New Zealand Law Society
Te Kāhui Ture o Aotearoa

Offshore Renewable Energy Bill

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

3 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 Offshore Renewable Energy Bill (**Bill**). This submission has been prepared by the Law Society's Environmental Law, Criminal Law, and Civil Litigation and Tribunals Committees.[1]

1.2 The Bill establishes a bespoke legislative regime to govern the construction, operation, and decommissioning of offshore renewable energy developments. This submission provides the Law Society's feedback on the following aspects of the Bill:

(a) details of the proposed permit regime (Part 2);

(b) enforcement powers, including powers of information-gathering and the proposed application of the Search and Surveillance Act 2012;

(c) drafting concerns with clauses 109 and 110, relating to safety zone officers;

(d) concerns with elements of the proposed criminal offence provisions; and

(e) possible errors in internal cross-referencing.

1.3 The Law Society **wishes to be heard** on this submission.

2 Regime for processing permits

Clause 15: minimum eligibility criteria for applicants for feasibility permits

2.1 Clause 15 of the Bill sets out criteria enabling a person to apply to the Minister for a feasibility permit. Clause 15(b) and (c) require that the person:

(a) is a single entity that is either a body corporate that is incorporated in New Zealand or an overseas company that is registered under Part 18 of the Companies Act 1993; and

(b) is not an applicant for another permit for the same type of technology in respect of the same region (where region has the same meaning as in section 2(1) of the Local Government Act 1974 and includes the adjacent area of the exclusive economic zone).

2.2 Regarding the requirement for a single entity, the Law Society notes that equivalent permits obtained under the Crown Minerals Act 1991 can be divided between different entities. There seems no self-evident rationale for taking the different approach proposed in this Bill, although the potential is noted for this requirement to assist, for example, where a 'change in significant influence' (provided for in the Bill) has occurred.[2] The Law Society draws attention to the difference compared to the Crown Minerals Act and invites the committee to seek advice from officials on the justification for the different approach.

---

1 More information about the Law Society's law reform sections and committees is available on the Law Society's website: NZLS | Branches, sections and groups.

2 Clauses 42–52. A change in significant influence (as defined in cl 44) occurs when a person obtains significant influence or ceases to have significant influence over the permit holder after a permit has been granted, a circumstance which requires Ministerial approval (cls 46–48).

2.3 It is also not clear why clause 15(c) stipulates only one application per person per region. The Law Society notes the potential for such a requirement to cut across the purpose of the Act (that is, what is best for New Zealand's national interests), particularly if a developer were looking at two non-contiguous areas or, for reasons such as the potential for competition, two alternative sites were being pursued.

Clause 17: Minister's process before feasibility permits can be granted

2.4 Clause 17 provides steps the Minister must take before granting any application for a feasibility permit in an application round. Clause 17(b) requires that the Minister allow any person who wishes to make a submission about a proposed development a "reasonable opportunity" to do so.

2.5 In the Law Society's view, this provision is inadequate. Specifying a minimum timeframe in clause 17(b) for submissions on proposed development is recommended to achieve clarity and certainty for all parties.

Clauses 19 and 29: mandatory considerations for granting permit applications

2.6 Clauses 19 and 29 specify mandatory Ministerial considerations for granting applications for (respectively) feasibility permits and commercial permits. The Law Society is concerned that both of these clauses omit any express requirement on the Minister to consider the applicant's environmental protection and (if applicable) consent compliance track record, and/or their ability to protect the environment. Arguably, these matters may be indirect considerations to some extent under clauses 19(1)(d) and (e) and 29(1)(b) and (e). However, in the Law Society's view — regardless of the fact that there will be a separate marine consenting process — such considerations should be:

(a) mandatory, and

(b) set out in the legislation.

Clause 64: defining persons 'likely to be affected' by an application for a safety zone

2.7 Clause 64 relates to applications by a permit holder for an area to be declared a safety zone. As clause 64(4) determines the extent of the consultation obligations imposed by clause 64(1)(b) on an applicant for the establishment of a safety zone, this provision is significant. Clause 64(4) provides that in both clauses 64 and 65:

> … persons likely to be affected by a safety zone include, but are not limited to, the following:
>
> (a) persons with an interest in a lawfully established existing activity, whether or not authorised under any legislation, involving rights of access, navigation, and fishing (for example, fishing operators and members of the freight and shipping industries); …

2.8 The meaning of "lawfully established" is qualified by the statement that there need not be a statutory authority for the activity. However, two examples of non-statutory activities are then given, which are both concerned with commercial operations. A court might consider that this reveals a Parliamentary intention to limit consultation to such commercial operators, to the exclusion of members of the general public. The issue is significant, as there may be members of the public whose boating and recreational

fishing activities might be affected, or scientists whose research might be impacted. The Law Society recommends clarifying, for the purposes of this clause, that lawfully established non-statutory activities are not confined to commercial activities.

