and Seabed Act. Such common area, with all the authority, ownership rights and control vested in the Crown, is simply Crown ownership in another guise.

8. The concept of common area, like terra nullius or empty land in Australia, implies that nobody had rights to the foreshore and seabed before the advent of Crown governance in Aotearoa New Zealand. Terra nullius, which was widely criticised internationally, was finally rejected by the Court in Australia in the Mabo case. Since that case, rights of the indigenous peoples that existed prior to colonial settlement have been recognised and upheld.

9. We believe it is important to accept the fundamental point that Aotearoa was occupied for centuries prior to the arrival of European colonists in the nineteenth century. That occupation included widespread and extensive usage of the foreshore and seabed areas. This usage and the rights to it were affirmed in the Treaty of Waitangi. The Treaty is unequivocal on the point, as shown in the passage from the English version of the Treaty that guarantees to the "Chiefs and Tribes of New Zealand...the full, exclusive and undisturbed possession of their Lands and Estates, Forest, Fisheries and other properties which they may collectively or individually possess..."

10. At no stage have iwi and hapū ceded their rights to the foreshore and seabed. Indeed, they have consistently and patiently used every legal means, including several appeals directly to the Queen in person, to have the rights recognised in the Treaty honoured and upheld.

11. The Court of Appeal judgment in the case of Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa, Rangitane and Te Atiawa Manawhenua Ki te Tau Ihu Trust v. The Attorney General and others in 2003 ruled that the Māori Land Court could investigate iwi title (including fee simple) to areas of foreshore and seabed. This was a further confirmation that the law recognised such rights.

12. It is our view that rather than iwi having to establish their rights, it is the Crown that needs to establish where, when and how those rights were ceded.

13. We are dismayed that the Bill places barriers to establishing iwi rights to the foreshore and seabed, which result from historical injustices. How can an iwi establish that it has exclusively used and occupied foreshore and seabed areas from 1840 to the present day when they have in many cases been illegally, and in some cases forcibly, removed from such occupation? This seems to 'add insult to injury', made even worse by placing a 6-year time limit on the process of establishing such rights. We are not aware of any other basic human rights that have a time limit.

14. The Bill is unjust and as such will replace the Foreshore and Seabed Act as the lightening rod of an ongoing and justifiable sense of unfairness and grievance.

15. In our view the most comprehensive and cogent analysis and critique of the then Government's foreshore and seabed policy was provided by the Waitangi Tribunal in its 2004 report (WAI 1701). Many of its points are equally relevant to the Marine and Coastal Areas (Takutai Moana) Bill. In particular we highlight the following:

- The only property rights abolished are those of Māori and the Crown is therefore failing to treat Māori and non-Māori citizens equally. This discriminates against Māori and contributes yet again to a justified sense of grievance.
- The policy is prejudicial to Māori in three ways; Māori citizenship is devalued, powerlessness through uncertainty is imposed and mana and property rights are lost.
- The policy is a serious breach of the letter, spirit and principles of the Treaty of Waitangi.

An alternative way forward

16. It is inconceivable in the present political circumstances that the Government would act unilaterally to remove property rights of citizens who are not of Māori descent in the manner demonstrated by the Foreshore and Seabed Act and this Bill (although the fear of the precedent-setting nature of the existing Act was no doubt what motivated some business and farming interests to oppose the legislation). The sole reason it is inconceivable at present is that the weight of numbers would not allow it in the peculiarly majoritarian constitutional arrangements we have in this country. But rightness and fairness do not depend on numbers. The majority is not always right which is why most democracies have inbuilt human rights safeguards.

17. The behaviour of Government in these instances highlights the weakness of human rights protections in New Zealand compared with most modern Western nations. Even the New Zealand Bill of Rights Act is relatively toothless as it allows for breaches of the provisions by Government, requiring only that reference to such breaches is tabled in Parliament. Protection of indigenous peoples' rights is almost non-existent.

18. It is the view of Quakers that until Māori rights as tāngata whenua are recognised and protected in our constitutional arrangements, injustices such as the Foreshore and Seabed Act and the Marine and Coastal Area (Takutai Moana) Bill will continue to be perpetrated. We consider that rather than replace the Foreshore and Seabed Act with the current Bill, the Act should be repealed and there should then be a wide-ranging dialogue about the constitutional arrangements in this country before any replacement legislation

is considered. The agreement the Government has with the Māori Party to review the constitutional arrangements in Aotearoa would provide a good basis for such a process.

Conclusion

19. We are pleased that the current Government has recognised how badly flawed and unjust the Foreshore and Seabed Act is and is committed to repealing that Act. As a nation that values justice, fairness and good government, we need a process of dialogue designed to lead toward legislation that proceeds from the premise that Māori never relinquished their right to 'full, exclusive and undisturbed possession' of the foreshore and seabed of Aotearoa. This requires consideration of our constitutional arrangements as a prior step to any new legislation to regulate property rights, public access and compensation in relation to the foreshore and seabed.

20. Given the many positive aspects of relationships in Aotearoa we need to be confident of our ability as a nation to work through these complex issues in good faith and come up with solutions that genuinely do justice to all.

21. There has been high emotion surrounding this issue of our foreshore and seabed. Unfortunately we have not well served by politicians who, instead of showing good leadership, have used the issue for political advantage for example by fostering the false notion that access to our popular beaches was at issue. It never has been as Māori have patiently repeated this assurance but have gone unheard.

22. The fact that there may have been a common misapprehension that the foreshore and seabed was owned by the Crown under common law is simply reason for better information about our history and constitutional arrangements to be more readily available, and was not a reason for any government to entrench such misapprehension in unjust legislation. It was, and remains, a situation that requires good, measured political leadership in the spirit of the consensus that had existed for some time with regard to the acknowledgement of Treaty breaches and the need for compensatory settlements. True democracy relies on the free and copious flow of information.

23. We sincerely hope that the Marine and Coastal Area (Takutai Moana) Bill does not proceed. If it does then at the very least we would like the following clauses amended:

    Clause 3 (3) (a) (i) – replace the existing wording with "The special status of the common marine and coastal area as an area that is capable of ownership only by whānau, hapū and iwi.

    Clauses 93 (2) and 98(2) – remove the 6 year limit.