

25 October 2022

Hon Andrew Little, Acting Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Spatial Planning Bill**

### **Purpose**

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1. We have considered whether the Spatial Planning 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 23429/20.0). 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 section 19 (freedom from discrimination) and section 14 (freedom of expression). Our analysis is set out below.

### **The Bill**

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4. The Bill is intended to provide a more strategic and coordinated approach to long-term regional planning. It requires spatial planning at the regional level through the development of regional spatial strategies.
5. The purpose of the Bill is to:
  - a. assist in achieving:
    - i. the purpose of the Natural and Built Environment Act 2022<sup>1</sup> (the NBA), including by recognising and upholding te Oranga o te Taiao;<sup>2</sup> and
    - ii. the outcomes described in section 2.3 of the NBA;
  - b. promote integration in the performance of functions under the NBA, the Land Transport Management Act 2003, and the Local Government Act 2002.

## **Consistency of the Bill with the Bill of Rights Act**

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### **Section 19 – Freedom from discrimination**

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

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<sup>1</sup> Currently the Natural and Built Environment Bill, which is progressing alongside this Bill.

<sup>2</sup> Te Oranga o te Taiao is defined in cl 2.1(2) of the Natural and Built Environment Bill (PCO 23532/16.43) as:

- (a) the health of the natural environment; and
- (b) the intrinsic relationship between iwi and hapū and te taiao; and
- (c) the essential relationship between the health of the natural environment and its capacity to sustain life; and
- (d) the interconnectedness of all parts of the environment.

7. Two factors must be met for discrimination to be identified under section 19(1) of the Bill of Rights Act<sup>3</sup>:
  - a. there is a differential treatment or effect as between persons or groups in analogous or comparable situations on the basis of 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).
8. Differential treatment will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Race and ethnic origins are both prohibited grounds of discrimination under section 21 of the Human Rights Act. Whether disadvantage arises is a factual determination<sup>4</sup>.
9. Clause 38 requires regional planning committees to invite iwi authorities, customary marine title groups or representatives of other Māori groups with interests in the region, to enter into engagement agreements.
10. The purpose of an engagement agreement is to provide a mechanism for a regional planning committee and 1 or more Māori groups—
  - a. to agree and record how the groups are to participate in preparing a regional spatial strategy for the region; and
  - b. to agree how the groups' combined participation is to be funded by the committee.
11. The Bill does not require regional planning committees to invite any other non-Māori groups to enter into engagement agreements. We consider there are likely to be other comparable groups who have significant interest in engaging with regional planning committees on the relevant regional spatial strategy. The Bill could therefore be seen to draw a distinction on the basis of race or ethnic origins.
12. Nevertheless, we do not consider the provision gives rise to discrimination because it does not impose a material disadvantage on a comparable group. The Bill requires each regional planning committee to adopt a process for preparing the strategy and give public notice of the process (clause 29). The adopted process must be designed to encourage participation by the public and all interested parties, particularly those who may be involved in implementing the regional spatial strategy (clause 31). The requirement to invite Māori groups to enter into an engagement agreement does not preclude other individuals or groups from engaging with the committee on the strategy. The intent to increase Māori participation in planning reflects the status of Māori as kaitiaki of land and natural resources as well as the Crown's duties under Te Tiriti o Waitangi to Māori.
13. For completeness, if a material disadvantage could be seen to arise, we have undertaken a section 5 analysis. A provision that is found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified under section 5 of that Act.

*Do these limits serve a sufficiently important objective?*

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<sup>3</sup> *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 CA at [55].

<sup>4</sup> See, for example *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153 at [40] per Elias CJ, Blanchard and Wilson JJ.

14. The broad purpose of the Bill is to provide for regional spatial strategies that give strategic direction for the natural and built environment of a region. The Bill is intended to assist in achieving the purpose of the NBA, including by recognising and upholding te Oranga o te Taiao.
15. Policy papers indicate that the Resource Management Act 1991 (RMA) has failed to deliver on opportunities for Māori and that more effective and strategic roles are required in the future system to better enable Māori participation. A key objective of the RMA reforms more broadly is to give effect to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori, including mātauranga Māori.
16. Reasons given to provide a strong role for mana whenua in spatial planning include:
  - a. The opportunity to improve the quality of spatial strategies through the incorporation of mātauranga Māori;
  - b. The principles of Te Tiriti;
  - c. Existing co-governance arrangements developed through Tiriti settlements;
  - d. Existing agreements between iwi and local authorities.
17. We have no doubt that ensuring increased Māori participation in regional spatial planning is a sufficiently important objective.