Clause 66 and 67: consultation about applications and determining applications for safety zones

2.9 Clause 66 would provide that before determining an application for the declaration of a safety zone, the Minister must consult with Maritime New Zealand, the relevant consent authority, and "any other relevant agencies".

2.10 In the Law Society's view, this risks uncertainty. It would be preferable to specify additional agencies the Minister must mandatorily consult with if relevant (even if there remains reference to 'any other relevant agencies' as a catch-all).

2.11 In clause 67, it would also be desirable to clarify whether transitory uses such as private fishing, seasonal recreational diving and the like are to be regarded as "existing activities" to which the Minister must have regard under clause 67(3)(c) ("the impact of the development on existing activities in the area of the proposed safety zone").

Clause 68: Minister may vary or cancel safety zone notice

2.12 The Committee may wish to take advice on whether there should be an explicit process for persons other than the permit holder to seek to have a permit cancelled. Transparency and accountability would be enhanced if such application could be made, with the possibility of judicial review by either party of either an unreasonable cancellation or unreasonable refusal to cancel.

3 Enforcement powers

Clause 104: power to require information

3.1 Clause 104(1) proposes a power to require, from a person, "any information that the person giving the notice considers is necessary for any purpose relating to that person's functions, duties, or powers under this Act or for the administration or enforcement of this Act". To ensure appropriate limitations on this power, the Law Society recommends redrafting clause 104(1) to include a reasonableness requirement such as (for example) "considers, on reasonable grounds, to be necessary…". For comparison, the Driftnet Prohibition Act 1991 is an example of a statute that applies to both territorial sea and EEZ activities. Under section 13 of that Act, information may only be required to be provided if there is reasonable grounds to believe an offence is being or has been committed.

3.2 The Law Society also recommends providing a defence in clause 104 for failing to disclose material if the person is under a legal obligation not to disclose it: see further discussion of clause 151, below.

Clause 105: power of entry for inspection

3.3 Clause 105 proposes to create a broad power of entry. As noted by the Ministry of Justice in its Bill of Rights advice to the Attorney-General,[3] the power is limited to entry at "all reasonable times". The approach is consistent with the wording of an equivalent provision in section 141 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. The Law Society supports such a qualification on the search power.

Clause 107: application of Part 4 of Search and Surveillance Act 2012

3.4 Clause 107 expressly applies the Search and Surveillance Act 2012 to actions under the Bill. For the avoidance of doubt, this express statement is desirable, as it is arguable that the wording of Schedule 4 of that Act means it only applies to conduct in the EEZ if the relevant statute is listed in the Schedule. However, it is not clear why clause 107 excludes the application of sections 118 and 119 of the Search and Surveillance Act. As the Bill, if it proceeds, will authorise searches in the territorial sea, the EEZ, and on land, it seems unusual to limit the Act in such a way. The Committee may wish to seek advice on whether there may be unforeseen effects of omitting those sections.

4 Clauses 109 and 110: safety zone officers

4.1 Clauses 109 and 110 of the Bill raise some questions as to the approach taken in the drafting.

Clause 109

4.2 In clause 109(1), the list of safety zone officers appears logical; however, as discussed below, the inclusion of persons who are not constables may have unexpected consequences.

4.3 The reason for clause 109(2) is not obvious. The Law Society queries whether it may have the effect of excluding from the enforcement of the Bill any New Zealand Navy ship being used at that time for commercial purposes although still commanded by a New Zealand navy officer. There may conceivably be occasions where such a ship would be the closest available vessel to an incident requiring intervention. The Law Society recommends reviewing whether clause 109(2) is necessary and will have the intended effect.

Clause 110

4.4 In the Law Society's view, clause 110 is problematic. The clause proposes to empower a safety officer to "require" the master of a ship, or any other person, either not to enter a safety zone, or to leave it. A person may be required to cease activities stipulated in the relevant notices. To "require" a person to act in a particular way means providing a written or oral order to act in a particular way. The consequences of a failure to comply with such a direction are dealt with under clause 148, which makes disobedience to such

[3] Ministry of Justice "Consistency with the New Zealand Bill of Rights Act 1990: Offshore Renewable Energy Bill" (14 November 2024) (**Bill of Rights advice**).

a direction punishable by a fine of up to $10,000 (but provides for a lack of fault defence), and the offence under clause 153 of failing to comply with a requirement by the safety officer. The second of those sections provides for a potential sentence of 12 months' imprisonment.

