New Zealand Law Society
Te Kāhui Ture o Aotearoa

Fisheries Amendment Bill

27/06/2022

Fisheries Amendment Bill 2022

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Fisheries Amendment Bill (**Bill**).

1.2 The Bill seeks to amend the Fisheries Act 1996 (**Act**) and support a commercial fishing sector that is "innovative, and technology driven, has highly selective practices and is responsive to cumulative pressures on the marine environment".[1]

1.3 This submission has been prepared with input from the Law Society's Environmental Law Committee.[2]

1.4 The Law Society does not wish to be heard in relation to this submission.

2 Drafting issues in new section 72

Offence to return, abandon, or retain fish, and animals and plants that are aquatic life

2.1 New section 72(1) prohibits abandoning or returning fish, except as provided for in subsections (2) and (3). Subsection (2) requires commercial fishers to abandon or return certain species to the sea if required by an instrument made under section 72A(2)(c), and subsection (3) provides that commercial fishers may abandon or return certain species if permitted by an instrument made under section 72A(2)(a).

2.2 An offence provision is then included in subsection (4). The drafting of subsection (4) is confusing because it relates to failures to comply with all of subsections (1), (2) and (3). The phrase that appears in paragraphs (a) and (b) ("returns, abandons, or retains") reads as an apparent impossibility. It renders this provision inaccessible to anyone who does not have a good understanding of how to read legislation. The Bill could be improved by describing a breach of subsection (2) as a separate offence, and amending subsection (4) as follows (amendments are in red font):

> (4) Every person commits an offence and is liable to the applicable penalty set out in section 252(3A), (5)(b), or (5A) if the person, in contravention of subsection (1) or subsection (2),—

2.3 It would, however, be preferable to create an entirely separate offence provision (which can be modelled on subsection (4)) which exclusively addresses breaches of subsection (2).

References to "animals or plants that are aquatic life"

2.4 Proposed new section 72(4) refers to "fish" and "animals or plants that are aquatic life". While the term "aquatic life" is defined in the Act,[3] the terms "animals" and "plants" are not defined in the Act or the Bill.

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1 Explanatory Note of the Bill.

2 More information about this Committee is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/environmental-law-committee/.

3 Section 2(1).

2.5 We appreciate that the references to "animals" and "plants" may have been included in the Bill to address grammatical issues which arise when prescribing the specific numbers of "aquatic life" that set the threshold for the new section 72(4) offence. However, the references to these undefined terms raise some practical difficulties.

2.6 While the term "plants" is not defined in the Bill, it is likely that seaweed (which includes all kinds of algae and sea-grasses that grow in fisheries waters)[4] comes within the meaning of "plants", and therefore, within the ambit of new section 72(4). In the absence of a definition (or any guidance as to what constitutes one "plant"), it would be difficult to precisely quantify how much algae or seagrass a person has returned, abandoned, or retained. As a result, there could be considerable uncertainty as to whether a person should be charged with an offence against new section 72(4)(a) (for returning, abandoning, or retaining *50 or fewer* plants) or new section 72(4)(b) (for returning, abandoning, or retaining *more than 50* plants). This is particularly important in light of the significantly higher penalties imposed on individuals who are convicted of an offence against new section 72(4)(b).

2.7 If this clause is to be enacted, the select committee should consider amending the Bill to define the terms "animals" and "plants", and to provide some guidance on what constitutes one "plant" (particularly in relation to algae and seagrass). Alternatively, the Committee should consider whether the offences in new section 72(4) should be graduated using a different model which does not require a precise count of the plants that are returned, abandoned, or retained.

