LEGAL ADVICE

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4 November 2022

Hon Andrew Little, Acting Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Natural and Built Environment Bill

Purpose

1. We have considered whether the Natural and Built Environment 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 23532/16.88), received on 3 November 2022, which remains subject to further renumbering and quality assurance. It updates our advice of 26 October 2022, which was based on version 16.56 of the Bill. Given time constraints, this update does not reflect a comprehensive re-review of the Bill, but rather an assessment of the limited number of substantive changes that we understand have been made since version 16.56. We will provide you with further advice if the introduction version of the Bill includes amendments that affect the conclusions in this advice.

Summary

3. The Bill replaces the Resource Management Act 1991 (RMA). The purpose of the Bill is to enhance the quality of the environment and achieve positive outcomes to support the well-being of present and future generations.

4. Due to the scale and complexity of the matters regulated by the Bill, a number of rights under the Bill of Rights Act are engaged.

5. Our advice discusses the consistency of the Bill with:

   a. section 14: freedom of expression;

   b. section 18 freedom of movement;

   c. section 19 freedom from discrimination in relation to several prohibited grounds of discrimination, including race, ethnic origins, disability, employment status and age;

   d. section 21: freedom from unreasonable search and seizure;

   e. section 25(c): the right to be presumed innocent until proven guilty in relation to the strict liability offences and infringement offences in the Bill; and

   f. section 27: right to justice, including natural justice (section 27(1)) and the right to bring civil proceedings against the Crown (section 27(3)).

6. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. Our analysis is set out below.

The Bill

7. The Bill repeals and replaces the RMA. It works in tandem with the Spatial Planning Bill (the SP Bill), which aims to provide a more strategic and coordinated approach to long-term regional planning, through requiring the development of regional spatial strategies. The new resource management system created by these Bills has been designed to achieve five objectives:

    a. To protect and, where necessary, restore the environment and its capacity to provide for the wellbeing of present and future generations;

    b. To better enable development within natural environmental limits including a significant improvement in housing supply, affordability and choice, and timely provision of appropriate infrastructure including social infrastructure;

    c. To give effect to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori including mātauranga Māori;

    d. To better prepare for adapting to climate change and risks from natural hazards and better mitigate the emissions;

    e. To improve system efficiency and effectiveness and reduce complexity while ensuring local input and involvement.

8. The Bill provides an integrated framework for regulating both environmental management and land use planning. It introduces a concept drawn from te ao Māori, te Oranga o te Taiao, as a new intergenerational environmental test that updates the RMA's focus on sustainable management. It enables use and development that recognises and upholds te Oranga o te Taiao and occurs within environmental limits and targets. It requires both positive outcomes to be achieved and adverse effects to be appropriately managed.

9. The purpose of the Bill is to recognise and uphold te Oranga o te Taiao[1] and enable use of the environment in a way that supports the well-being of present generations without compromising the well-being of future generations.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

10. 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]

[1] Te Oranga o te Taiao is defined in clause 7 to mean:
(a) the health of the natural environment; and
(b) the essential relationship between the health of the natural environment and its capacity to sustain life; and
(c) the interconnectedness of all parts of the environment; and
(d) the intrinsic relationship between iwi and hapū and te Taiao.

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

11. There are a vast number of provisions in the Bill which *prima facie* engage the right to freedom of expression. Some of these provisions are prescriptive, describing in detail what is required and by whom, while others set out more generic requirements that may be drawn upon further in any regulations (noting secondary legislation is also subject to the Bill of Rights Act).

12. These provisions can be broadly split into the following categories:

    a. **Requirement to provide particular information to authorities to support decision making**: Throughout the Bill, individuals may be required to provide additional or particular information to the relevant authorities in order for the proper procedures to be followed and so decisions can be made, and resource consents issued. For example, clause 294(1) provides that a person may request the consent authority to issue them a certificate of compliance. Sub-clause (2) allows a consent authority to require additional information from a person making this request, should the authority consider the extra information is necessary before issuing the certificate.

    b. **Mandated information-sharing:** Some provisions in the Bill require individuals like applicants, appellants, farm operators, and landowners to share certain information with other parties. For example, clause 519(4) requires appellants to ensure that a copy of the notice of an appeal to the Environment Court is served on specified persons.

    c. **Requirement to publish occurrence of non-compliance:** Clause 731 states that a person who has failed to comply with the provisions of the Bill in relation to a resource consent may be subject to an adverse publicity order that requires them to publicise the non-compliance and associated information. This may include any impacts of the non-compliance on human health or the environment; and any penalties or orders imposed.

