



Submission: COVID-19 Recovery (Fast-track Consenting) Bill

About the New Zealand Council for Civil Liberties

1. The New Zealand Council for Civil Liberties is a watchdog for rights and freedoms in New Zealand. The Council is a voluntary not-for-profit organization that works through education and advocacy to promote a rights-based society and prevent the erosion of civil liberties.
2. We wish to appear before the Committee to make an oral submission.

Introduction

3. The Council believes that our democratic rights to participate in decision making on environmental issues should not be sacrificed in a short term effort to boost our economy, and does not support this Bill progressing further.
4. The Council rejects the false dichotomy proposed by this Bill that we must choose to weaken either our economy or our democracy. The Council notes that history demonstrates that prosperity flows from freedom, not the reverse.
5. A healthy democracy is more than a series of elections between which people sit back and do nothing while elected representatives act as if they have *carte blanche* to do as they please. Successive governments have recognised that the protection of the environment in which we all live is not solely the responsibility of public authorities or private landowners, but something in which every member of the public has a part to play.
6. This is recognised in Principle 10 of the Declaration at the 1992 Rio Earth Summit that New Zealand signed up to. The Resource Management Act 1991 is part of the system giving effect to this principle, and includes carefully designed processes by which our government informs itself of people's views on proposals that will have an effect on the environment. This Bill proposes to radically upset these processes by radically limiting public opportunities to participate in decision making affecting the environment. In doing so, it privileges the voices of a small group of organisations, purporting to make them proxies for the wide variety of public views.

7. The Council recognises the desire to undertake initiatives to recover from the economic impacts of COVID-19, but this Bill appears to be a vehicle for enabling accelerated implementation of projects that many would contest the need for and appropriateness of as the country should be moving to decarbonise economic activity. The rights of the public to participate in decision-making and appeal processes must be protected in order that competing values and visions of New Zealand's future are not excluded from consideration of resource consent applications.
8. In the event the Government chooses not to withdraw the Bill for revision, this submission sets out a number of recommendations for amendment.

Concerns

Submission Period

9. The Council expresses its profound disappointment in the Government for the short period of public submissions on this Bill. The Council notes that this is not the first time this year that we have raised concerns about a bill being pushed through Parliament with indecent haste.^{1,2} The Council draws the Committee's attention to the serious errors in recent rushed legislation.³
10. The decision to only permit five days for people to make submissions to a select committee strongly suggests that the Government is merely making a performative nod towards democratic norms, and does not seriously respect people's rights to participate in the making and administration of laws that govern us.

Transparency

11. Clause 17 of Schedule 6 fundamentally alters New Zealander's relationship with their government by removing public consultation on the projects subject to this act.
12. The Council opposes on principle the prohibition in clause 17(1) on the panel informing the public of a consent application or notice of requirement. Clause 17 is, in effect, a secrecy clause with a scheme of exceptions, rather than an access to information provision. This fundamentally reverses the presumption of availability of information that had guided New Zealand since enactment of the Official Information Act in 1982 included repeal of the Official Secrets Act. The Council notes that a considerable part of the public pressure for enacting the Official Information Act came from the concern that the New Zealand government, under Robert Muldoon, was pushing through in secret the 'Think Big' projects that had major impacts on the environment.

¹<https://nzcl.org.nz/sites/default/files/Submission%20on%20COVID-19%20Public%20Health%20Response%20Act%2007-06-2020.pdf>

²<https://nzcl.org.nz/sites/default/files/NZCCL%20submission%20Terrorism%20Suppression%20%28Control%20Orders%29%20Bill.pdf>

³ For example

<https://thespinoff.co.nz/politics/04-05-2020/passing-the-wrong-bill-wasnt-even-the-worst-thing-parliament-did-last-week/>

13. The Council notes with great disappointment that this provision, and therefore the Bill as a whole, is entirely contrary to the government's claimed support of Open Government and transparency.