3 Observer programme (new section 223(3A))

3.1 New section 223(3A) seeks to allow the Chief Executive to take into account the number of demerit points recorded against certain individuals when deciding whether to place an observer on board a vessel, and the appropriate period of observer presence on the vessel. This includes demerit points recorded against:

(a) holders of fishing permits;

(b) owners and caveators of quota and annual catch entitlements;

(c) owners, operators, notified users, and masters of vessels;

(d) owners and persons in charge of any premises where fish are received, purchased, stored, transported, processed or sold;

(e) persons engaged in the receiving, purchasing, transporting, processing, storage, sale, or disposal of fish; and

(f) holders of high seas fishing permits.

3.2 If demerit points are to inform the placement of observers, it is likely that observers would be placed on vessels to monitor compliance and detect offences, or to penalise individuals who accrue a certain number of demerit points.

3.3 We note that section 224(1) of the Act only requires the chief executive to notify owners, masters, operators, and licence holders of an observer being placed on their vessel.

[4] Section 2(1) of the Act.

Similarly, the offence in section 224(3) (causing or allowing a vessel to be put to sea without the specified number of observers on board) is limited to owners, masters, operators, and licence holders, of or in respect of a vessel.[5] Against this background, it is unclear why the chief executive may have regard to demerit points against individuals who do not own or operate the vessel (such as persons in charge of any premises where fish are stored or sold, or persons engaged in processing, storing and selling fish).

3.4 For consistency with sections 224(1) and 224(3), we suggest amending new section 223(3A)(a) to clarify that the chief executive may only have regard to demerit points against owners, masters, operators, and licence holders, of or in respect of a vessel, as follows:

> (a) "have regard to the number of demerit points recorded against the owner, master, operator or licence holder in respect of the vessel under regulations made under section 298A…"

3.5 We also note that the primary purpose of the observer programme is to collect reliable and accurate information for fisheries research, fisheries management, and fisheries enforcement.[6] Unlike fishery officers (who are enforcement officers),[7] observers have no regulatory or law enforcement functions, or powers to investigate offences, gather evidence of offending, or enter premises (including vessels) for such purposes.[8] The Act maintains a strict demarcation between observers and fishery officers and states that no fishery officer shall be appointed as an observer.[9]

3.6 If demerit points are to inform the placement of observers, a greater proportion of observer resources may be diverted to vessels of individuals with a high number of demerit points (for the purpose of collecting enforcement data). This risks undermining the other purposes of the observer programme (which include collecting data on fisheries research, fisheries management, vessel safety, and employment).

4 Penalties for multiple convictions in the same proceeding (new section 252(3A))

4.1 The Bill seeks to amend sections 252, 255A and 255C of the Act, and provide for graduated penalties for unlawfully discarding or retaining certain quantities of fish or aquatic life.[10] This graduated penalties regime seeks to ensure fishers are penalised in a manner that is proportionate to their offending, and to ensure the Ministry of Primary Industries (**MPI**) can apply compliance measures more easily, more often, and more effectively.[11] This proposed penalties regime gives rise to a number of concerns, as discussed below.

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5 *D'Esposito v MPI* [2018] NZHC 1529.

6 Section 223(1) of the Act.

7 Search and Surveillance Act 2012 (SSA), section 3(1) and Schedule.

8 Fishery officers can exercise powers of entry, search, inspection, examination, or seizure under Part 11 of the Fisheries Act. There are no statutory provisions which allow observers to exercise such powers.

9 Section 223(5) of the Act.

10 Departmental Disclosure Statement, page 6.

11 Fisheries New Zealand *Fisheries Amendment Bill: Strengthening Fishing Rules and Policies – Regulatory Impact Assessment* (October 2021), pages 29-30.

Inconsistency with objective to impose proportionate penalties

4.2 New section 252(3A) provides that *"[e]very person convicted, **whether in the same or separate proceedings**, of 2 or more offences against section 72(4)(a) or (b) … is liable to a fine not exceeding $250,000 in respect of the second offence and each subsequent offence committed within that period"* (emphasis added).