13. 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 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.[3]

14. 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 overall objective of the Bill, which is to recognise and uphold te Oranga o te Taiao and enable beneficial use and development of the environment, is sufficiently important to justify some limitation on section 14;

    b. The requirements imposed on both individuals and specific groups or bodies to provide 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 regime;

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

c. We understand that the requirement to publicise non-compliance via an adverse publicity order aims to encourage compliance with the provisions of the Bill, which also appears rationally connected with the objective of recognising and upholding te Oranga o te Taiao; and

d. 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 in particular that many of these provisions are broadly similar to existing legislation and requirements on other publicly owned entities and local authorities, and that the majority of relevant provisions involve factual information with limited expressive value. A person on whom an adverse publicity order has been served may appeal to the Environment Court against the order.

15. The Bill also, in some instances, requires public notification, information-sharing, record-keeping, and reporting from other entities or persons (such as regional planning committees, special tribunals, boards of inquiry or heritage protection authorities) that have specified roles or functions related to, or that contribute in some way to, the objectives of the Bill. 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. They also impose limits no more than reasonably necessary for the regime to operate efficiently. Accordingly, any limits to section 14 for these entities are justified under section 5 of the Bill of Rights Act.

Section 18 – Freedom of movement

16. Section 18(1) of the Bill of Rights Act states that everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

17. Clause 613(1)(b) of the Bill appears to limit the right to freedom of movement under the Bill of Rights Act. This provides that esplanade strips or access strips may be closed to the public by the local authority during periods of emergency or public risk likely to cause loss of life, injury, or serious damage to property.

18. We consider that any limit that this provision places on freedom of movement is justified, because:

a. ensuring public safety is an important objective;

b. limiting access to land during periods of emergency or public risk is rationally connected to that objective; and appears to impair section 18 no more than is reasonably necessary and in due proportion to the importance of that objective.

19. For completeness, we also note that clause 613(1)(a) enables these strips to be closed to the public for the times and periods specified in the instrument or easement under Schedule 12.[4] Any such instrument or easement would need to be consistent with the Bill of Rights Act.

[4] We understand that the landowner whose land is being vested in the Crown to create the esplanade strip can negotiate with the local authority as to the circumstances under which access would be restricted, in order to protect certain interests, such as proximity to livestock at certain sensitive times of the year such as lambing. This is an existing process under the Resource Management Act 1991.

Section 19 – Freedom from discrimination

20. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993.

21. Discrimination under section 19 of the Bill of Rights Act arises where:[5]

    a. there is differential treatment as between persons or groups in analogous or comparable situations based on a prohibited ground of discrimination; and

    b. that treatment has a discriminatory impact (i.e., it imposes a material disadvantage on the person or group differentiated against).

22. The differential treatment analysis takes a purposive and untechnical approach to avoid artificially ruling out discrimination.[6] Not all differential treatment will be discriminatory.[7] Once differential treatment on prohibited grounds is identified, the question of whether disadvantage arises is a factual determination.[8]

Freedom from discrimination on the basis of race or ethnic origins

23. Race and ethnic origins are prohibited grounds of discrimination under section 21 of the Human Rights Act. We have considered whether certain clauses in the Bill could be seen to draw distinctions between groups of people in a manner that amounts to discrimination on the basis of race or ethnic origins. The following are examples of such provisions.

<u>Engagement and consultation</u>

24. Certain provisions require that a public authority must consider engaging with, or engage or consult with, certain Māori entities at various stages in the regulatory processes:

    a. Clause 656 – local authorities can enter into management agreements with certain public authorities (including iwi authorities and groups representing hapū);

    b. Clause 679 – iwi authorities, groups representing hapū, local authorities or regional planning committees may invite each other to enter into a Mana Whakahono ā Rohe agreement;

    c. Clause 53(c) – the national planning framework must enable Māori to be involved in monitoring of environmental limits and targets;

    d. Schedule 7 clause 11 – regional planning committees must initiate engagement agreements with Māori entities;

    e. Clause 164 – a consent authority may recover consent engagement costs and pay them to relevant Māori parties that incurred the costs;

