New Zealand Law Society
Te Kāhui Ture o Aotearoa

Gene Technology Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

17 February 2025

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Gene Technology Bill (**Bill**), which seeks to establish a new regulatory regime for gene technology and genetically modified organisms (**GMOs**).[1]

1.2 This submission, prepared with input from the Law Society's Public Law Committee,[2] raises concerns about:

(a) the independence of the Gene Technology Regulator;

(b) the limited appeal rights available to parties;

(c) the limited scope of reviews of decisions made by the Gene Technology Regulator;

(d) how the Bill will enable the Crown to give effect to its obligations under the Treaty of Waitangi;

(e) the broad regulation-making powers granted to the Minister responsible for administering the legislation; and

(f) the application of the Official Information Act 1982.

1.3 The Law Society wishes to be heard in relation to this submission.

2 Independence of the Gene Technology Regulator

2.1 Clauses 108 and 109 of the Bill require there to be a Gene Technology Regulator (**Regulator**) to regulate the use of gene technologies and regulated organisms in order to achieve the purpose of the Bill. Clause 111(1) requires the Regulator to act independently of the Minister responsible for administering the legislation (**Minister**) and the EPA (subsection (a)), but nevertheless be subject to 'general policy directions' (**GPDs**) given by the Minister (subsection (b)).

2.2 We understand GPDs are intended to be 'used by the Minister to address operational matters such as how to set risk tolerance, specifying performance targets and providing direction on use of discretionary powers'.[3] They could be used, among other things, to:[4]

(a) influence the risk assessment process by providing direction on risk tolerance (i.e., the level of risk at which an application should be approved);

(b) provide specific guidance on how the scope of environmental and human health risks should be interpreted;

(c) set *binding* operational expectations, such as achieving a certain percentage of approvals within a percentage of the statutory maximum; and

(d) require the regulator to make greater use of discretionary powers.

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1 Explanatory Note of the Bill.

2 See the Law Society's website for more information about its law reform committees: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

3 Ministry of Business, Innovation and Employment *Regulatory Impact Statement Reform of Gene Technology Regulation* (31 July 2024) (**RIS**) at [508].

4 RIS at [461].

2.3 These examples, and the reference in the Bill to the Regulator being 'subject to' GPDs, suggests GPDs are binding on the Regulator, and can potentially compromise their ability to act independently of the Minister.

2.4 This is a notable departure from the Australian regime, on which the framework in this Bill is based.[5] The Australian framework provides for Ministerial direction only 'in relation to ethical issues or recognising areas designated under State law for the purposes of preserving the identity of GMO or non-GMO crops'.[6]

2.5 We also note the RIS refers to the Biosecurity Act 1993,[7] which provides for the making of national policy directions, which are, in some respects, similar to GPDs. However, the requirements and purposes of national policy directions made under that Act are more clearly prescribed, unlike this Bill, which does not provide any clarity, or impose any limitations on the form, content, or purpose of a GPD.

2.6 In the absence of any definition of 'general policy direction' in the Bill, the Law Society is concerned subsection (b) of clause 111(1) would compromise the Regulator's ability to act independently, as required under subsection (a), and materially undermine the Regulator's perceived independence. These concerns are heightened because:

(a) the Bill does not require the Minister to undertake any consultation about a proposed GPD; and

(b) the Regulator is to be a single individual, rather than a board or a committee comprised of a group of individuals.[8]

2.7 The Regulatory Impact Statement (**RIS**) for the Bill also identifies similar concerns about the independence of the Regulator:

(a) it acknowledges that Ministerial influence of GPDs could 'undermine the regulator's authority and public trust', and notes 'the public may perceive the Minister's decisions or directions as politically driven and the result of industry lobbying';[9] and

(b) states the agencies consulted on this particular proposal were also concerned 'the ability for ministerial influence would likely take away from a public perception of the regulator as being independent, science-based, and technically focussed'.[10]

2.8 In addition, the RIS notes that GPD provisions could be used to increase or decrease the weight given to Māori rights and interests by the regulator (such as through assigning more or less weight to the advice of the Māori Advisory Committee).[11] It notes this approach would create uncertainty and may impact on appropriate protection of Māori

