

26 February 2016

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Kermadec Ocean Sanctuary Bill

Purpose

1. We have considered whether the **Kermadec Ocean Sanctuary 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'). We have concluded that while the Bill engages sections 14, 20 and 25(c), overall it is consistent with the Bill of Rights Act. We have also considered whether section 19 of the Bill of Rights Act is engaged and concluded that it is not.

The Bill

2. The purpose of the Bill is to establish a new marine protected area – the Kermadec Ocean Sanctuary – in New Zealand's exclusive economic zone around the Kermadec Islands. The Bill defines the area that constitutes the Kermadec Ocean Sanctuary. This area comprises the remaining part of Fishery Management Area 10 (FMA 10) where commercial fishing is currently permissible.
3. In order to achieve this purpose, the Bill introduces a range of prohibited activities within the Kermadec Ocean Sanctuary: mining, fishing, seismic surveying, and the dumping of waste and other matter.
4. Some of these activities are permitted by the Bill in certain circumstances. For example, the Bill allows seismic surveying for the purpose of scientific research on successful application to the Environmental Protection Authority. Applicants must consult with local iwi before the application is made.
5. The Bill amends a number of existing Acts, notably the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, which is amended to include offences in respect of the prohibited activities contained in the Bill.
6. Activities in the Sanctuary not specifically prohibited or regulated under the Bill will continue to be regulated under their applicable regimes as if the Sanctuary were part of the exclusive economic zone.

Section 14 - Consistency with the Right to Freedom of Expression

7. We have considered whether clause 15(1)(a) of the Bill, which requires any application for an authorisation for marine scientific research to be made on a prescribed form, is consistent with section 14 of the Bill of Rights Act, which affirms the right to freedom of expression.
8. Although we consider that clause 15(1)(a) does limit the right to freedom of expression, the limitation is very minimal and we consider it is justified in terms of section 5 of the Bill of Rights Act.

Section 19 – Consistency with the Right to Freedom from Discrimination

9. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the prohibited grounds set out in section 21 of the Human Rights Act 1993. The grounds of discrimination under the Human Rights Act include sex, marital status, race, disability, age, employment status, and family status.
10. A legislative provision will limit the right to freedom from discrimination if:
 - a) The legislation draws a distinction based on one of the prohibited grounds of discrimination, and
 - b) The distinction involves material disadvantage to one or more classes of individuals.
11. Clause 9 of the Bill prohibits all fishing activities in the Kermadec Ocean Sanctuary. Clause 11 provides that clause 9 prevails over any other statutory authority or permission in relation to a prohibited activity. Clause 1 of new Schedule 1 provides that no compensation will be payable for any loss or damage, including any adverse effects on the value of quota or rights to fish arising as a result of the Bill.
12. The effect of these provisions is to close the whole of what is known as FMA 10 to commercial fishing, without any compensation. This could be seen as indirectly but unfairly affecting Māori by reason of Māori interests in area specific fishing quota in FMA 10.
13. In determining whether or not the right to freedom from discrimination is engaged by the Bill, we have considered:
 - a) Whether any provision of the Bill treats two groups differently, which are otherwise comparable, by reason of one of the prohibited grounds of discrimination; and
 - b) Whether any provision of the Bill treats two groups the same, which are otherwise different, by reason of one of the prohibited grounds of discrimination.
14. As noted above, the Bill prevents the exercise of existing rights to undertake commercial fishing in FMA 10. Under s 29B of the Fisheries Act 1996, 20 million fishing quota shares for quota species in FMA 10 have been allocated to Te Ohu Kai Moana Trustee Limited on behalf of iwi. Te Ohu Kai Moana Trustee Limited is a private statutory trust that is entitled to allocate those 20 million shares to iwi. A further 80 million quota shares for FMA 10 have been allocated to the Crown under s 29B. This raises the question as to whether preventing the exercise of the commercial fishing rights of Te Ohu Kai Moana Trustee Limited amounts to discrimination on the basis of ethnic origin.
15. We consider that, in respect of the right to undertake commercial fishing in FMA 10, all owners of area specific quota shares for FMA 10 are in a comparable position. We take this view because:
 - a) Both the Crown and Te Ohu Kai Moana Trustee Limited hold quota shares as property allocated under s 29B; and
 - b) Had any other person obtained any of the Crown's quota shares they would have been equally affected; and