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[5] *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 CA at [55].
[6] *Atkinson v Minister of Health* [2010] HRRT 1 at [211] – [212]; *Air New Zealand v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [51], per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].
[7] *Ministry of Health v Atkinson*, above n 6, at [75].
[8] See for example, *Child Poverty Action Group v Attorney-General*, above n 7c, at [179]; and *McAlister v Air New Zealand*, above n 7b, at [40] per Elias CJ, Blanchard and Wilson JJ.

f. Clause 783(5) – the local authorities must provide iwi authorities and groups representing hapū within the region with opportunities, in relation to the state of environmental monitoring and the state of plan effectiveness monitoring, to be involved in the development of monitoring methods, policy, and the actual monitoring work;

g. Clause 818 – local authorities must develop a policy relating to Māori participation;

h. Clause 819 – each local authority must keep and maintain certain records for the iwi and hapū and any groups that represent hapū with interests in their region or district; and the Crown must maintain and provide to each local authority information on iwi authorities and groups representing hapū in that region or district;

i. Clause 836(3) – Chief executives must engage with Māori when preparing or updating the evaluation framework.

25. These provisions generally require that the relevant public entity must engage with or provide for engagement with Māori (or groups such as iwi authorities and groups representing hapū). The provisions are either limited to only requiring engagement with Māori in those specified ways, or require engagement with a list of groups/entities, of which Māori are one group. The Bill does not require the relevant public entity to engage or consult with any other ethnic groups. We are of the view that these clauses distinguish and grant differential treatment to Māori on these matters as there may be other groups that have an interest in these matters and are therefore in a comparable situation.

26. Nevertheless, we do not consider these provisions give rise to discrimination because it does not impose a material disadvantage on a comparable group:

a. Providing for specific Māori participation, engagement and/or consultation recognises a Māori interest in regulatory decisions about natural resources and recognises a particular quality of the subject-matter of the decision-making (the natural environment) in terms of its significance to Māori and the Māori interest that has been recognised in relation to it.[9]

b. The relevant provisions are not designed to provide specific advantage to Māori, but rather achieve equity among New Zealand's population groups. The previous regime this Bill replaces has disadvantaged Māori for decades.[10] Addressing inequity does not result in disadvantage to those who are not currently disadvantaged.

c. The requirement to enable engagement with or engage with the specific Māori groups on the specific issues identified does not preclude other individuals or groups from also engaging with the relevant public entity on the issue.

27. For completeness, if discrimination could be seen to arise, we consider that this is justifiable under section 5 of the Bill of Rights Act:

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[9] The special interest of Māori in the natural environment has been recognised by the courts (e.g. *New Zealand Māori Council v Attorney-General* [2013] 3 NZLR 31 (SC)) and Waitangi Tribunal (e.g. in the Wai 2358 inquiry).

[10] Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358, 2019) at 561.

a. A key objective of the Bill is to give effect to the principles of Te Tiriti o Waitangi; provide greater recognition of te ao Māori; and provide Māori with increased opportunities to contribute to decision-making for the planning and regulation of the natural environment. This is a sufficiently important objective.

b. We find that the provisions are rationally connected to these objectives, by enabling public entities to facilitate engagement with (or consider engaging with) Māori in certain circumstances, including in the development of a plan, when preparing the evaluation framework, and in environmental monitoring.

c. As we note above, these provisions do not preclude the public entities from engaging with other groups or individuals. Instead, the provisions simply require engagement with (or considering engaging with) Māori as specified. We consider that this restricts the right to freedom from discrimination no more than what is reasonably necessary.

d. Policy papers indicate that the RMA has failed to deliver on opportunities for Māori and has created inequities. These provisions address this inequity by providing specific engagement opportunities for Māori. Given the significance of this issue, any specific provision addressing Māori appears to be proportionate to the important objective of providing for better engagement with Māori in the planning and regulation of the natural environment.

Mātauranga Māori

28. Clause 666 requires the members of the National Māori Entity[11] to collectively have knowledge of, and experience and capability in relation to the principles of te Tiriti o Waitangi; and tikanga Māori, te reo Māori, and mātauranga Māori.

29. Schedule 13 clause 6(1)(d) states that when the Environment Court sits for a proceeding involving a question of tikanga Māori, quorum requires at least 1 alternate Environment Judge who is a Māori Land Court Judge or an acting Māori Land Court Judge, or includes at least 1 Environment Commissioner who has knowledge and expertise in tikanga Māori, or receives advice on the question from a pūkenga.

