

10 August 2023

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Hauraki Gulf/Tīkapa Moana Marine Protection Bill

Purpose

1. We have considered whether the Hauraki Gulf/Tīkapa Moana Marine Protection Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 23438/6.6). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with:
 - a. section 14: freedom of expression,
 - b. section 21: freedom from unreasonable search and seizure,
 - c. section 25(c): right to be presumed innocent until proven guilty,
 - d. section 27(3): right to bring civil proceedings.
4. Our analysis is set out below.

The Bill

5. The Bill contributes to the restoration of the health and mauri of the Hauraki Gulf by establishing new marine protected areas within the Hauraki Gulf and acknowledging customary rights within certain marine protected areas.
6. Specifically, the Bill establishes:
 - a. 12 High Protection Areas, which will protect and enhance marine communities, ecosystems, and habitats, while providing for customary practices by mana whenua with the following provisions:
 - i. customary fishing must align with the biodiversity objectives for a site;
 - ii. customary fishers will require authorisations under the existing customary fisheries framework established under the Fisheries Act 1996; and
 - iii. there will be a legislative mechanism whereby Ministers can, if necessary, apply additional management actions should customary fishing conflict with the biodiversity objectives of a site.

- b. five Seafloor Protection Areas, which will protect sensitive sea floor habitats by prohibiting activities that damage or disturb the seafloor, like bottom trawling and mining.
 - c. two marine reserves, one adjacent to the existing Cape Rodney – Okakari Point (Leigh/Goat Island) Marine Reserve, and one adjacent to the Whanganui A Hei (Cathedral Cove) Marine Reserve. This will have the practical effect of extending the two existing marine reserves. These marine reserves will protect the marine environment by prohibiting all fishing and other impactful activities.
7. The Bill also contains detailed powers for the issuing of permits, and monitoring and enforcement of protected areas, as well as providing for the making of regulations for a limited range of purposes.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

8. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
9. There are a number of provisions in the Bill which prima facie engage the right to freedom of expression. These can all be categorised as provisions that require the provision of information to authorities. For example, clause 37(1)(b) provides rangers with the power to require persons to provide their full name, date of birth, address, email address, and evidence of those particulars if they believe on reasonable grounds that a person is committing, has committed, or is about to commit an offence against this Act.²
10. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in terms of section 5 of that Act. The section 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the right or freedom; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the right or freedom no more than reasonably necessary to achieve that objective.³
11. We consider that any limits on the freedom of expression created by these provisions are justified under section 5 because:
 - a. the overall objective of restoring the health and mauri of the Hauraki Gulf is sufficiently important to justify some limit on the right,
 - b. the requirement to provide certain information is connected to this objective by requiring the provision of information that will help authorities implement the protective framework in the Bill

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² Clause 37(1)(b) may also engage Section 21, freedom from unreasonable search and seizure. Justification of that is discussed below.

³ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

- c. the requirements are no greater than reasonably necessary and proportionate to the importance of the objective.

Section 21 – Freedom from unreasonable search and seizure

12. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise. The right protects an amalgam of values including property, personal freedom, privacy, and dignity. The touchstone of this section is the protection of reasonable expectations of privacy, although it does not provide a general protection of personal privacy.⁴
13. Clause 39 of the Bill allows a ranger, if they believe on reasonable grounds that a person is committing or has committed an offence under this Act, to:
 - a. stop, enter, and search any vehicle, vessel, aircraft, or structure in the control of the person, and
 - b. open and search any parcel, package, container, or luggage in the control of the person.
14. The ranger may also seize any item, document, or thing that the ranger believes, on reasonable grounds, is being or has been used in the commission of an offence under this Act or is evidence of the commission of an offence under this Act.
15. Clause 40 of the Bill allows a ranger to seize any fish, aquatic life, seaweed, or natural material if they believe on reasonable grounds that it was removed from a protected area in contravention of this Act.
16. Ordinarily a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that logically, an unreasonable search cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.⁵ Rather, in order for a statutory power to be consistent with s 21, engagement of the right must not be unreasonable.
17. Whether a search will be unreasonable turns on a number of factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale of the search.⁶ The greater the degree of intrusiveness, the greater the need for justification and attendant safeguards.
18. We consider these powers to be reasonable given they are necessary to investigate potential offences under this Act and ensure the restoration of the health and mauri of the Hauraki Gulf, and given the following safeguards associated with the exercise of these powers:
 - a. the ranger must believe on reasonable grounds that a person is committing or has committed an offence under this Act (clause 39), or has removed fish, aquatic life, seaweed, or natural material from a protected area in contravention of this Act (clause 40), and

⁴ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁵ *Ibid* at [162] per Blanchard J.

⁶ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172] per Blanchard J.

- b. the provisions of Part 4 of the Search and Surveillance Act 2012 (except sub-part 3) apply to the exercise of powers under clause 39.