Participation

14. Clause 17 of schedule 6 lists a small set of groups who are given preferential access to information, and therefore have greater power than the public who are shut out of the decision making process.
15. The Council opposes in principle the idea that access to power is limited to certain groups or individuals.
16. The schedule does not list local community or environmental groups that could have concerns about a RMA consent in their local area, nor provide a mechanism by which local input could be sought. At the least the Bill should create an ability for local groups who must be invited to comment on a referred project. While the schedule states that "A panel **may** invite written comments from any other person the panel considers appropriate", this does not recognise any local civil society groups and is entirely at the discretion of the panel.
17. Article 21(1) of the Universal Declaration of Human Rights (UDHR), to which New Zealand is a signatory says "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives."⁴ The Council believes that clause 17 of schedule 6 transgresses this right. We note that no report on the Bill's compliance or otherwise with the NZ Bill of Rights Act appears in the usual locations of the Ministry of Justice website. Nor is there a Regulatory Impact Analysis on the Treasury website. The claims for the benefits that will supposedly accrue from disempowering the public in this way appear therefore to be unscrutinised and untested within government at the time of writing.
18. Further, New Zealand signed up to the 1992 Rio Declaration, Principle 10 of which states:

"Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."⁵

19. The UN guide to implementing Principle 10 explains why these three fundamental rights: access to information, access to public participation and access to justice, are key pillars of sound environmental governance:

⁴ <https://www.un.org/en/universal-declaration-human-rights/index.html>

⁵ <https://www.unenvironment.org/civil-society-engagement/partnerships/principle-10>

‘The “access rights” have emerged to be very important in promoting transparent, inclusive and accountable environmental governance. Access to information empowers citizens and incentivises them to participate in decision and policy-making processes in an informed manner. Public participation is increasingly being a vital part of addressing environmental problems and achieving sustainable development by encouraging governments to adopt policies and enact laws that take community needs into account. Access to justice provides the foundation of the “access rights”, as it facilitates the public’s ability to enforce their right to participate, to be informed, and to hold regulators and polluters accountable for environmental harm.’⁶

20. At a Meeting of the Parties (countries that have ratified the Aarhus Convention) in 2014 - so in the aftermath of the Global Financial Crisis - states affirmed that:

“Especially in times of economic crisis, the efforts made to improve governance are investments in democracy; the economic crisis should not be seized as an excuse to cut down on environmental protection and procedural rights. In times of economic crisis, access to information, participation and access to justice are even more important, as the focus on solving the crisis has in many cases led to increased pressure to weaken measures aimed at protecting the environment.”⁷

Appeal Rights

21. Subclause 42(3) of schedule 6 proposes that the Court of Appeal serve as the final appellate court for any appeals on decisions made under powers granted by this Bill, thereby ousting the Supreme Court.
22. The Council believes this is inconsistent with the legislative and constitutional standing of the Supreme Court. If Parliament wishes to redefine the constitution of New Zealand by fundamentally altering the jurisdiction of the Supreme Court then this legislation is an inappropriate vehicle for that transformation of our society. The Council also strongly opposes such a move.

Corruption

23. Publication of information about resource consent applications, and the related right to participation in decision making, is a primary control on corruption.^{8, 9, 10} The Organisation

⁶ *Ibid*

⁷ Fifth session, Meeting of the Parties, Maastricht, 2 July 2014, paragraph 6. Accessed from: <https://undocs.org/ECE/MP.PP/2014/27/Add.1>

⁸ Transparency International says “To fight corruption, we must embrace transparency” and “Seeking and receiving information is a human right that can act as a safeguard against corruption, and increase trust in decision makers and public institutions.” <https://www.transparency.org/en/what-is-corruption#>

⁹ The World Bank recommends “pathways that give citizens relevant tools to engage and participate in their governments”. <https://blogs.worldbank.org/governance/here-are-10-ways-fight-corruption>

¹⁰ The United Nations’ Office on Drugs and Crime recommends both a “fair and transparent system of public procurement” and “an informed society with free access to information” <https://www.unodc.org/unodc/en/corruption/prevention.html>

for Economic Co-operation and Development (OECD)'s most recent report on their Anti-Bribery convention was already critical of New Zealand for insufficient transparency in public procurement.¹¹ Increasing secrecy, as the Bill does, creates greater opportunities for corrupt practices in regulatory matters, since it is often members of the public in an affected area that know about relationships between the various parties that other organisations may not know about.