30. Schedule 13 clause 24(2)(f) and (g) requires the Attorney-General to consider, when appointing a person as an Environment Commissioner or Deputy Environment Commissioner, whether they have knowledge and experience in matters relating to te Tiriti o Waitangi and kaupapa Māori; and matters relating to te ao Māori, tikanga Māori and mātauranga Māori.

31. These clauses could be interpreted as treating Māori differently if a Māori person is more likely to have the required skills and knowledge than a non-Māori person. However, as these clauses only require (or consider requiring) knowledge, experience and expertise in tikanga Māori, te ao Māori, te reo Māori, mātauranga Māori and/or the principles of te Tiriti on a person or collective group of persons, we do not consider that these provisions differentiate between separate groups on the basis of race or ethnic origin.

32. As a result, we conclude that the right to freedom from discrimination affirmed under section 19 of the Bill of Rights Act is not engaged by these provisions.

[11] An independent statutory entity established under clause 659 for the purpose of providing independent monitoring of decisions taken under the Bill or the Spatial Planning Bill (see clause 660).

Transfer of powers and functions

33. Clause 650 provides that a local authority or regional planning committee may transfer its functions, powers or duties to another public authority, which includes a local authority, a regional planning committee, an iwi authority, a group representing hapū, a statutory authority, a government department, a joint committee, and a local board. Subclause (3) sets out certain criteria in order to be able to make the transfer, and subclause (4) provides that criteria in subclause (3)(c) do not apply to the transfer of power to an iwi authority or group representing hapū.

34. This provision *prima facie* appears to treat Māori, or persons who identify as Māori, differently to persons who are non-Māori or do not identify as Māori. This provision can be seen to grant Māori differential treatment by reducing the requirements that must be satisfied to transfer a power to them, that otherwise apply to the transfer of powers to other public authorities, making it "easier" to transfer a power to iwi authorities and groups representing hapū rather than other public authorities.

35. However, we do not consider that there is any other comparable group that may be materially disadvantaged. Iwi and hapū have significant interest in the natural environment which has been acknowledged by the Crown.[12]

36. This is the basis for enabling powers to be transferred to iwi authorities and groups representing hapū, in addition to transferring powers to other public authorities who have a role in the regulation of land and resources. However, we understand that the removal of the specific criteria in subclause (3)(c) for transfers to iwi and hapū is to provide for equity in that process – while satisfying those criteria for the other public authorities is no particular barrier, existing provisions under the RMA have posed a particular obstacle to transferring powers to iwi and hapū. Accordingly, the removal of these criteria achieve equity. As noted earlier, addressing inequity does not result in disadvantage to those who are not currently disadvantaged.

37. As a result, we consider that clause 650 does not limit the right to freedom from discrimination under section 19 of the Bill of Rights Act.

Freedom from discrimination on the basis of disability and employment status

38. Employment status and disability are prohibited grounds of discrimination under section 21 of the Human Rights Act 1993. Employment status is defined as being unemployed or being a recipient of a benefit.

39. The Bill states that when a regional planning committee is preparing or changing a natural and built environment plan (clause 108(e)); a consent authority is considering a resource consent application (clause 223(8)); a board of inquiry is considering a proposal (Schedule 6 clause 19(2)(c)); or the Independent Hearing Panel is formulating its recommendations on a proposed plan (Schedule 7 clause 126(2)(c)), the relevant authority must not have regard to any adverse effect arising from the use of the land by:

    a. people on low incomes; or

    b. people with special housing needs; or

[12] Affidavit of Simon William English in opposition to application for judicial review, 7 November 2012 (filed in *Pouakani Claims Trust v Attorney-General*, CIV-2012-485-2185).

c. people whose disabilities mean that they need support or supervision in their housing.

40. These provisions may be seen to create a distinction on the grounds of disability; and indirectly on the grounds of employment status, given that this is likely to correlate with low income. Since the relevant authority is prevented from considering effects on land arising from its use by the identified groups of people, but not by others, this may result in differential treatment of these groups.

41. However, we do not consider that these provisions give rise to discrimination. They appear to be intended to enhance equity for people on low incomes; people with special housing needs; or people whose disabilities mean that they need housing supervision or support. As these groups are not in an analogous situation to groups who do not need additional support, it appears unlikely that any other groups would be disadvantaged by these measures. Addressing inequity does not result in a disadvantage to those who are not affected by the existing inequities.