4.5 This is important because there is no general power under New Zealand law to arrest persons where the offence committed is punishable only by a fine.[4] However, the general power of arrest for an imprisonable offence only applies where the arrest is made by a constable or by a person called on to assist the constable. While the Bill envisages (see clause 109, discussed above) that a constable may be appointed as a safety officer, other persons may also be appointed. Based on its reading of the Bill and the general law, in the Law Society's view non-constable safety officers do not have any power to arrest for breaches of the Bill including an offence under clause 153. This could leave such officers with no power to enforce compliance at the time any direction is given under clause 109 or if that direction is being or has been ignored or disobeyed. The consequences are serious: an ineffective law could leave non-constable safety officers powerless to intervene effectively in dangerous situations, such as where a protest boat seeks to interfere with construction activities in ways which do not trigger other statutory offences such as endangering transport (section 270 of the Crimes Act 1961 will not apply, because an offshore renewable energy installation is not transport, and sections 12 and 13 of the Summary Offences Act 1981 will not apply because the safety zone is not a public place). Wilful obstruction or hindrance of a safety officer would be an offence under the proposed clause 150 but, as the penalty is again only a fine, arrest is not available to compel obedience.

4.6 The Law Society recommends that to remedy this defect, the Committee should consider including in the Bill's offence provisions a provision equivalent to section 203 of the Fisheries Act 1996, which confers a power of arrest on enforcement personnel where there is persistent non-compliance. Drafters or officials may be able to advise the Committee on other options.

5 Criminal offences and penalties

Clause 144: undertaking ORE generation infrastructure activities under consent without commercial permit

5.1 Clause 144, like others in the Bill, is an unusual provision as it creates two different kinds of offence. There is what, on the face of it, could be an absolute liability offence of breaching clause 12, but with such serious penalties that the court might read in either a defence of total lack of fault or (less likely) interpret the offence as involving implied mens rea, where the defendant has only an evidential onus to show a lack of mens rea. By contrast, it is well established that "permitting" something — here the contravention of clause 12 — requires at least recklessness as to whether the breach will occur. The Bill of Rights advice prepared by the Ministry of Justice on whether this clause infringes the right to be presumed innocent finds the issue to be "finely balanced", without considering the difference between the two elements of the offence, and points to the

[4] See the Crimes Act 1961, s 315.

ability of a court to award a penalty less than the maximum.[5] The Law Society notes that if that is the standard for a breach of the Bill of Rights, almost all offences could be ones of absolute or strict liability without infringing the Bill of Rights.

5.2 It is also necessary to consider how it might happen that clause 144 would come into play, given the scale of offshore renewable energy activities and the ability to police commencement, which lies with Government. The most likely scenarios are that a resource or marine consent holder has begun offshore renewable energy activities either with a mistaken belief as to the locus of the activities being within an issued permit, or in the mistaken belief that a permit for the offshore renewable energy activities had been issued. It can be argued that a mistake of either kind, if reasonable and established by the consent holder, should be a defence. The Law Society recommends that a suitably drafted defence be included. Clause 145(3) provides a good model on which such a provision could be based.

Clauses 146 and 147: failing to notify Minister of changes in circumstance or significant influence

5.3 Both clauses 146 and 147 are treated in the Bill of Rights advice provided on the Bill as justifiably placing an onus on the defendant to show a lack of fault — despite the fact that clause 146 has no provision for such a defence.[6] In the Law Society's view, the reasoning in paragraphs 38, 39 and 40 of the Ministry of Justice report is faulty on this point. The fact that imprisonment may not follow from conviction is not relevant to the question of whether it is acceptable to reverse the burden of proof. The Law Society recommends that clause 146 include a defence in the same terms as in clauses 145(3) and 147(3).

Clause 149: knowingly failing to meet decommissioning obligation or financial security obligation

5.4 Clause 149(5) contains a limitation period, providing that proceedings under this section "may be commenced within 3 years after the matter giving rise to the offence was discovered or ought reasonably to have been discovered".

5.5 Limitation periods adopting, for commencement purposes, the date of discovery or reasonable discoverability are usually used in cases that involve an element of latency (such as discoverability of latent defects in a defective building case). The rationale is that it is only fair to avoid situations where a plaintiff is time-barred before they know, or are able to know, that they have a cause of action. On the other hand, reasonable discoverability inevitably introduces an element of uncertainty for the defendant. Minimising this uncertainty is the purpose of a limitation period.

