



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Conservation (Indigenous Freshwater Fish) Amendment Bill

18/10/2018

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1. Introduction

- 1.1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Conservation (Indigenous Freshwater Fish) Amendment Bill (Bill).
- 1.2. This submission comments on the Bill generally and makes some technical drafting suggestions to assist with the Bill's clarity and workability.
- 1.3. The Law Society does not seek to be heard in relation to this submission but is happy to provide clarification and/or work with officials advising the committee on drafting changes should that be of assistance.

2. General comments

- 2.1. As a general observation, the Law Society notes, from section 2.4 of the Regulatory Impact Statement,¹ that the scope of the review was limited, meaning a complete reform of the system to resolve any jurisdictional overlaps with the Fisheries Act was ruled out as an option on the basis that "past attempts did not reach clear agreement, so there was no agreed reform that could be implemented through a Bill in the available timeframe".²
- 2.2. The Law Society considers it would be appropriate to review any jurisdictional overlaps before implementation of the proposed changes.
- 2.3. There are also overlaps with other legislation that have not been addressed, notably the interface with the Resource Management Act 1991 (RMA). Activities controlled by the RMA impact directly and indirectly on indigenous freshwater fish, both positively and negatively. The desirability of a fragmented legislative management regime for indigenous freshwater fish requires careful and comprehensive consideration.

Lack of consultation

- 2.4. The Regulatory Impact Statement³ and Departmental Disclosure Statement⁴ expressly note that a key constraint on the Bill was the short timeframe before introducing the Bill to the House. This has meant that the Bill has been introduced without consultation with iwi or other stakeholders. The Law Society questions whether that is appropriate, given the implications it will have for some stakeholders such as:
 - (a) Iwi interests, given that many of the provisions within the Bill relate to and/or have the potential to affect iwi interests in fisheries.

¹ Department of Conservation, Regulatory Impact Statement – Conservation (Indigenous Freshwater Fish) Amendment Bill, at p 9.

² Department of Conservation, Regulatory Impact Statement – Conservation (Indigenous Freshwater Fish) Amendment Bill, at p 12.

³ Department of Conservation, Regulatory Impact Statement – Conservation (Indigenous Freshwater Fish) Amendment Bill, at p 4.

⁴ Departmental Disclosure Statement – Conservation (Indigenous Freshwater Fish) Amendment Bill, at [2.3.1].

- (b) Fish and Game Councils, given that under clause 5 (proposed section 17J(6)) a freshwater fisheries management plan can prevail over a sports fish and game management plans.
 - (c) Landowners alongside spawning grounds, given that under clause 11 (proposed section 26ZL(1)(aa)) the Director-General may declare through a public notice that specified land is spawning grounds for freshwater fish, and prohibit or impose restrictions and conditions on entry to that land.
 - (d) Owners of structures in water bodies such as NZTA, KiwiRail, local authorities, agricultural interests and hydro-electricity generators, given that clause 16(2) (proposed section 48A(1)(na)) would allow the making of regulations prohibiting, restricting, or regulating any structure or alteration to a water body that could impede or affect the passage of freshwater fish or specified freshwater fish.
- 2.5. Clause 16(3) (proposed section 48A(1)(r)) would also allow the making of regulations which, in relation to indigenous freshwater fish, specify activities that are reasonably likely to injure or kill specified indigenous freshwater fish, and regulate, restrict or impose conditions on those specified activities. This could have ramifications for a range of activities which take place in rivers such as recreational and/or commercial (tourist) jetboating, or activities authorised under the RMA as permitted activities or by resource consent including intakes, diversions and discharges.
- 2.6. As there has not been sufficient prior consultation, the Committee may wish to consider whether it has sufficient information concerning the potential impacts of the amendments that are proposed in the Bill.