*Is the limiting measure rationally connected with its purpose?*

18. Requiring engagement with Māori on regional spatial planning is rationally connected to the objective of making better provision for Māori participation in regional planning.
19. It is widely acknowledged that engagement with Māori to date on the resource management system has not been effective and has created inequities. The Resource Management Review Panel Report from June 2020 states that, despite the large number of provisions in the RMA designed to provide for Māori interests, these have not been implemented to enable mana whenua to engage meaningfully in the resource management system<sup>5</sup>.
20. A number of reasons lie behind this failure, including capacity and capability constraints for both mana whenua and local authorities. The panel identified a lack of adequate funding and resourcing is a barrier to mana whenua participation. Māori involvement in the resource management system has tended to be at the later stages of resource management processes, rather than at the strategic planning stages.
21. The engagement agreements are designed to provide for the funding and mandate needed for meaningful Māori engagement. The requirement for the regional planning committee to invite Māori groups to enter into engagement agreements early in the process is rationally connected to the objective of achieving meaningful Māori engagement in regional spatial planning.

*Do the limits impair the rights or freedoms no more than is reasonably necessary for sufficient achievement of the objective?*

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<sup>5</sup> The Resource Management Review Panel Report June 2020 can be found at [rm-panel-review-report-web.pdf \(environment.govt.nz\)](https://www.environment.govt.nz/rm-panel-review-report-web.pdf)

22. While there is no requirement in the Bill for committees to invite other parties to engage, the engagement agreement provisions do not preclude regional planning committees from engaging with other groups or individuals on the spatial plans. As noted above, the Bill requires the committee to adopt a process for preparing the strategy and give public notice of the process (clause 29), and the process must be designed to encourage participation by the public and all interested parties, particularly those who may be involved in implementing the regional spatial strategy (clause 31).
23. The Ministry for the Environment has advised that the committee would have the discretion to carry out engagement and utilise its funding as appropriate to carry out its functions under the Bill.
24. We consider that, for these reasons, any limit on the right to freedom from discrimination is no more than what is reasonably necessary.

*Is the limit in due proportion to the importance of the objective?*

25. A key objective of the RMA reforms is to give effect to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori, including mātauranga Māori. In order to ensure that the RMA reforms deliver on their objectives, it will be essential for the Crown to uphold its Te Tiriti obligations.
26. In addition, it is clear that engagement with Māori to date on RMA matters has not been effective and has created inequities. The engagement agreements address this inequity by providing specific engagement opportunities for Māori. Any limit on section 19 created by specific provision for engagement with Māori appears to be relatively minor, particularly when compared to the important objective of providing for better engagement with Māori on regional spatial planning.

#### **Section 14 – Right to freedom of expression**

27. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. Section 14 has been interpreted as including the freedom not to be compelled to say certain things or to be compelled to provide certain information<sup>6</sup>.
28. However, a limit on a right or freedom may be justified with relation to section 5 of the Bill of Rights Act. Justification under section 5 occurs where the limit is rationally connected to a sufficiently important objective; impairs the right or freedom no more than reasonably necessary to achieve the objective; and is otherwise in proportion to the importance of the objective<sup>7</sup>.

*Clause 57 – Minister can require information*

29. Clause 57 of the Bill allows for Ministers to require information to be supplied by the following bodies:
  - a. A regional planning committee
  - b. A local authority

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<sup>6</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>7</sup> See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

c. A network utility operator approved as a requiring authority.

30. The body must supply the information to the Minister within 20 working days of the date of notice, or a longer time set by the Minister, and must not charge the Minister for supplying the information.
31. The reporting requirements in the Bill are rationally connected to the important objective of the provision of regional spatial strategies as they assist in the provision of Ministerial oversight of the relevant authorities which provides a monitoring mechanism as to their efficacy. The requirements are limited to information that the Minister can reasonably require, and that is already held by the body or can be reasonably produced by the body. For these reasons we consider that any limits within the Bill on the right to freedom of expression are justified under section 5 of the Bill of Rights Act.

*Clause 63 – Duty to assist regional planning committees*

32. Clause 63 of the Bill sets out a duty for government departments, Crown entities, local authorities, iwi authorities and groups that represent hapū, and network utility operators approved as requiring authorities, to provide information to a regional planning committee when the committee requests the information to assist it in performing or exercising its powers, functions or duties under the Bill.
33. This duty is rationally connected to the important objective of the effective provision of regional spatial strategies as it is designed to assist regional planning committees in carrying out their functions. This requirement only applies where it is practical and reasonable for the body to provide the information or support. For these reasons we consider that any limits within the Bill on the right to freedom of expression are justified under section 5 of the Bill of Rights Act.

**Conclusion**

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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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