5.6 In this Bill, the Law Society considers it doubtful that the offences prescribed in clause 149(1)(a)(i) and (ii) have any element of latency. These offences require that Person X (clauses 70, 71) must decommission ORE infrastructures by Time Y (clause 74). Therefore, the causes of action in clause 149(1)(a)(i) and (ii) accrue at the date of failure to decommission by Time Y. In practice, the issue of whether the cause of action is

5 Bill of Rights advice at [34].
6 Bill of Rights advice at [38]–[40].

reasonably discoverable or not is likely to arise only where there existed circumstances hindering discovery (such as latent defects). In all other cases, the date of reasonable discoverability is likely to simply be the date of the accrual of action (for example, the failure to decommission by Time Y).

5.7 In the Law Society's view, the relevance of the reasonable discoverability aspect (if any) is most likely to be confined to the offence in clause 149(1)(a)(iii), which relates to the failure to "maintain" an acceptable security arrangement: clause 79(3) or (4). There could be some delays (or latency) arising for reasons that fall short of actual fraud and therefore are not captured under the separate fraud limitation period) for example, administrative errors that meant the failure to maintain could not have been reasonably discovered until later.

5.8 In the Law Society's overall view, the broader framing of clause 149(5) is unlikely to cause issues for any of the offences under clause 149. However, it would be helpful, for the avoidance of doubt, to clarify in clause 149(5) that proceedings must be commenced within 3 years after the matter giving rise to the offence was discovered or ought reasonably to have been discovered, whichever is earlier in time. That is keeping with the idea of limitation periods giving certainty to defendants of potential claims.

Clause 150: wilfully obstructing, hindering, resisting, or deceiving person executing powers

5.9 As noted earlier, wilful obstruction or hindrance of a safety officer will be an offence under proposed clause 150. While setting penalties is a policy matter, the Law Society draws to the Committee's attention the implications for powers of arrest of including a potential penalty of imprisonment. One option may be for the offence to provide for a lower fine but also a short term of imprisonment: for example, compare section 23 of the Summary Offences Act 1981 (a maximum penalty of 3 months imprisonment or a fine not exceeding $2,000).

Clause 151: failing to provide information

5.10 As earlier identified for clause 104, it would be appropriate to provide a defence in both clauses 104 and 151 for failing to disclose material if the person is under a legal obligation not to disclose it. As the clauses are currently drafted, a lawyer could be asked questions about a client's affairs and legal professional privilege would not provide a defence to a charge of failure to provide the information requested. Appropriate amendment is necessary.

Clause 153: failing to comply with requirement of safety zone officer

5.11 Earlier comments on clause 110 have addressed the principal issue. In addition, there may be a question about the wording of clause 153(3), which requires the consent of the Attorney-General for any prosecution in respect of an offence under this section committed by a person on board a foreign ship, or by a person leaving a foreign ship. The former is understandable in terms of international comity. The latter may perhaps benefit from further thought and advice. Does "leaving" have a temporal connotation — such that the act of leaving the foreign ship is relied on as an element of the offence

charged, or is it meant to be wider and include an offence by a person who has previously (even if only very shortly beforehand) left a foreign ship? Would this be so even if the person was a New Zealand citizen or permanent resident? The Law Society recommends that the Committee should seek advice on this point.

Clause 154: office holder having pecuniary interest

5.12 Clause 154 provides for offences of both

(a) mens rea (permitting the contravention of clause 112, which requires office holders not to have pecuniary interests); and

(b) strict liability (having a pecuniary interest but with a defence of total and reasonable lack of knowledge).

5.13 Under clause 154(3), it is a defence if the defendant proves that they did not know, and could not reasonably be expected to have known, that they held a pecuniary interest in a permit.

5.14 As clause 154(3) can only apply to the holder of the pecuniary interest, it is irrelevant to a charge of permitting the holding of the interest. On that basis, the prosecution would have to establish actual knowledge (or perhaps wilful blindness) of the contravention. It is not clear that this was the intention of the drafters. The Law Society recommends the Committee looks at this point. The penalty provision also seems low compared with, for example, clause 152.

Clause 155: contravening compliance notice

5.15 As with clause 154 and others, the use of "permitting" means two different kinds of offence are created by the section. Again, there is a defence available to the contravener: clause 155(3) provides for "reasonable excuse". However, on a literal reading of the subsection, the reasonable excuse defence is only available to the person required to comply with the notice, not to a person permitting non-compliance. The alleged permitter will only be liable if actual knowledge of the contravention is proved (or perhaps wilful blindness as to the contravention).

5.16 As raised in regard to clause 154, the Law Society queries whether this is the intended effect of the provision. Clause 155(4), providing that it is not an offence to fail to comply with recommendations in a compliance notice, seems a sensible provision to prevent prosecution over-reach (clause 129 of the Bill makes a clear distinction between what is mandatory and what is a recommendation).