4.3 The means that on an individual's first prosecution for two or more offences of unlawfully discarding fish, the maximum penalty of $250,000 could apply to the second offence (even if the second offence involves discarding 50 or fewer fish or aquatic life). The penalty for a single offence of this type is $10,000,[12] presumably because of an assessment that this is a low-level offence. The imposition of a significantly higher penalty for two or more offences of this type runs counter to the objective of the Bill to penalise offenders in a manner that is proportionate to their offending. In addition:

(a) A perverse incentive could be created for prosecutions to be taken on multiple charges, simply for the purpose of encouraging a defendant to plead guilty to a single representative charge by way of a negotiated outcome.

(b) Notwithstanding the existence of a viable defence, this could mean that a fisher elects to plead guilty to minimise the penalty and/or to avoid forfeiture.

(c) The regime does not consider the impact of cumulative maximum penalties on a person who is charged with two or more offences. For example, a person convicted of two or more offences with a maximum penalty of $100,000 could be required to pay a penalty of $200,000 for two charges, $300,000 for 3 charges, and so forth (irrespective of the total number of fish or aquatic life returned, abandoned, or retained, and whether the offences were committed on the same day or on a single fishing trip).

Alignment with sentencing principles

4.4 The Act currently requires the court to have regard to "the need to maintain adequate deterrents" when imposing a sentence for an offence against the Act.[13] In making this assessment, the court must consider the nature of the offence and any previous convictions which demonstrate the need for a greater deterrent response.[14]

4.5 Previous convictions (at least for similar types of offending) may support an uplift of penalties where deterrence is the dominant sentencing principle.[15] However, we note that the majority of fisheries prosecutions are likely to involve multiple changes and incidents of offending (as a result of the proposed strict liability regime and operational realities). These prosecutions often involve mistakes which accumulate because offenders simply repeat the same mistake or behaviour without any intention to offend.

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12 New section 252(5A).

13 See section 254 of the Act, which provides that *"… the court shall, in imposing sentence, take into account … the need to maintain adequate deterrents against the commission of such offences".*

14 *Reedy v Police* [2015] NZHC 1069 at [19].

15 *R v Arthur* [2005] 3 NZLR 739, (2005) 21 CRNZ 453(CA); Simon France (ed) *Adams on Criminal Law* (online ed, Thomson Reuters) at [SA 9].

4.6 The Regulatory Impact Assessment suggests that the proposed regime seeks to deter reoffending, improve compliance and incentivise good fisher behaviour.[16] Providing for an escalation of the penalty for two or more convictions in the same proceeding undermines that purpose and presents no opportunity for offenders to reform their behaviour. In addition, the proposed regime fails to accommodate:

(a) those who are entitled to receive credit for the absence of previous convictions;[17] and

(b) the existence of previous convictions as an aggravating factor.[18]

4.7 We note that these concerns similarly apply to new section 255C(1)(aa) which provides that, *"on conviction for a second or subsequent offence referred to in section 252(3A)"*, forfeiture of fish, fishing equipment and the vessel will follow.

Compliance with requirements of the Criminal Procedure Act 2011

4.8 The Criminal Procedure Act 2011 (**CPA**) provides that a charge must contain "*sufficient particulars to fully and fairly inform the defendant of the substance of the offence"*.[19] If a defendant is to be charged with an offence which carries a greater penalty where the defendant has a previous conviction, the charge must disclose:[20]

(a) the range of penalties available on conviction for the offence; and

(b) the existence of any previous convictions which would make the defendant liable to a greater penalty.

4.9 If this provision is retained, care must be taken to ensure the maximum penalties for second or subsequent offences are disclosed in the charge (including maximum penalties which would apply in the event of a conviction in relation to the first charge).

4.10 In light of these concerns, we recommend amending new section 252(3A) to provide that the maximum penalty of $250,000 only applies where a person has a previous conviction for another offence against sections 72(4)(a) or (b) in a *separate proceeding* (rather than the same proceeding).

