

30 November 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Māori Fisheries Amendment Bill

Purpose

1. We have considered whether the Māori Fisheries 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 in relation to the latest version of the Bill (PCO 21120/1.44). 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 s 14 (freedom of expression). Our analysis is set out below.

The Bill

4. The Bill amends the Maori Fisheries Act 2004 (the **principal Act**), which sets out a framework for the allocation and transfer of fisheries settlement assets to iwi, institutional requirements, and a governance framework comprised of four Māori fisheries governance entities for managing those settlement assets for current and future generations of iwi and Māori.¹
5. The principal Act requires entities established under that Act to be periodically reviewed by an independent reviewer. The first review of the Act was completed in 2015. It recommended significant changes to the governance structures of the entities and simplified processes for trading assets, intended to bring iwi closer to their entities, in order to assert a greater degree of rangatiratanga over their assets. Some of these recommendations require legislative change.
6. The Bill provides for several amendments to be made to the principal Act, together with consequential amendments to other legislation, to give effect to review recommendations. These are intended to:
 - a. move iwi towards a greater degree of rangatiratanga over the Fisheries Settlement entities;
 - b. improve the ability of the entities to deliver benefits to all Māori;

¹ The four entities are Te Ohu Kaimoana, Aotearoa Fisheries Limited (Moana New Zealand), Te Pūtea Whakatupu Trust, and Te Wai Māori Trust, which play different roles in the governance framework.

- c. improve the operational efficiency of the entities; and
- d. better achieve the purposes of the principal Act.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

- 7. Section 14 of the Bill of Rights Act affirms 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 to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.²
- 8. There are a several provisions in the Bill which *prima facie* engage the right to freedom of expression. These provisions can be broadly split into the following categories:
 - a. **Requirement to provide certain information to support transparency and accountability:** The Bill requires Te Ohu Kai Moana Trustee Limited to provide certain information to support the overall governance of the 1992 Fisheries Settlement assets to some or all of the following: mandated iwi organisations, recognised iwi organisations, and representative Māori organisations.³ For example, Te Ohu Kai Moana Trustee Limited must provide a draft of its annual plan to mandated, recognised, and representative Māori organisations (clause 36); provide a strategic plan to mandated and recognised iwi organisations for approval (clause 36A); and provide an annual report to mandated, recognised, and representative iwi organisations, to assess the performance of Te Ohu Kai Moana Trustee Limited against its annual and strategic plans (clause 38).
 - b. **Requirement to receive certain information:** The Bill requires mandated iwi organisations, recognised iwi organisations, and/or representative Māori organisations to receive certain information from Te Ohu Kai Moana Trustee Limited. For example, a draft of its annual plan (clause 36) and the strategic plan for approval (clause 36A).
 - c. **Miscellaneous provisions to support the administration of Fisheries Settlement assets:** The Bill also contains various provisions throughout that are related to, or that contribute in some way to, the objectives of the Bill. For example, requirements regarding notification, information-sharing, and reporting.
- 9. 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.

² See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

³ Te Ohu Kai Moana Trustee Limited is a registered company and the sole trustee of Te Ohu Kai Moana – a charitable trust established to administer the 1992 Fisheries Settlement assets and advance the interests of iwi, primarily in the development of fisheries, fishing, and fisheries-related activities. Mandated and recognised iwi organisations act as the shareholders of Te Ohu Kai Moana Trustee Limited.

10. The section 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression and, if so, whether the limitation is rationally connected and proportionate to that objective and limits the freedom of expression no more than reasonably necessary to achieve that objective.⁴
11. We consider that any limits on the freedom of expression contained within the Bill are justified under section 5 of the Bill of Rights Act because:
 - a. the Bill seeks to, amongst other things, better achieve the purposes of the principal Act, which is sufficiently important to justify some limitation on section 14;
 - b. the requirements imposed on entities to provide, or receive, certain information in specific circumstances are rationally connected to this objective. Ensuring that relevant information is provided in the prescribed manner to all necessary parties is fundamental for the overall function and efficiency of the administration of Fisheries Settlement assets; and
 - c. these provisions impair section 14 no more than reasonably necessary and are in due proportion to the importance of the Bill's objective. We note that the requirements for what type of information needs to be captured, notified, written or shared is largely factual by nature and contains limited expressive value. Accordingly, any limits to section 14 for these entities are justified under section 5 of the Bill of Rights Act.

Conclusion

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



Edrick Child
Acting Chief Legal Counsel
Office of Legal Counsel

⁴ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.