Freedom from discrimination on the basis of age

42. Age is a prohibited ground of discrimination under section 21 of the Human Rights Act 1993, under which it is defined as any age commencing with the age of 16 years.

43. Schedule 13 clause 10 sets out who is eligible to be an Environment Judge or alternate Environment Judge. In order to be an Environment Judge, a person must be, or be eligible to be, a District Court Judge (see Schedule 13 clause 10(1)). An alternate Environment Judge must either be:

    a. a District Court or Māori Land Court Judge;

    b. acting in either of these roles; or

    c. a retired Environment Judge under the age of 75 years and the Chief Environment Court Judge certifies to the Attorney-General that the appointment is necessary for the proper conduct of the Environment Court.

44. Schedule 13 clause 10(4)(c)(i) states that a person eligible for appointment as an alternate Environment Judge under Schedule 13 clause 10(3)(b) must not be appointed for a term that extends beyond the date on which the Judge reaches the age of 75 years. Additionally, District Court Judges and Māori Land Court judges must retire at age 70.[13]

45. The existence of a mandatory retirement age (regardless of the age at which it was fixed) is *prima facie* discrimination on the basis of age, contrary to section 19 of the Bill of Rights Act.

46. Setting a mandatory limit, however, also has an important purpose: namely, the preservation of judicial independence. The importance of this purpose is affirmed by the Bill of Rights Act section 27 right to natural justice.

47. A mandatory retirement age may be rationally connected to achieving this purpose, as it forms part of a wider range of statutory controls on judicial service (such as fixed income and protection against removal from office) which, taken together, instil security of tenure and judicial independence.

[13] The retirement ages for District Court and Māori Land Court Judges are set out in section 28 District Court Act 2016 and section 12 Te Ture Whenua Māori Act 1993.

48. The age limits adopted in this Bill reflect a proportionate response. The Bill reflects the age limit adopted for both District Court Judges and acting District Court Judges.[14] An age limit of 70 years has been adopted in the United Kingdom, Australia, and Ireland. The United Nations General Assembly has also affirmed the reasonableness of mandatory retirement ages generally in GA Res 40/32, 29 November 1985 and GA Res 40/146, 13 December 1935: Basic Principles on the Independence of the Judiciary.

49. Alternatives (such as having no mandatory limit) would potentially provide greater security of tenure but would have disadvantages (such as potential diminution of judges' health). Similarly, having judicial appointments limited by term, while potentially avoiding *prima facie* age discrimination, would create risks for judicial independence.

50. We therefore conclude that these age limits represent a justified limit on the section 19 right to be free from discrimination.

Section 21 – Freedom from unreasonable search and seizure

51. 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 a number of values including personal property, dignity, and privacy.[15]

52. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of activities that constitute a "search or seizure". Secondly it protects only against those searches or seizures that are "unreasonable" in the circumstances.

53. The Bill includes a number of provisions that we consider to be powers of search, or of search and seizure:

Search powers

a. Clause 235(3) and (4) enables the consent authority to enter on land in specified circumstances where a bond has been given in relation to land use or subdivision consent.

b. Clause 753 enables the local authority or consent authority, without prior notice, to enter any place that it considers likely to be affected by an emergency, where the authority has financial responsibility or jurisdiction over a resource or area, to take action to mitigate the harm.

c. Clause 789 enables an enforcement officer to direct a person to provide certain identifying information where there are reasonable grounds to believe that an obligation under or provision of the Bill is being or has been breached.

d. Clause 792 enables a warrant to be issued authorising entry and search of any place or vehicle where there are reasonable grounds to believe anything is situated in respect of which an offence has been or is suspected of having been committed; will

[14] Under the District Court Act 2016, a Judge must retire at age 70 (section 28) and only a former Judge under the age of 75 years is eligible for appointment as an acting Judge (section 31(2)). An acting Judge must not be appointed for a term that extends beyond the date on which the Judge reaches the age of 75 years (section 32(2)(a)).
[15] See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

be evidence of an offence; or is intended to be used for an offence, where the offence in each case is punishable by imprisonment.