5 Prohibition of fishing activity in case of reoffending (section 257 of the Act)

5.1 Section 257(1) of the Act states a person who is convicted of two or more offences that are referred to in sections 252(1) to (3) of the Act may be prohibited from:

(a) holding any licence, approval, permission, or fishing permit obtained under this Act;

(b) engaging in fishing or any activity associated with the taking of fish, aquatic life, or seaweed; or

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16 Above n 11, at pages 26 and 47.

17 This is an element of the offender's previous good character (see section 9(2)(g) of the Sentencing Act 2000).

18 Sentencing Act, section 9(1)(j).

19 Criminal Procedure Act 2011, section 11(4).

20 Criminal Procedure Act, section 22.

(c) deriving any beneficial income from activities associated with the taking of fish, aquatic life, or seaweed.

5.2 The Bill does not clarify whether section 257 also applies to the offences that are referred to in new sections 252(3A) of the Bill. This is likely due to an oversight, and we invite the select committee to consider if section 257 should be amended to include the offences in these new sections.

6 The proposed infringement offences regime (new section 297(1)(na))

6.1 New section 297(1)(na) seeks to enable regulations to be made which prescribe infringement offences for various fishing activities. These infringement offences in the Bill aim to encourage compliance, correct any offending in a proportionate way, deter any future offences, and to enhance MPI's ability to operate the VADE compliance model.[21]

6.2 In a recent submission to MPI, the Law Society raised several concerns regarding the proposed infringement offence regime. We reiterate these concerns below, and invite the select committee to consider whether the proposed regime meets the objectives set out in the Regulatory Impact Assessment.[22]

Potential 'net-widening' effect

6.3 Researchers have cautioned that extensive infringement regimes could have a 'net-widening' effect,[23] for example, where notices are issued when they should not be issued, or when a warning or caution is more appropriate.[24] This phenomenon has been attributed to the cost, ease, and efficiency of the infringement system, which encourage its growth.[25]

6.4 It has been observed that, instead of diverting people away from the criminal justice system, the use of infringement offences has seen a growing number of people enter it, albeit at the lower end of the scale. A similar effect could be expected here.

Cumulative effect of multiple infringement offences

6.5 As noted above, the proposed infringement offence regime seeks to encourage compliance, correct any offending in a proportionate way and deter future offences. In order to achieve these objectives, special consideration should be given to the context of fisheries operations and the potential cumulative effect on individuals who may be issued multiple infringement notices (for example, as a result of applying incorrect processes or repeating the same mistake).

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21 Above n 11, pages 26 and 28. VADE is an acronym for voluntary, assisted, directed, enforced.

22 New Zealand Law Society submission on *Proposed technical amendments to fisheries regulations* (3 March 2022), copy available here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/MPI-Amendments-to-fisheries-regulations-3.pdf.

23 David Wilson "Instant Fines: Instant Justice? The Use of Infringement Offence Notices in New Zealand" (2001) Social Policy Journal of New Zealand: Issue 17 (available here: www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj17/17-pages72-81.pdf).

24 New South Wales Law Reform Commission "Penalty notices" (February 2012) at [0.5].

25 Above n 23.

6.6 If, for example, an individual omits a certain type of information from a record, that omission may be found in in every instance of that document being produced by that individual. Each individual omission would be a separate infringement offence, particularly where the offence relates to a failure to keep records or a failure to include all required information.[26] In such circumstances, the total fines payable may be much higher than the total fine that would be imposed by a court at sentencing.

6.7 It is currently common practice for all entities involved in a fishing operation to be charged for offences which are detected and prosecuted by MPI. In such cases, the charges generally relate to the same fish and essentially the same offending. These offences are usually dealt with by the court at sentencing by applying the principle of totality, which requires the courts to consider the overall effect of the sentences when determining the appropriate level of fine.

