

26 July 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Conservation (Indigenous Freshwater Fish) Amendment Bill

Purpose

1. We have considered whether the Conservation (Indigenous Freshwater Fish) Amendment 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 concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion we have considered the Bill's consistency with s 25(c) of the Bill of Rights Act (the right to be presumed innocent until proved guilty). Our analysis is set out below.

The Bill

3. The Bill amends the Conservation Act 1987 ('the Act'). Its objective is to improve and clarify the Act's provisions relating to the management of freshwater fish, including indigenous freshwater fish, to ensure that effective tools are available. The Bill clarifies and restructures offences in the Act, and clarifies restrictions relating to fishing and other activities that may affect freshwater fisheries. Amendments to section 48A of the Act enable regulations and notices to be made relating to freshwater fisheries, but provides that those regulations or notices do not affect Māori fishing rights.

Consistency of the Bill with the Bill of Rights Act

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

4. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law. The right to be presumed innocent requires the prosecution to prove an accused person's guilt beyond reasonable doubt.
5. Clause 7 of the Bill replaces regulation 70 of the Freshwater Fisheries Regulations 1983, inserting new section 26ZHB into the Act and making it a statutory offence to take indigenous freshwater fish without authorisation. The offence carries a penalty of a fine not exceeding \$5,000. Read in conjunction with s 43B of the Act, new s 26ZHB creates a strict liability offence with a reverse onus. This means the defendant must prove the elements of the defence (in this case, that they did not intend to commit the offence and took all reasonable steps to avoid doing so) in order to escape liability. A defendant who is unable to prove these matters could be convicted even if reasonable doubt exists as to their guilt.
6. Strict liability offences and reverse onus provisions both limit the right to be presumed innocent until proved guilty, affirmed in s 25(c) of the Bill of Rights Act.

7. 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 justifiable in terms of s 5 of the Bill of Rights Act. On balance, we consider that this limitation is justified in the context of the Act's regulatory regime, noting in particular:
 - a. the objective of encouraging and enforcing compliance with rules protecting and improving the conservation management of indigenous freshwater fish;
 - b. the practical implications of a prosecutorial requirement to prove all elements of the offence (including the absence of a defence) and, correspondingly, that matters of the defence are likely to fall peculiarly within the knowledge of the defendant; and
 - c. the penalty is imposition of a fine and not a sentence of imprisonment, and the maximum fine of \$5,000 is proportionate to the gravity of the offence.
8. We therefore consider that the strict liability, reverse onus offence contained in the Bill appears to be justified.

Conclusion

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

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