Search and seizure powers

a. Where a person has failed to comply with an enforcement order, clause 701(2) enables any person, with the consent of the Environment Court, to enter upon any land or enter any structure for the purposes of complying with the order on behalf of the person, and to sell or otherwise dispose of materials salvaged in complying.

b. Where a person has failed to comply with an abatement notice relating to noise, clause 709(2) enables an enforcement officer, without further notice, to enter the place where the noise source is situated and (when accompanied by a constable) seize and impound the noise source.

c. Where a person has not complied with an excessive noise direction or a direction cannot be given, clause 716 enables a constable (or enforcement officer accompanied by a constable) to enter a place without further notice; and seize or remove the noisy item or make it inoperable. A constable may use reasonable force in exercising this power.

d. Clause 790 provides an enforcement officer with power of entry for the purpose of inspection to assess compliance, including a power to take samples of certain substances (such as water or soil) or suspected contaminants.

e. Clause 791 provides an enforcement officer who has authorisation in writing with power of entry, as well as the ability to carry out inspections, surveys, investigations, tests or measurements; and take samples of any water, air, soil, or vegetation and to enter or re-enter land.

Are the search and seizure powers in the Bill reasonable?

54. Ordinarily, a provision found to limit a particular right or freedom may be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of section 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.[16] Rather, section 21 is self-limiting in that the assessment to be undertaken is whether the search power is reasonable. The reasonableness of a search or seizure can be assessed with reference to its purpose and the degree of intrusion on the values which the right seeks to protect.

55. We consider the search and seizure powers in the Bill are consistent with the Bill's purposes of recognising and upholding te Oranga o te Taiao and enabling use and development of the environment within environmental limits and targets. The powers appear reasonable for the purpose of ensuring compliance with the provisions of the Bill. There are also several safeguards associated with the exercise of these powers:

[16] *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC) at [162] per Blanchard J.

a. Under clauses 701(2), 709(2) and 753, the person entering must be accompanied by a constable if entering a dwellinghouse.[17] The powers of entry under clauses 235(3), 790(1), and 791(1)(c) exclude dwellinghouses, which limits the intrusion on privacy.

b. The powers under clause 716(3) and (4) could be exercised only where a notice had not been complied with or could not be given. Any force exercised would need to be reasonable in the circumstances.

c. The powers of entry under clauses 790 and 791 require authorisation in writing from a specified authority and must be exercised at a reasonable time. Under clause 790(6), an enforcement officer may not enter land without the permission of the landowner if permission to enter is required by any other Act. Under clause 791, reasonable notice of the authorisation, purpose of entry, and how and when entry is to be made must be provided to the occupier.

d. The powers of entry under clause 792 may be used only if there are reasonable grounds for believing an offence punishable by imprisonment has been or is being committed, or there is evidence of such; and are subject to the provisions of Part 4 of the Search and Surveillance Act 2012. Under clause 794, a warrant under clause 792 may only be executed by a constable or by an enforcement officer when accompanied by a constable.

56. Accordingly, we consider that the search and seizure provisions of the Bill are reasonable, and therefore consistent with section 21 of the Bill of Rights Act.

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

57. 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.[18]

58. On the face of it, strict liability offences limit section 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by finding that certain facts occurred without proof of *mens rea*. The accused must prove a defence (on the balance of probabilities), or disprove a presumption, in order to avoid liability, whereas in other criminal proceedings an accused must merely raise a defence in an effort to create reasonable doubt.

59. 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.[19] 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

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[17] We understand that buildings associated with marae would be captured within the existing definition of 'dwellinghouse' due to their residential use.
[18] *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.
[19] See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

c. the penalty for the offence is at the lower end of the scale and proportionate to the importance of the Bill's objective.

Strict liability offences in the Bill

60. The Bill contains a number of strict liability offences. Clause 760 of the Bill contains two offences[20] that are expressly strict liability offences,[21] with limited defences (the Bill also preserves the common law defence of total absence of fault):

    a. Contravening or permitting a contravention of duties and restrictions in relation to land, subdivision, the coastal marine area, the beds of certain rivers and lakes, water, and discharges of contaminants; and

    b. Discharging any harmful substance or contaminant or water in the coastal marine area.[22]

61. A person who commits an offence against these clauses is liable on conviction in the case of a natural person to imprisonment for a term not exceeding 18 months or a fine not exceeding $1,000,000. In the case of a person other than a natural person, the maximum is a penalty is a fine not exceeding $10,000,000. If the offence is a continuing one, further fines apply at a daily rate.

62. The Bill contains a number of other offences that appear to be strict liability offences. While it is not clear if these are strict liability offences or not, we have assumed that they are for the purposes of our analysis. These include a number of offences that are public welfare regulatory offences, namely contravening or permitting a contravention of:

    a. an enforcement order or a condition of a resource consent, an abatement notice, or an enforceable undertaking;

    b. failing to provide certain information to an enforcement officer, protection of sensitive information, an excessive noise direction, an abatement notice for unreasonable noise and any order made by the Environment Court.