6.8 This principle has been considered in the context of fisheries offences, where the court has held:

> *"… in a case involving this number of offences and convictions, it is, of course, very important that the sentencing Court should have regard to the totality of the offending and also to the totality and the effect of the penalty imposed. In other words, it is not only a matter of fixing an amount per offence, but at the end one has to stand back, consider the total effect of the sentencing and have regard to whether in the final result that achieves broad fairness".*

6.9 While infringement regimes are administratively efficient, infringement penalties are usually fixed and cannot be similarly adjusted to fit the circumstances of the case or the offender. Without appropriate checks or balances, there is potential for multiple infringement notices to be issued to one party, or for multiple events which relate to essentially the same error. This could ultimately result in incurring a financial penalty that is equivalent to, or higher than, a penalty that would be awarded if the offender was prosecuted. Such an outcome would not be consistent with the objectives set out in the Regulatory Impact Assessment.

6.10 To address these concerns, we urge the select committee to:

(a) Consider if new section 297(1)(na) should prescribe limits on the maximum number of infringement notices that can be issued in relation to specific offences (for example, offences in respect of reporting and record-keeping requirements), and

(b) Review section 255A of the Act (which contains forfeiture provisions for infringement offences) for consistency and applicability, if the nature, scope, and variety of infringement offences is to be widened.

7 The proposed demerit points system (new section 298A)

7.1 New section 298A provides for the making of regulations to introduce a new demerit points system which would apply to individuals specified in sections 189(a) to (f), (i), or (j) of the Act.

[26] New section 297(1)(na)(ii) states that infringement offences can include offences in respect of reporting and record-keeping requirements.

7.2 This provision effectively seeks to create an extensive new civil penalty regime by regulations, without Parliament or public scrutiny of its proposed purpose, objectives, administration, and scope. This is a significant policy matter which should be addressed in primary legislation (leaving only minor or technical matters of implementation and the operation of the Act to be addressed in the regulations).[27] We note that the Act currently provides for a demerit points system for 'approved service delivery organisations' (**ASDOs**).[28] However, unlike the proposed demerit points system, the demerit points system for ASDOs has been created by, and is expressly provided for in the Act.

7.3 In the absence of a statutory framework prescribed in primary legislation, it is unclear whether the proposed system would include, for example, the following key features which give effect to the principles of natural justice:[29]

(a) processes to record and correct information regarding demerit points;

(b) requirements to notify persons against whom demerit points are proposed to be recorded;

(c) processes for objecting to the recording of demerit points;

(d) the expiry of demerit points;

(e) penalties for different levels of demerit points;

(f) requirements to notify persons of any penalties imposed for demerit points;

(g) the review of penalties imposed for demerit points;

(h) appeals against penalties imposed for demerit points; and

(i) a statutory bar against civil penalties (for demerit points) and criminal penalties being imposed in respect of the same conduct.

7.4 We therefore urge the select committee to insert a new clause into the Bill which provides for the establishment of the proposed demerit points system, and the key features noted above. In drafting these provisions, we also invite the select committee to consider how the following outstanding issues should be addressed:

(a) The proposed demerit points system has the potential to duplicate the penalties imposed by the proposed infringement offence regime for lower level offending (as both regimes seek to address "lower-scale repeat offending",[30] however, the penalties imposed for demerit points are "civil penalties", as opposed to

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27 Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021). The Guidelines state, at [14.1], that "matters of significant policy and principle should be included in an Act" and secondary legislation "should generally deal with minor or technical matters of implementation and the operation of the Act".

28 See section 296W of the Act, which enables sanctions to be imposed for failing to comply with standards and specifications, or directions.

29 New section 298A states that the Governor-General *may* make regulations relating to these key features - as a result, there is no guarantee that these regulations will be made, or if they will be made in conjunction with other regulations which establish the proposed system.