Section 25(c) – Right to be presumed innocent until proven guilty

19. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proven guilty according to the law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the state must bear the burden of proof.⁷ This means the state must affirmatively prove the physical and mental elements of the offence and must also negative any matter of defence raised by the evidence.

Strict liability offences

20. Strict liability offences give rise to a prima facie issue of inconsistency with section 25(c) because a strict liability offence may be proved by a finding that certain facts occurred without proof of mens rea. The accused is then required to prove (on the balance of probabilities) a defence to avoid liability; whereas, in other criminal proceedings an accused must merely raise a defence in an effort to create reasonable doubt.
21. Strict liability offences may nevertheless be consistent with the Bill of Rights Act if the grounds for the offence are rationally connected to a sufficiently important objective; if the onus impairs the right or freedom no more than reasonably necessary to achieve the objective; and if it is otherwise in proportion to the importance of the objective.⁸ Strict liability offences have been found more likely to be justifiable where:
 - a. the offences are regulatory in nature and apply to persons participating in a highly regulated industry,
 - b. the defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite, and
 - c. the penalty for the offence is proportionate to the importance of the Bill's objective.
22. The Bill contains a number of strict liability offences, relating to undertaking a prohibited activity within a high protection area or seafloor protection area (clause 41).
23. A person who commits a strict liability offence under clause 41 is liable on conviction to a fine not exceeding \$100,000. A person who commits an offence for a commercial purpose is liable on conviction to a fine not exceeding \$200,000.
24. We consider that the strict liability offences set out in the Bill can be justified under s 5 of the Bill of Rights Act, because:
 - a. the offences are proportionate to the importance of the Bill's objective and apply in a regulated environment,
 - b. the defendant is likely to be in the best position to justify an apparent failure to comply with the legislation, and
 - c. the penalty for the strict liability offences is a fine that appears proportionate to the Bill's objective and does not involve imprisonment.

⁷ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [26] and [27] per Elias J.

⁸ See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

25. Additionally, the Bill contains a defence regime (clause 44) which will apply to the strict liability offences introduced by the Bill. The Bill states that the defendant has a defence if they prove that they did not intend to commit the offence, and that they took all reasonable steps to follow the law.

Infringement offences

26. The Bill provides in clause 48 that a person who undertakes a prohibited activity within a high protection or seafloor protection area, or uses, disposes of, or is in possession of, any fish, aquatic life, seaweed, or natural material that has been removed from a protected area commits an infringement offence and is liable to:
- a. an infringement fee of the amount prescribed in the regulations, or
 - b. a fine imposed by the court not exceeding the amount prescribed in the regulations.
27. Because infringement offences are strict liability offences, they also prima facie limit s 25(c) of the Bill of Rights Act, which affirms the right to be presumed innocent until proven guilty. The accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability.
28. Although infringement offences do not result in a criminal conviction,⁹ the Court of Appeal in *Henderson v Director of Land Transport New Zealand* held that the rights in sections 24 and 25 of the Bill of Rights Act apply to minor offences dealt with under the infringement notice regime.¹⁰
29. The context for these infringement offences is a regulated environment designed to restore the health and mauri of the Hauraki Gulf. They apply to individuals who engage within the regulated environment and where a prohibited activity occurs. Bearing this in mind, we consider that the infringement offences set out in the Bill can be justified under s 5 of the Bill of Rights Act, because:
- a. the offences are proportionate to the importance of the Bill's objective,
 - b. the offences relate to public regulatory matters, and
 - c. the penalty for infringement offences is a fine and does not involve imprisonment.
30. We note for completeness that regulations setting out the quantum of the infringement fee and fine must be consistent with the Bill of Rights Act, otherwise there is a risk they will be ultra vires.

Section 27(3) – Right to bring civil proceedings

31. Section 27(3) of the Bill of Rights Act affirms that everyone has the right to bring civil proceedings against the Crown and to have those proceedings heard according to law, in the same way as civil proceedings between individuals.
32. Clause 40(5) of the Bill provides that a ranger exercising their powers under clause 40 has no civil or criminal liability to any person claiming ownership or possession of the fish, aquatic life, seaweed, or natural material seized regardless of whether that person is charged with or acquitted from an offence against this Act or any other Act.

⁹ Section 375(1)(a) of the Criminal Procedure Act 2011.

¹⁰ [2006] NZAR 629 (CA).

33. Section 27(3) of the Bill of Rights Act has been interpreted by the courts as protecting procedural rights, rather than as restricting the power of the legislature to determine what substantive rights the Crown is to have.¹¹ We consider that clause 40(5) of the Bill affects substantive law and does not fall within the ambit of s 27(3).
34. On this basis, we do not consider that the civil immunity given by the Bill is in conflict with s 27(3) of the Bill of Rights Act.

Conclusion

35. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

¹¹ *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at 55.