63. The offences contained in paragraph 62 a. above have the same penalties as above in paragraph 61.

64. The offences contained in paragraph 62 b. above are punishable on conviction to a fine not exceeding $10,000, and if the offence is a continuing one, further fines apply at a daily rate.

65. Clause 760(2) makes it an offence to dump and incinerate waste or other matter, or radioactive waste or other radioactive matter and other waste in a coastal marine area. This offence has the same penalties set out in paragraph 61.

Are the strict liability offences justifiable under section 5?

66. We consider these offences to be rationally connected to a very important objective. These offences operate as part of a scheme to recognise and uphold te Oranga o te Taiao and enable the use and development of the environment in a way that promotes outcomes for the benefit of the environment.

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[20] See clauses 760(1)(a) and 760(3).
[21] See clauses 762 and 763.
[22] In breach of clause 24 of the Bill.

67. We have been advised that the spectrum of potential harms to the environment and community that may arise from these offences is extremely broad from minor to extremely serious. The severe end of the spectrum includes serious threats to public safety, up to and including the risk of fatalities. The spectrum of penalties is designed to reflect this, in order to have a sufficiently robust specific and general deterrent and denunciatory effect. The penalties available in the Bill in relation to similar environmental offences in other commonwealth jurisdictions are in line with international comparators.

68. It is a general principle that strict liability offences are associated with penalties at the lower end of the scale. The financial penalties for strict liability offences in the Bill are significantly higher than fines typically associated with strict liability offences. Nevertheless, we consider these fines are reasonable in the context of protecting the environment and necessary to contribute to the purposes of the offence regime (including deterrence and punishment). A court retains the discretion to impose a lower penalty than the maximum prescribed in the Bill.

69. Although the potential for imprisonment for a strict liability offence is highly unusual, we consider that in this instance the severity of the penalty is in proportion to the significant irreparable environmental harm that could be caused by contravention of the Bill. As above, a court retains a discretion as to both the type and extent of any penalty.

70. The potential for financial gain that an offender might obtain through unlawful exploitation of resources is very significant. The resultant harms fall primarily on common resources which the community at large are dependent on (including, but not limited to, marine and freshwater environments, valuable life supporting ecosystems, productive soil, the airsheds we breathe, and other essential common resources).

71. Environmental use and development is a highly regulated area, and individuals would be in a better position to justify a contravention of the Bill's requirements than a prosecuting agency would be to prove *mens rea*.

72. While finely balanced, we consider that these provisions impair the right to be presumed innocent no more than reasonably necessary and are in proportion to the importance of the Bill's objective. We conclude that they are a justified limit on s 25(c) of the Bill of Rights Act in this particular context.

73. Clauses 760(5)(b) and (c) create apparent strict liability offences for, without sufficient cause, not attending or refusing to cooperate with the Environment Court or contravening a summons or order; or contravening an instrument for the creation of an esplanade strip or easement for an access strip. These offences are punishable on conviction by a maximum fine of $1,500. If these are strict liability offences, we consider the limit on s 25(c) is justifiable and proportionate to the objectives of the Bill.

Infringement offences

74. The Bill contains regulation making powers that allow for the creation of infringement offences.[23]

[23] Currently, clauses 775 and clause 857 both enable regulations to be made relating to infringement offences. Maximum infringement fees are the same under both clauses.

75. The provision that empowers the making of these regulations, does not, in itself, limit the right to be presumed innocent; and is accordingly consistent with the Bill of Rights Act. However, secondary legislation made under this empowering provision may limit the right.

76. We note for completeness that secondary legislation must be consistent with the Bill of Rights Act, otherwise there is a risk it will be *ultra vires*. We also note that the empowering provision limits the penalty for an offence to:

    a. $2,000, in the case of a natural person;

    b. $4,000 in the case of a person other than a natural person;

    c. $100 per stock unit for each infringement offence that is differentiated on the basis of the number of stock units, to a maximum fee of –

        i. $2,000 for each infringement offence in the case of a natural person; and

        ii. $4,000 for each infringement offence in the case of a person other than a natural person.