30 Above n 11, at page 28.

"infringement fees"[31]). As a result, a two-tier system of penalties could conceivably develop. The legislation should therefore include adequate mechanisms to ensure individuals are not subject to both criminal proceedings and civil proceedings that seek a pecuniary penalty for the same conduct.[32]

(b) A two-tier system may also result in further complexity and disproportionate impacts on offenders. Research undertaken on demerit schemes indicate an almost universal desire for reduction in complexity.[33]

(c) A different burden of proof[34] could conceivably apply to establish the same breach of the Act, depending on whether the issuer of the penalty notice chose to issue a civil penalty, an infringement notice, or indeed commence prosecution through the laying of a charge.

(d) The Departmental Disclosure Statement states that the Bill provides for "regulation-making powers that enable infringements for low level commercial offences, and eventually, the creation of a permit holder-based demerit points system to address repeat offending".[35] However, the regulation-making powers in new section 298A extend well beyond permit holders, and:

(i) May potentially apply to any person listed in sections 189(a) to (f), (i), or (j) of the Act. This list is extensive and includes all persons associated with commercial fishing and sale of fish.[36]

(ii) Would require registers, as well as licences for onboard roles to apply demerit points for others (for example, masters and operators of vessels).

(e) The Bill does not clarify why the proposed demerit points system extends to owners, caveators, and mortgagees of quota, and owners and caveators of annual catch entitlements.[37] Persons with this status do not generally engage in fishing, and are not bound by the offence provisions of the Act. While they may also have a fishing permit or other licence or authority under the Act, it is entirely unclear why they should be included in the demerit system based on their status as an owner, caveator or mortgagee (as they cannot commit an offence or breach of the Act in that capacity).

8 Removal of minimum legal sizes for finfish (Schedules 1 and 3)

8.1 Schedule 3 of the Bill seeks to amend the Fisheries (Amateur Fishing) Regulations 2013 (**Regulations**) to:

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31 Defined in section 2(1) of the Act.

32 Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021), at [26.5].

33 See, for example, Charles Goldenbeld, C. van Schagen, I. & Vlakveld, W. (eds) "Identification of the essential features for an effective Demerit Point System" (SWOV Institute for Road Safety Research, project no. MOVE/SUB/2010/D3/300-1/S12.569987-BestPoint, 2012).

34 By, for example, requiring the prosecution to prove the case on the 'balance of probabilities', rather than 'beyond reasonable doubt'.

35 Above n 10, at page 16.

36 See paragraph 3.1 above for examples.

37 Section 189(b) of the Act.

(a) Revoke Schedule 2, which specifies minimum legal sizes for certain species and stocks; and

(b) Enable the Minister to set or vary minimum legal sizes by way of instruments made under new sections 11(7) and 72A.

8.2 Practitioners have observed that it can be difficult to locate, or even ascertain the existence of such instruments, particularly where they are not published by the Parliamentary Counsel Office.[38] The proposal to specify minimum legal sizes by instruments, rather than by regulations, could therefore reduce the clarity and accessibility of the law.

8.3 Given the likelihood of minimum legal sizes prevailing in New Zealand's fisheries regulatory framework, we do not see any justification for removing minimum legal sizes from the Regulations. To do otherwise adds unnecessary and undesirable complexity, and may potentially obscure the law from those who need to comply with it.

8.4 If these amendments are to be enacted (notwithstanding these concerns), it is likely that amateur fishers would look to other sources (such as MPI's website and the *NZ Fishing Rules* mobile app) for guidance on minimum legal sizes. These sources would need to be reviewed frequently to ensure they are up to date, and accurately set out information regarding minimum legal sizes.

David Campbell
Vice-President

[38] New section 72(7) provides that an instrument made under this section is secondary legislation, which is subject to the publication requirements of the Legislation Act 2019. Section 73(2) of that Act provides that, for secondary legislation that is not published by the Parliamentary Counsel Office, *"[t]he maker of the secondary legislation must comply with the applicable publication requirements (if any) for that secondary legislation."*