- c) Each share affords to its owner commercial fishing rights, regardless of the identity of the owner of the share.
16. No provision of the Bill treats these comparable groups in a different manner to the other, by reason of any of the prohibited grounds of discrimination directly or indirectly. Accordingly we consider that the Bill is consistent with s 19 of the Bill of Rights Act.

Section 20 – Consistency with the Rights of Minorities

17. Section 20 of the Bill of Rights affirms the rights of individuals who belong to minority groups to enjoy the culture, to profess and practice the religion, or to use the language of their minority.
18. The Bill engages section 20 by prohibiting all fishing in the Kermadec Ocean Sanctuary, including situations where that fishing is a historical cultural practice.
19. There are known traditional Māori navigation passages through the proposed Kermadec Ocean Sanctuary. While use of those passages will not in itself be affected by the Bill, fishing is an ordinary cultural practice for those using the paths. We consider that the total prohibition of fishing is a limit on the rights of minorities.

Is the limit on section 20 justifiable under section 5 of the Bill of Rights Act?

20. In accordance with the guidance provided by the Supreme Court in *Hansen v R*¹, we have considered the following factors in assessing whether the departure from section 20 can be justified under s5:
- a) does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?
 - b) if so, then:
 - i) is the limit rationally connected with the objective?
 - ii) does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii) is the limit in due proportion to the importance of the objective?
21. On balance, we are satisfied that the limitation of a customary fishing right is justifiable. In coming to this view, we consider that:
- a) The purpose of the Bill is to preserve the Kermadec Ocean Sanctuary in its natural state. We are advised that the Kermadec area is one of the most pristine and unique places on earth, and is home to many different species of fish, whales, dolphins and other marine life, some of which are endangered. It also provides an important migration path for species crossing the Pacific. We consider the objective of preserving the sanctuary to be sufficiently important, and a prohibition on fishing is rationally connected with that purpose.
 - b) Although the prohibition on fishing does impair the right of individuals to take fish in the sanctuary as part of a cultural practice, we consider the limitation of the right to be minimal as the Bill does not prevent the use of traditional navigation passages through the sanctuary, or any other cultural practices associated with these journeys other than fishing.

¹ *Hansen v R* [2007] 3 NZLR 1, (2007) 23 CRNZ 104 (SC).

- c) The Bill puts a total ban on fishing in the Sanctuary. We consider that the limitation of the right is proportionate to the high importance placed on the preservation of a pristine and unique ocean environment as any fishing would undermine the purpose of the Sanctuary.

22. Accordingly we consider that the limitation on the right to enjoy culture is justified.

Section 25(c) - Consistency with the Right to be Presumed Innocent

- 23. Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proved guilty according to law. The presumption of innocence is generally safeguarded by requiring the prosecution to prove both that the accused undertook the act in question and that there was some form of intent involved.
- 24. The onus lies with the prosecution to prove both the act and the intent beyond a reasonable doubt. A defendant raising a defence only needs to show that the defence creates sufficient doubt to prevent the prosecution meeting its onus of proof.
- 25. The Bill engages s25(c) by introducing strict liability (reverse onus) offences for prohibited activities. Reverse onus offences require the defendant to prove an element of their defence, on the balance of probabilities, in order to avoid conviction. Because some burden of proof to demonstrate innocence falls on the defence, a reverse onus offence is a limitation on the right to be presumed innocent.
- 26. The Bill requires that the prosecution prove only that a prohibited activity has occurred. If it is proven that a prohibited activity occurred, then the onus is on the defendant to prove that an applicable defence applies to their circumstances. We consider that this places a limit on the right to be presumed innocent.
- 27. The Bill sets out two defences to the prohibited actions in clause 41 (which inserts new section 134EB into the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012). These defences are:
 - a) That the act or omission that is alleged to constitute the offence –
 - i) was necessary to save or prevent danger to human health or safety, or the marine environment, to avert a serious threat to the ship, aircraft or structure, or (in the case of force majeure cause by stress of weather) to secure the safety of the ship, aircraft, or structure; and
 - ii) was a reasonable step to take in all the circumstances; and
 - iii) was likely to result in less damage than would otherwise have occurred; and
 - iv) was taken or omitted in such a way that the likelihood of damage to human or marine life was minimised.
 - b) That the action or event to which the prosecution relates resulted from an event beyond the control of the defendant, including natural disaster, mechanical failure, or sabotage, and in each case –
 - i) the action or event could not reasonably have been foreseen or been provided against by the defendant; and
 - ii) the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred.