Clause 156: contravening enforceable undertaking

5.17 Clause 156 creates a mens rea offence (permitting the contravention of clause 141) and what appears to be an absolute liability offence of contravening an enforceable undertaking. The Ministry of Justice's Bill of Rights advice identifies this as a strict

liability offence,[7] as does the departmental disclosure statement, but no reason is given in either document for that view.

5.18 If strict liability is intended, an express absence of fault defence would be helpful. In the Law Society's view, clause 156(3) is unusual and its inclusion is unexplained. The Law Society recommends that the Committee take advice as to the purpose for including clause 156(3) and whether there might be unexpected consequences. For example, would this preclude prosecution where the contravention was concealed by fraud or misleading conduct by the person giving the undertaking or by another person for their own purposes? Or where external circumstances (for example a hostile virus attack on a government computer database) prevented a prosecution being taken within this relatively short timeframe?

6 Referencing inconsistencies

6.1 The Bill may contain some errors in internal cross-referencing:

(a) In clause 148, subcls (1)(c) and (2)(b) refer to clause 62, when it likely should refer to clause 63 (declaration of a notice in relation to a safety zone);

(b) clause 149(3) refers to clause 80(2)(a) which does not exist: the reference should perhaps be to clause 82(1)–(2) which sets out the process for reaching a financial security arrangement;

(c) clause 158(1) refers to clause 156 which should perhaps be clause 157 (when discussing a pecuniary penalty contravention);

(d) clause 159(1) similarly refers to clause 157 which should perhaps be clause 158 (reference to a defence to a pecuniary penalty order).

7 Recommendations

7.1 The Law Society recommends:

(a) That the Committee note and seek advice on the different approach taken in clause 15(b) compared to the Crown Minerals Act; and also the clause 15(c) restriction per person per region to a single application.

(b) Specifying a minimum timeframe in clause 17(b) for submissions on proposed development.

(c) Expressly requiring mandatory consideration by the Minister in clauses 19 and 29 of the applicant's environmental protection and (if applicable) consent compliance track record, and/or their ability to protect the environment.

(d) Clarifying, for the purposes of clause 64(4)(a), that lawfully established non-statutory activities may not be confined to commercial activities.

(e) Specifying in clause 66 any agencies in addition to Maritime New Zealand with whom the Minister must consult (if relevant).

[7] Bill of Rights advice at [24(h)].

(f) Clarifying in clause 67 whether transitory uses such as private fishing, seasonal recreational diving and the like are to be regarded as "existing uses" to which the Minister must have regard under clause 67(3)(c).

(g) Considering whether there should be an explicit process for persons other than the permit holder to seek to have a permit cancelled (clause 68).

(h) Rewording clause 104(1) to include a reasonableness requirement such as "considers, on reasonable grounds, to be necessary…"; and providing a defence in this clause for failing to disclose material if the person is under a legal obligation not to disclose it.

(i) Reviewing why clause 107 excludes the application of sections 118 and 119 of the Search and Surveillance Act.

(j) Reviewing whether clause 109(2) is necessary and will have the intended effect.

(k) To remedy the defects identified in clause 110 of the Bill, consider including a provision equivalent to section 203 of the Fisheries Act 1996 (or other equivalent option).

(l) Including a suitably drafted defence in clauses 144 and 146. Clauses 145(3) and 147(3) provide a good model.

(m) Clarifying in clause 149(5) that proceedings must be commenced within 3 years after the matter giving rise to the offence was discovered or ought reasonably to have been discovered, *whichever is earlier in time*.

(n) Considering whether the proposed clause 150 penalty could or should be adjusted to provide for a lower fine but also a short term of imprisonment (given the implications for powers of arrest of providing for a penalty of imprisonment). Section 23 of the Summary Offences Act 1981 may provide a model.

(o) Providing a defence in clause 151 for failing to disclose material if the person is under a legal obligation not to disclose it (see also clause 104).

(p) Seeking advice on the wording and intent of clause 153(3), which requires the consent of the Attorney-General for any prosecution in respect of an offence under this section committed by a person leaving a foreign ship.

(q) Reviewing the intended scope of clauses 154(3) and 155(3): was this defence intended to also apply to charges of *permitting* the holding of an interest or contravention of a compliance notice?

(r) Reviewing the purpose for including clause 156(3) and whether there might be unexpected consequences; and (if clause 156 is intended to be a strict liability provision) providing expressly for a total absence of fault defence.

(s) Noting and, if needed, correcting the referencing errors identified.

Nāku noa, nā

David Campbell
Vice President