Principle against retrospectivity

- 2.7. As set out above, clause 16 would amend section 48A of Conservation Act 1987 (the Act) to allow new regulations to be made for prohibiting, restricting, or regulating any structure or alteration to a water body that could impede or affect the passage of freshwater fish or specified freshwater fish. A similar regulation-making power exists with respect to activities that are reasonably likely to injure or kill specified indigenous freshwater fish.
- 2.8. Legislation should generally have prospective and not retrospective effect.⁵ It is acknowledged that the strength of the application of the presumption against retrospective legislation depends on context. While Parliament has the power to pass such legislation, good reasons are required to justify such a departure in order to avoid infringing the rule of law.
- 2.9. While the principle against retrospectivity should mean that regulations cannot be made which affect lawfully established structures or activities, this is not necessarily clear cut when dealing with structures or activities in rivers or streams which are subject to resource consent requirements under the RMA with finite consent terms. These structures need to be reconcented on an ongoing basis which gives rise to a risk that existing structures may need to be retro-fitted or re-designed (a costly exercise).

⁵ Legislation Advisory Committee *Guidelines – Guidelines on Process and Content of Legislation* at 4.7 (2018 edition), chapter 11 and s 7 of the Interpretation Act 1999.

- 2.10. The Law Society recommends that the relationship between any such regulations and the RMA be clarified to be consistent with the principle against retrospectivity.

3. Technical drafting suggestions

Part 1 – Amendments to Conservation Act 1987

Clause 4 – section 2 amended (proposed definition of ‘freshwater fish’)

- 3.1. Clause 4 of the Bill proposes to amend the definition of **freshwater fish** currently contained in section 2(1) of the Act by replacing “fresh water” with “freshwater (but not any part of that water that is seawater)”. The explanatory note to the Bill states:

“Because freshwater is defined to include bodies of water that comprise seawater and freshwater (for example, coastal lagoons), the requirement that the fish species inhabit freshwater in its lifetime is amended to exclude those parts of the freshwater that is seawater.”

- 3.2. The change to the definition is to avoid confusion with indigenous fish that are salt water fish. The Law Society considers that is appropriate but notes that the term “fresh water” appears (in separated form as is the current position) only once in the definition of **freshwater fish**. Presumably the definition is therefore intended to read:

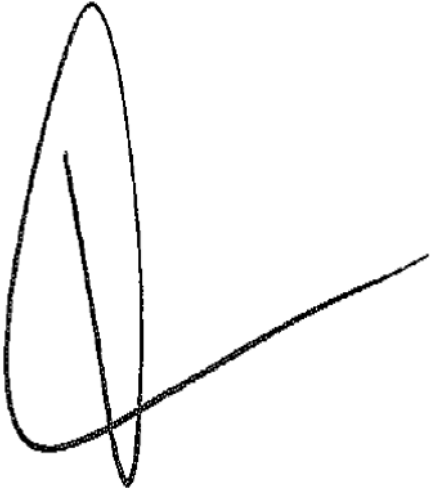
Freshwater fish includes all species of finfish of the Classes Agnatha and Osteichthyes, and all shellfish of the Classes Mollusca and Crustacea, that must, at any time in the life history of the species, inhabit ~~fresh water~~ freshwater (but not any part of that water that is seawater); and includes any part thereof and such finfish and shellfish that seasonally migrate into or out of freshwater

- 3.3. However, section 2 of the Act separately defines **freshwater**, and includes waters of estuaries or coastal lagoons, estuarine waters, and waters in the mouth of every river or stream. No change is proposed to the standalone definition of “freshwater”. Further, the term “seawater” is not defined in the Act.
- 3.4. Using a defined term that includes coastal lagoons (which include a mix of fresh water and seawater) and then excluding seawater (as proposed) has the potential to cause confusion for users. The Law Society recommends that this should be clarified.

Clause 6 – Section 26ZG amended (Application of Part)

- 3.5. Clause 6 of the Bill concerns the application of Part 5B of the Act to freshwater fisheries by proposing to replace section 26ZG(2)(c) where Part 5B does not apply. The new subparagraph states that Part 5B of the Act does not apply to the “taking, holding, possession, sale, or disposal of freshwater fish by a person” including “a person who is authorised (whether generally or specifically) by or under Treaty settlement legislation”.
- 3.6. Reference to authorisation under legislation “whether generally or specifically” is a relatively imprecise term and the Law Society queries whether it is clear from relevant Treaty settlement legislation whether someone is “generally” authorised by that legislation.

3.7. The Law Society recommends that this is clarified and that consideration is given to consultation with Iwi.

A handwritten signature in black ink, consisting of a large, vertical, teardrop-shaped loop on the left and a long, thin horizontal stroke extending to the right.

Andrew Logan
Vice President
18 October 2018