5 RIS at [95].
6 RIS at [466].
7 At [461].
8 Clause 108(2) of the Bill.
9 RIS at [472].
10 RIS at [468].
11 RIS at [467].

rights and interests.[12] This could undermine the objective of the Bill to 'recognise and give effect to the Crown's obligations under the Treaty of Waitangi'.[13]

2.9 Under rule of law and public law principles, GPDs should only be made for proper and specified purposes that do not conflict with other provisions in the Bill. As currently drafted, the Bill imposes no safeguards or other limitations on GPDs to ensure they cannot be used, for example, to influence the Regulator, or to prevent the Crown from giving effect to its obligations under the Treaty of Waitangi (as discussed above).

2.10 For these reasons, we recommend deleting clause 111(1)(b), so the Regulator may act independently, unconstrained by GPDs made by the Minister. If clause 111(1)(b) is to remain, notwithstanding the concerns outlined above, we recommend**:**

(a) Amending the clause to provide that the Regulator *may take into account* any GPDs given by the Minister. This would enable the Regulator to simply take into account any GPDs given by the Minister, without any obligation or requirement to comply with or implement them.

(b) Providing greater certainty as to what GPDs are, what topics and matters they can cover, and the process for making GPDs (including any process the Minister must follow). Currently, these matters are not specified in the Bill, and are largely discretionary, which is not desirable given the potential to interfere with the Regulator's independence.

(c) Amending the Bill to require the Minister to undertake public consultation on proposed GPDs.

3 Limited appeal rights

3.1 Clauses 141 and 142 allow appeals to the High Court, Court of Appeal and Supreme Court only on questions of law. Such appeals would exclude examination of the facts and merits of a decision, and whether a decision-maker erred in reaching certain conclusions about the facts relevant to a decision. This effectively makes the appeal process similar to judicial review (which is already available under the Bill).[14]

3.2 Where appeals are to be limited to questions of law, the reasons for this should be made clear, and include careful consideration of the purpose of the appeal, the competence of the appellate body, and the appropriate balance between finality, accurate fact-finding and correct interpretation of the law.[15] While the Departmental Disclosure Statement for this Bill acknowledges that the Bill limits appeals to questions of law,[16] it states that, given time constraints and the stage of policy development when the RIS was completed, the RIS did not include any analysis of the proposed appeals process (and the matters identified above).[17]

12 RIS at [467].
13 Explanatory Note of the Bill.
14 Legislation Design and Advisory Committee *Legislation Guidelines* (2021 edition) at page 142.
15 Above n 14 at page 142.
16 *Ministry of Business, Innovation and Employment* Departmental Disclosure Statement (6 December 2024) (**DDS**) at page 6.
17 DDS at page 8.

3.3 We acknowledge other statutes such as the Employment Relations Act 2000 and the Resource Management Act 1991 also limit certain appeals to questions of law. However, the limited appeal mechanisms in those enactments involve specialist courts in the first instance, which have expertise in the subject matters of those appeals, and are well-equipped to consider questions of facts.

3.4 We note the District Court, which is the only Court which will be able to consider questions of fact under this Bill, is a generalist court with a high workload and a high volume of cases. Therefore, it may be worth seeking advice from officials on whether it would be appropriate to broaden the appeal rights available under this Bill by allowing merit-based appeals to the higher courts.

4 Mechanism for reviewing the Regulator's decisions

4.1 Clause 134 and Schedule 3 of the Bill allow applicants and licence holders to ask the Regulator to review certain decisions (including determinations about regulated organisms or gene technology, and decisions to decline or grant licences). The Bill does not enable anyone else, including anyone who might have been consulted on, or who made a submission on an application (for example, under clause 18 of the Bill), to seek such a review.

4.2 It is unclear why the review mechanism is limited in this way.[18] We appreciate its scope may have been intentionally narrowed to limit the requests for review and reduce the burden on the Regulator to respond to those requests. However, without any ability to seek a review under clause 134, individuals who are not applicants or licence holders, but are nevertheless likely to be impacted by a decision, will have no option but to seek judicial review in order to challenge decisions made by the Regulator. This would likely create delays in the overall review process, and impose additional costs on both the Regulator and individuals seeking judicial review.

