

24 March 2022

Hon David Parker, Attorney-General

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

Purpose

1. We have considered whether the 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 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 21 (freedom from unreasonable search and seizure) and s 25(c) (the presumption of innocence until proven guilty). Our analysis is set out below.

The Bill

3. New Zealand's Quota Management System (QMS) was introduced in 1986 to provide for the use of fisheries resources while ensuring sustainability. New Zealand's commercial, recreational and customary fishers are managed under the QMS.
4. According to the Bill's explanatory note, a strong fisheries management system requires commercial fishing to be sustainable, productive and inclusive. While the QMS has improved the sustainability of many of New Zealand's fisheries, there are fundamental issues with the fisheries management system that contribute to fish wastage, illegal activity and lost future economic opportunity. The Bill will amend the Fisheries Act 1996 (the principal Act) and will require amendments to the commercial and recreational fishing regulations to incentivise good fishing practice. The Bill also aims to better support the overall objective of the principal Act, which is to provide for the utilisation of fisheries resources while ensuring sustainability.
5. The Bill's explanatory note outlines the legislative changes it makes, which include:
 - a. the introduction of a graduated offences and penalty regime;
 - b. amended rules for commercial fishers that set out what fish must be brought back to port and what fish may (or must) be returned to sea;
 - c. a new defence to lawfully return fish to sea to save protected species;
 - d. amended processes for adjusting commercial and recreational catch limits;
 - e. enabling an approval process (established through regulations) that provides alternative avenues for fishers to dispose of unwanted catch; and
 - f. extended observation of fishing activities.

Consistency of the Bill with the Bill of Rights Act

Section 21 – Unreasonable search and seizure

6. 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 privacy, dignity and property.¹
7. Schedule 3 of the Bill amends the Fisheries (Electronic Monitoring on Vessels) Regulations 2017 by replacing regulation 9(1) and (2). Regulation 9(1) and (2) sets out what the electronic monitoring equipment on a vessel must be used to detect and record, and what the chief executive must be able to identify from the video recording, with reasonable accuracy. The amendment extends the fishing and related activities the electronic monitoring equipment must record, including sorting, processing, and discarding of fish, and measures to avoid, remedy, or mitigate fishing-related mortality.
8. To the extent that this extension engages s 21, noting that it is s 227A of the principal Act that allows the chief executive to require equipment to observe fishing and transportation to be installed and maintained on a vessel and this provision was found to be consistent with the Bill of Rights Act,² we consider it to be reasonable. The objective of the electronic monitoring system is to collect information for fisheries management and enforcement purposes. The search powers enable these objectives to be achieved.

Section 25(c) – Presumption of innocence until proven guilty

9. 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.³
10. In order to give full recognition to this right, which is also a fundamental principle of criminal law, the legal burden of proving every element of an offence to the required standard of proof, and the onus for disproving any potentially available defence, must remain on the prosecution.
11. Strict liability offences *prima facie* limit s 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by a finding that certain facts occurred without proof of *mens rea*. The accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability. This means that, where the accused is unable to prove a defence, they could be convicted even where reasonable doubt exists as to their guilt. The Bill creates several strict liability offences.
12. Strict liability offences may nevertheless be consistent with the Bill of Rights Act if the limits can be demonstrably justified in a free and democratic society, in accordance with

¹ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

² Ministry of Justice Legal Advice – *Consistency with the New Zealand Bill of Rights Act 1990: Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill* (24 September 2012).

³ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

s 5 of the Bill of Rights Act. Justification under s 5 occurs where the limit seeks to achieve, and 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.⁴

