

14 October 2015

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Resource Legislation Amendment Bill

Purpose

1. We have considered whether the Resource Legislation 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 not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (PCO 17509/4.0). We will provide you with further advice if the final version of the Bill 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 s 27(1) (right to natural justice) and s 19(1) (freedom from discrimination). Our analysis is set out below.

The Bill

4. The purpose of the Bill is to create a resource management system that achieves the sustainable management of natural and physical resources in an efficient and equitable way. Specifically, the Bill aims to achieve:
 - a. better alignment and integration across the resource management system;
 - b. proportional and adaptable resource management processes; and
 - c. robust and durable resource management decisions.
5. The principal proposed amendments are to the Resource Management Act 1991 ('the principal Act'), the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, and the Environmental Protection Authority Act 2011. The Bill would also amend the Conservation Act 1987, the Reserves Act 1977, and the Public Works Act 1981.
6. To achieve the purpose of the Bill, the Bill seeks to amend the principal Act by:
 - a. introducing two new planning tracks for councils, namely, the Streamlined Planning Process and the Collaborative Planning Process. The Streamlined Planning Process will provide flexibility in planning processes and timeframes and allow these to be tailored to specific issues and circumstances; and
 - b. making the consent processes more simple and efficient by identifying the parties eligible to be notified of different types of applications. In particular, the Bill refines

the notification regime, and introduces limits to the scope and content of submissions and subsequent appeals.

7. The Bill also seeks to place a statutory obligation on councils to engage with iwi through Iwi Participation Arrangements during the early stages of plan making processes. This aims to improve consistency in iwi engagement in plan development.

Consistency of the Bill with the Bill of Rights Act

Section 27(1) – Right to natural justice

8. Section 27(1) of the Bill of Rights Act affirms that “Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.”
9. Observance of the "principles of natural justice" includes that all parties have the opportunity to be fairly heard.¹
10. Clause 55 inserts subpart 5 after s 80 of the principal Act, which makes provision for a streamlined planning process. A local authority intending to prepare, change, or vary a policy statement or plan may apply to the responsible Minister to enter a streamlined planning process. In particular, the process introduces limited notification as an available option and removes any appeal rights.
11. Clause 127 replaces s 95B of the principal Act and sets out a step-by-step process for consent authorities to follow when determining whether to give limited notification of a consent application, if it is not publicly notified. The circumstances in which an application may be notified, and the persons to whom it may be notified are more limited under the new s 95B than they are currently (in that affected persons are only entitled to be notified of an application if they are eligible to be notified in accordance with the provisions of a new s 95DA).
12. Clause 137 amends s 120 of the principal Act, which provides rights of appeal to the Environment Court in relation to a consent application, an application to change consent conditions, or a review of consent conditions. New s 120(1A) is added to:
 - a. remove the right of appeal in relation to resource consents for certain activities; and
 - b. limit the right of appeal of a person who made a submission on the application or review to an appeal only in respect of provisions or matters raised in the person's submission (excluding any part of the submission that is struck out).
13. To the extent that the amendments to the plan making and consent processes might limit opportunities to be heard for people affected by planning decisions, we consider the limitation is justified under s 5 of the Bill of Rights Act. This is because:
 - a. the Bill serves an important objective – it seeks to make the plan making and consent processes simpler and more efficient;

¹ *Combined Beneficiaries Union v Auckland COGS Committee* [2009] 2 NZLR 56 (CA) at [11].

- b. there is a rational connection to the objective – refining the notification regimes, and introducing limits to the scope and content of submissions and subsequent appeals will result in more streamlined processes; and
 - c. the right is minimally limited as follows:
 - i. the use of the Streamlined Planning Process has specific criteria that must be satisfied before the process may be used. Also, the use of limited notification is intended for where directly affected parties are easily identifiable;
 - ii. the consent process includes a new stepped approach in determining whether to notify an application as the effect of land use activities are most prominent in the immediate surroundings and diminish away from the site; and
 - iii. the limitation on the right to appeal a resource consent is limited to boundary infringements, subdivisions and residential activities in a residential zone.
14. The Bill also does not prevent the principles of natural justice from applying to decisions or actions of the responsible Minister, a local authority, or any other person, and nothing in the Bill affects the right to apply for judicial review. The limitations are therefore in due proportion to the importance of the objective.
15. We therefore conclude the Bill appears to be consistent with the right to natural justice affirmed in s 27(1) of the Bill of Rights Act.

Section 19(1) – Freedom from discrimination

16. Section 19(1) of the Bill of Rights Act affirms the right of everyone to the freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993. Those grounds include race.
17. Arguably, the requirement for local authorities to extend an invitation to iwi to enter into an Iwi Participation Arrangement in clause 39 of the Bill draws a distinction on the basis of race. This is because it distinguishes between groups that are predominately Māori and those that include non-Māori. Nevertheless, in our view, the provision does not give rise to discrimination because it does not create any substantive disadvantage.
18. In reaching this view, we have noted that s 6(e) of the principal Act already requires all persons exercising functions and powers under the Act to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga. This provision needs to be read with s 7(a) and s 8 of the principal Act. Section 7(a) requires decision-makers to pay particular regard to Kaitiakitanga (Māori stewardship). Section 8 requires decision-makers to take into account the principles of the Treaty of Waitangi. The Courts have also placed considerable emphasis on the proper consideration of matters of importance to Māori in decision making under these three sections.²

² See, for example, *McGuire v Hastings Council* [2002] 2 NZLR 577, 594 (per Lord Cooke of Thorndon).

19. It is apparent, however, that the Bill does not require decision makers to comply with Iwi Participation Arrangements above all other considerations. While the interests of some groups will take priority over others in individual cases, this priority does not equate to a disadvantage for any particular group.
20. We therefore conclude that the Bill appears to be consistent with the freedom from discrimination affirmed in s 19(1) of the Bill of Rights Act.

Conclusion

21. 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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