Aarhus Convention

24. The United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (more commonly known as the Aarhus Convention) guarantees public rights of access to environmental information, rights to participate in decision making about the environment, and access to justice on environmental issues. It is “the only global legally binding global instruments on environmental democracy that put Principle 10 of the Rio Declaration on Environment and Development in practice.”¹²
25. The Council supports New Zealand's accession to the Aarhus Convention. If the Government wants to demonstrate that they are truly committed to openness and transparency in environmental decision making, they will rapidly commit to acceding to the Convention, and initiate the Parliamentary consideration of the Convention that is required. A Meeting of the Parties to the Convention will be taking place in October 2021, and countries that wish to accede to the Convention by then must lodge their application with the Convention secretariat in Geneva by February 2021. Accession to the Convention would not only provide a baseline for access to information and participation below which future legislation could not sink, but it would also prevent travesties of democracy such as that seen under the previous government, when a democratically elected decision making body, Environment Canterbury, was suspended and unelected Commissioners appointed to make decisions in their place.
26. If the Committee would like further information on this issue, we can make a supplementary submission.

Duration of the Act

27. The Council believes the 2-year period for this Bill is too long for its intended purpose of streamlining projects for quicker economic recovery from the impacts of COVID-19. The Act should be limited to 1 year, which is sufficient time to consider the 'listed projects' in the Bill. Any 'referred projects' that have not been completed within 1 year after enactment should return to the normal Resource Management Act process.

¹¹ Paragraph 141 of the Phase 3 Report on Implementing the OECD Anti-Bribery Convention in New Zealand, OECD, 2013. Accessed from:

<http://www.oecd.org/daf/anti-bribery/NewZealandPhase3ReportEN.pdf>

¹² <http://www.unece.org/env/pp/introduction.html>

Recommendations

1. The New Zealand Council of Civil Liberties recommends that this Bill be withdrawn.
2. Should this Bill continue through Parliament, the Council recommends that:
 - a. The Bill is amended to ensure that the process by which projects are assessed is public and participatory while still meeting the government's objective to streamline the application process.
 - b. Clause 3 of Schedule 6 is amended to add a sub-clause (3) requiring that all information received by the Environmental Protection Authority (EPA) as part of an application made under clause 2 of the schedule, that is to say all the information required to be supplied under clauses 9, 10, 12, and 13, must be proactively published on the EPA's own website within 1 working day of it providing notice to the panel under sub-clause 3(2) of Schedule 6.
 - c. Clause 17(1) of Schedule 6 is amended to require public notification by the EPA of a panel's receipt of a consent application or notice of requirement.
 - d. In clause 17(4) of Schedule 6 insert before (a) 'The public'. In clause 17(6) of Schedule 6 insert before (a) 'The public'.
 - e. If the amendments recommended above are not accepted, then we recommend that clause 17 of Schedule 6 is to amended to:
 - i. Expand the list of persons and organisations to be consulted with under clause 17(4)(g) to include:
 1. the Minister of Health
 2. the Minister for Disability Issues
 - ii. Expand the list of persons and organisations to be consulted with under clause 17(4)(h) to include:
 1. the Parliamentary Commissioner for the Environment,
 2. public health and disability oversight bodies
 - iii. Expand the list of persons and organisations to be consulted with for referred projects under Schedule 6 clause 17(6)(j-u) to include:
 1. the Parliamentary Commissioner for the Environment,
 2. public health and disability advocates.
 - f. Clause 42 of Schedule 6 is amended to restore the constitutional role of the Supreme Court.
 - g. The Act ceases to be in effect after one year.