13. Clause 13 of the Bill amends s 72 of the principal Act. The new s 72(1) contains a general prohibition against commercial fishers returning or abandoning any fish or aquatic life that is subject to the QMS. The new s 72(4) creates graduated offences relating to returning, abandoning or retaining fish or aquatic life in contravention of the new s 72(1).
14. Clause 20 of the Bill amends s 252 of the principal Act to specify the penalties for offences affected by the changes made to s 72 of the principal Act. The new s 252(3A) provides that a person convicted, whether in the same or separate proceedings, of two or more offences against the new offences in s 72(4) (unlawfully returning, abandoning or retaining fish or aquatic life) committed within a period of 3 years is liable to a fine not exceeding \$250,000 in respect of the second offence and each subsequent offence committed within that period. This penalty applies regardless of the number of fish or aquatic life returned, abandoned or retained. In addition to the fine, an amendment to s 255C (cl 22) automatically requires forfeiture of property in accordance with the principal Act.
15. The new s 252(5)(ba) provides that a person convicted of an offence against the new s 72(4)(b) (unlawfully returning, abandoning or retaining more than 50 fish or aquatic life) is liable to a fine not exceeding \$100,000. In addition to the fine, an amendment to s 255C (by cl 22) provides that a court may order forfeiture of property in accordance with the principal Act. The new s 252(5A) provides that a person convicted of an offence against the new s 72(4)(a) (unlawfully returning, abandoning or retaining 50 or fewer fish or aquatic life) is liable to a fine not exceeding \$10,000.
16. In addition to the above, schedule 3 of the Bill amends the Fisheries (Amateur Fishing) Regulations 2013. Schedule 3 inserts new regulations 17B and 17C. These regulations apply to any person who takes or possesses any fish, aquatic life, or seaweed, to which the regulations relate, from or in New Zealand waters. They do not apply to a commercial fisher.
17. Regulations 17B and 17C create prohibitions on persons taking or possessing more than the general daily limit, or the general accumulation limit⁵, for specified species of fish, aquatic life, or seaweed. A person contravenes the prohibition if the person, on any day, takes or possesses more than the general daily limit, or the general accumulation limit, but not more than three times that limit. That person commits an offence and is liable on conviction to a fine not exceeding \$10,000. If a person takes more than three times the general daily limit, or the general accumulation limit, that person commits a serious non-commercial offence and is liable on conviction to a fine not exceeding \$20,000.

⁴ See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

⁵ An accumulation limit is the total number of specified fish, aquatic life, or seaweed, that can be taken across a multi-day trip.

18. Strict liability offences have been considered more justifiable where:
- the offence is a regulatory offence;
 - the defendant is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
 - the penalty for the offence is proportionate to the importance of the Bill's objective.
19. We consider the limit on s 25(c) to be justified under s 5 of the Bill of Rights Act because:
- Commercial and recreational fishing is a heavily regulated environment; parties should be aware of the risks and expectations of the system. Proper regulation of fishing in New Zealand is necessary to ensure public confidence in the fisheries management system and the fishing industry, including for compliant fishers, is maintained. It is also necessary to ensure fishing practices continue to be sustainable so that fisheries resources can continue to be enjoyed by future generations of New Zealanders, and to avoid, remedy, or mitigate any adverse effects fishing has on the aquatic environment.
 - In respect of the offences in s 72, the principal Act provides for a defence under s 72(5).⁶ In respect of regs 17B, the Fisheries (Amateur Fishing) Regulations 2013 provides for a defence under reg 157.⁷ In addition, s 241 of the principal Act⁸ provides an absence of fault defence.⁹ The matters of justification and excuse are more likely to be in the knowledge of the person who has not complied with the provisions of the principal Act or the regulations. For example, the defendant will be better placed to identify that the breach was due to an act or omission of another person, was an accident, or beyond the defendant's control, and the person took all reasonable precautions and exercised due diligence.
 - The penalties for the offences are financial in nature and do not involve imprisonment. While it is acknowledged that the financial penalty in s 72(4) is high, it reflects the seriousness of illegal dumping by commercial fishers when there is a clear disregard for the rules (illegally dumped two or more times within a 3-year period). With the presence of defences, we consider the financial

⁶ Section 72(5) provides a defence if the return was lawful, necessary for the safety of the vessel or crew, or complied with the directions of a fisheries officer or observer.

⁷ It is a defence to a charge of possessing more than the specified daily limit if the defendant satisfies the court that the number or quantity of fish, aquatic life or seaweed possessed in excess of the specified daily limit was not taken in breach of the regulations.

⁸ Section 241 of the principal Act refers to an "offence against this Act". References to "this Act" include references to rules and regulations made under the principal Act (see s 2(1A) of the principal Act). Therefore, the defence is available for offences committed against the Fisheries (Amateur Fishing) Regulations 2013.

⁹ It is a defence under s 241 of the principal Act if a defendant proves the offence was caused by another person, or by an accident, or by some other cause beyond the defendant's control, and the defendant took reasonable precautions and exercised due diligence to avoid the contravention, and if fish were taken, they were immediately returned to the sea (except where prohibited by this Act), and the taking of those fish was recorded or reported.

penalties to be proportionate and appropriate in the circumstances as they aim to deter non-compliance with the rules, thereby meeting the Bill's objective of ensuring sustainable fishing practices and protecting the marine environment.

20. For the above reasons, we consider the strict liability offences to be justified in terms of s 25(c) 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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