4.3 We therefore recommend broadening the scope of clause 134 and Schedule 3, so others who are also directly affected by a decision have the ability to seek a review. This clause could be modelled on section 120 of the Resource Management Act 1991, which allows any person who made a submission on an application or review of consent conditions to appeal to the Environment Court (in addition to the applicants and consent holders themselves).

4.4 We also note clause 135(2) of the Bill requires the Regulator to review decisions 'as soon as is reasonably practicable' after a request is made under clause 134. We suggest amending this clause to specify an appropriate timeframe for making a decision on a review, in order to provide more clarity and certainty for all parties involved in the review process.

18 The DDS states, at page 8, that the review mechanism was excluded from the scope of the Bill because of time constraints and 'the stage of policy development when the RIS was completed'.

5 Giving effect to obligations under the Treaty of Waitangi

5.1 This Bill has implications for Māori, and the Crown's obligations under the Treaty of Waitangi – these are canvassed in the Waitangi Tribunal's *Ko Aotearoa Tēnei* report (**WAI262**),[19] and the RIS.[20]

5.2 However, the Law Society is concerned the Bill does not enable the Crown to give effect to its obligations under the Treaty, or the recommendations from WAI262, for a number of reasons:

(a) The RIS notes that Māori stakeholders consulted on the framework proposed in the Bill raised four 'major concerns' relating to environmental impacts, impact on cultural values and practices, bioprospecting, and partnership and representation.[21] It also acknowledges there may be other areas of significant concern for Māori not captured in the RIS.[22]

(b) Te Puni Kōkiri considers the Māori Advisory Committee model provided in the Bill does not sufficiently provide for Māori interests, and limits the scope for Māori to uphold kaitiaki relationships and directly benefit from these reforms.[23]

(c) The single Regulator model does not implement the recommendation in WAI262 for Māori to be represented on the decision-making board.[24]

(d) The Hazardous Substances and New Organisms Act 1996, which will be partly replaced by this Bill, contains a provision which requires those exercising powers and functions under that Act 'to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)'.[25] While this Bill contains a provision which explains *how* it 'recognises and respects the Crown's obligations under the principles of the Treaty of Waitangi',[26] it does not impose a similar requirement on the Regulator and others who will exercise powers and functions under the Bill. Maintaining the status quo is more likely to actively protect Māori rights and interests under the Treaty in the absence of such a requirement.[27]

(e) The RIS also notes the proposal to allow activities to be classified as 'exempt' and 'non-notifiable' activities, without wider public notification or consultation:[28]

> … would change the opportunities for Māori to provide input to decisionmakers on how their rights and interests may be affected by activities. It would change from predominantly case-by-case input under the status quo to providing input on the class of activities that qualify for those types of authorisations.

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19 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011).
20 Particularly at pages 33-39.
21 At [113].
22 At [114].
23 RIS at [126].
24 RIS at [128].
25 Section 8.
26 Clause 4.
27 RIS at [287].
28 RIS at [237].

> This has efficiency gains for the regulator and for Māori. However, this trades off the ability for Māori to provide input for most individual low-risk activities.

5.3 Such outcomes are likely to be inconsistent with the objective of the Bill to 'recognise and give effect to the Crown's obligations under the Treaty of Waitangi'.[29] We therefore invite the select committee to consider whether amendments are necessary to meet this objective, and to give effect to obligations arising under the Treaty of Waitangi.

6 Broad regulation-making powers

6.1 The Bill allows for the making of regulations on a broad range of matters, including:

(a) the criteria which must be satisfied in order for an activity to be classified as a notifiable or non-notifiable activity (clauses 158 and 159);

(b) the criteria and conditions for activities requiring a licence (clause 161); and

(c) offences for breaching regulations, which carry a maximum penalty of $20,000 (clause 165(a)).

6.2 These are significant matters which either clarify key aspects of the proposed new regulatory framework (and are therefore matters of significant policy), or carry significant penalties. The effect of clause 167 is that such regulations could be made without public consultation. In the Law Society's view, it would be more appropriate for these matters to be prescribed in primary legislation (i.e., in the Bill itself), so they are passed into law with Parliamentary oversight and accountability, and can be easily located alongside other key provisions.[30] These matters are also unlikely to frequently change over time, and would benefit from the certainty and stability of being clearly set out in the primary legislation.