Is the limit on section 25(c) justifiable under section 5 of the Bill of Rights Act?

28. On balance, we are satisfied that the strict liability offences contained in the Bill are justifiable. In reaching this conclusion, we have taken into account that the strict liability offences:

- a) are proposed for an important purpose, namely to deter people who choose to participate in regulated industries from actions (such as wilful mining and dumping of waste and other materials) that are a risk to the environment and marine life in that area.
- b) are rationally connected to the Bill's objective of preserving marine life and the environment in the Sanctuary. The Bill's objective is that as little harm as possible be done to the environment and marine life, and that no-one should undertake any of the prohibited activities unless there are good reasons to do so. The reverse onus offences require a defendant to demonstrate that there were good reasons for the prohibited offences to occur.
- c) make statutory defences available to the defendant where a prohibited activity was necessary and reasonable to take in all circumstances, or beyond the control of the defendant. These defences limit strict liability to actions committed without any prescribed justification.

We considered whether the defence set out in new s134EB(2)(a)(iii) is reasonable. This limb of s134EB(2)(a) requires the defence to prove (in addition to other mandatory limbs of the defence) that the action "*was likely to result in less damage than would otherwise have occurred*". However, for example, if the defendant dumped waste to preserve human health or safety knowing that there would be damage to the environment, it would be difficult for the defendant to quantify which action would likely have resulted in less damage.

This limb appears difficult to demonstrate and may be unnecessary given, for example, that the defence must also establish that the action was a reasonable step to take in the circumstances. However, we note that this statutory defence mirrors s134E(c) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

- d) strict liability is being introduced as a strong deterrent to preserve marine life and the environment in the Sanctuary for the greater public good. The strict liability defences mirror the statutory defences in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and s341A of the Resource Management Act 1999. The new offences are in proportion to the importance of the objective, as without the offences there would be a higher likelihood that people would continue to do damage to the environment and marine life of the Kermadec Ocean area.

29. We also considered whether the penalties are reasonable and proportionate to the objective and offence. This Bill brings the prohibited activities within the penalties already found in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012:

- i. in the case of a natural person, to a fine not exceeding \$300,000 (s134H(1a));
- ii. in the case of a person other than a natural person, to a fine not exceeding \$10 million (s134H(1b)).
- iii. make reparations for damage caused to the environment through the dispersal of hazardous materials (s134I).

30. The Bill of Rights advice prepared when the penalties above were introduced in 2012 notes that the Courts have flexibility to exercise their discretion in sentencing and may impose fines less than the maximum.
31. The \$10 million maximum penalty is above the normal penalty range for strict liability offences. However, a potential fine of this magnitude is arguably necessary to incentivise large multinational corporations to comply with the law. The type and scale of activities in question (such as mining for minerals and petroleum), the need for effective deterrence, and the potentially serious consequences of offending justifies a high criminal penalty level.
32. Additionally, reparations are likely necessary to cover any costs incurred to clean up hazardous materials and restore local marine life.
33. Overall we conclude that although the provisions in the Bill may appear to limit rights under section 25(c) of the Bill of Rights Act, such limitation is justified in terms of section 5 of the Bill of Rights Act.

Conclusion

34. 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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