Section 27 – Right to justice

77. Section 27(1) of the Bill of Rights Act provides that every person has the right to the observance of the principles of natural justice by any tribunal or a 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. Section 27 is concerned with procedural fairness and what will be procedurally fair depends on the facts of each case. Natural justice includes the right to a fair hearing.

78. There are a number of provisions where the right to justice is *prima facie* engaged. These fall broadly into the following categories:

    a. A power for decision-makers or decision-making bodies to impose limitations on how submissions or evidence are given or restricting who may be heard in certain circumstances;[24]

    b. A restriction on receiving late submissions;[25]

    c. A power for decision-makers or decision-making bodies to strike out submissions, in whole or in part, in certain circumstances; and

    d. Restrictions on making submissions and representation, and other prohibitions, where persons are trade competitors.[26]

79. The objective of these provisions is to ensure the efficient and effective conduct of proceedings, including to prevent the use of litigation to oppose trade competition. Decision-makers and members or representatives of decision-making bodies will have to act in a manner that is consistent with the Bill of Rights Act when exercising public and

[24] This includes the ability to strike out submissions in certain situations – e.g., where the submission is frivolous or vexatious, or contains offensive language (Schedule 7 clauses 38, 89 and 117); limitations on who may be heard at hearings – e.g., limitations where the Independent Hearings Panel considers there is likely to be excessive repetition (Schedule 7 clause 111).
[25] For example, Commissioners of Regional Planning Committees or Independent Hearing Panels must not accept late submissions (Schedule 7 clauses 56(3) and 113(5)).
[26] Clauses 148-151.

statutory functions. As such, while section 27 is engaged, we consider any limitation on the right is demonstrably justified in terms of section 5 of the Bill of Rights Act.

80. The Bill also contains provisions enabling decision-makers or decision-making bodies to remove members or representatives.[27] Such powers must be exercised consistently with the Bill of Rights Act. Combined with the desirability of flexible and responsive processes, and the ability to judicially review any such decision, we are satisfied that these provisions are not inconsistent with section 27(1) of the Bill of Rights Act.

81. Section 27(3) provides that every person has the right to bring civil proceedings against the Crown. We consider that section 27(3) is engaged by provisions restricting the ability to bring proceedings in certain circumstances or by specified persons.

82. The Bill contains provisions conferring immunities on members of the Environment Court and Independent Hearings Panels, Registrars, and Judges for acts or omissions done in good faith in performance of their functions or duties. These provisions restrict the right to bring civil proceedings against the Crown. However, enabling these individuals and bodies to exercise their statutory jurisdiction in good faith without fear is an important social objective and an immunity for good-faith actions is a proportionate means in giving effect to it. Therefore, we consider that any limitation is demonstrably justified in terms of section 5 of the Bill of Rights Act.

83. The Bill also includes the ability for a judge to make an order restricting a person from commencing or continuing proceedings in the Environment Court where a Judge considers two or more proceedings were totally without merit.[28] The restriction on commencing or continuing Environment Court proceedings is not a complete bar. Such orders can be made for a limited time, and for no longer than five years and an individual subject to such an order may apply for leave to bring proceedings.

84. These orders may prevent an individual from bringing proceedings against the Crown and would therefore engage section 27(3). However, the right of access to the courts is fundamental, but not absolute.[29] The objective of such provisions is to protect litigants from having to respond to vexatious proceedings, and to prevent unreasonable use of judicial resources.

85. Similar provisions are contained in the Senior Courts Act 2016. In respect of those provisions, the Court of Appeal has held that an individual has a right under section 27 to be notified that such an order is being considered and to make submissions at a fairly conducted hearing before any order is made.[30] The Environment Court will need to act in accordance with natural justice principles when considering making an order.

86. We therefore consider that any limitation is demonstrably justified in terms of section 5 of the Bill of Rights Act.

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[27] For example, the Minister may remove a convenor for just cause (Schedule 6 clause 10(6)); the Chief Environment Court Judge may, at any time for just cause, remove an Independent Hearings Panel member by written notice to the member (Schedule 7 clause 100(2)); an appointing body may remove or replace any of its representatives on the planning committee, at any time, in accordance with its appointment policy (Schedule 8 clause 14(3)).
[28] Schedule 13 clause 94.
[29] See *Brogden v Attorney-General* (2001) NZAR 809 (CA) at [20].
[30] *Genge v Visiting Justice at Christchurch Men's Prison* [2019] NZCA 583 (CA).

Conclusion

87. 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