7 Application of the Official Information Act 1982

7.1 Clause 59(3) provides that the Official Information Act 1982 (**OIA**) does not apply to information provided to the Regulator that is likely to relate to a licence or determination application, until the application is received by the Regulator. Clause 59(4) then specifies that such information supplied to the Regulator is to be held on behalf of the person who supplies it.

7.2 The RIS does not consider or justify the exclusion of this information from the OIA or why it differentiates information held by the Regulator pre/post application. The DDS identifies that this is due to the time constraints imposed on the policy development process, and states that the limitation on application of the OIA is '*necessary to protect confidential information while an application is being developed and to avoid discouraging pre-application engagement with the Regulator*.'[31] The purpose of clause 59(4) remains unclear.

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29 Explanatory Note of the Bill.

30 We also note the *Legislation Guidelines* (above n 14, at pages 68-69), requires matters of significant policy, and the creation of significant penalties, to be addressed in primary legislation.

31 DDS at 4.9.

7.3 The OIA is a fundamental constitutional statute that has as its aim the progressive availability of official information to enable participation in government, and promote the accountability of Ministers and officials. It is intended to promote the availability of information unless one of the reasons for withholding information apply (and in the case of some of those reasons, there is not a countervailing public interest in disclosure). Pre-application information would be official information and subject to the OIA unless clause 59(3) is enacted.

7.4 Statutory exemptions (including limitations such as those proposed in the Bill) from the OIA should only be enacted for good reasons and after careful consideration.[32] This does not appear to be the case here. There are already reasons for withholding under the OIA that could apply to this information and enable it to be withheld. For example, if the concern is to maintain the commercial interests of the person the information relates to or who provided it, section 9(2)(b)(ii) could be used. If the concern is to protect information provided in confidence, section 9(2)(ba) may apply. Although these withholding grounds are subject to the public interest test in section 9, release would only be required where, in the circumstances of a particular request, there are countervailing public interest considerations favouring disclosure (or partial disclosure), which outweigh the need to withhold the information.[33]

7.5 Indeed, there are many other situations where organisations subject to the OIA hold pre-application information, which is official information under the OIA, but the organisations are commonly able to withhold that information under the OIA. The Commerce Commission and the Overseas Investment Office are examples. Another example is local authorities routinely withholding information obtained during engagement prior to a party lodging a resource consent application.

7.6 No analysis has been provided or appears to have been undertaken as to why the protections in the OIA for this kind of information are not sufficient.

7.7 In addition, by exempting pre-application information from the OIA, the Bill precludes consideration of any countervailing public interest factors that favour release of requested information where one or more of the reasons in section 9 of the OIA apply. This means there is no consideration of these factors in cases where transparency and accountability (such as where something 'goes wrong') strongly favour the disclosure of information. It also avoids the independent oversight of the Ombudsman.

7.8 There appears to be no justification for placing this information outside of the scope of the OIA, which is capable of protecting legitimate interests from likely prejudice. We recommend that clause 59(3) is removed.

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32 As the Ministry of Justice has identified, there is in inadequate scrutiny of legislative clauses that override the disclosure requirements of the OIA, and it is not currently known how many of these clauses exist. Targeted engagement on this topic was undertaken by the Ministry in March 2024. The Law Society's feedback is available on its website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/law-reform-submissions/discussion-papers/.

33 There are also conclusive reasons for withholding information (section 6 of the OIA), such as where releasing information could prejudice the security or defence of New Zealand. These conclusive reasons are not subject to the public interest test. It is possible that they could apply in some instances.

7.9 Finally, we note the language of clause 60, which talks of 'withholding' information in the context of requirements or permissions in the Bill to publish information. Although clause 60(1)(b) provides that the clause does not affect the operation of the OIA, the terminology of 'withholding' is more closely associated with decisions under the OIA. For clarity, it may be preferable to use language such as 'The Regulator is not required to publish any information that the Regulator…'.

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