

# COVID-19 RECOVERY (FAST TRACK CONSENTING) BILL

21 June 2020



**NZ  
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Human Rights Commission  
Te Kāhui Tika Tangata

## Submission of the Human Rights Commission

## **Submission of the Human Rights Commission to the Environment Committee**

**21 June 2020**

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## Introduction

1. The Human Rights Commission welcomes the opportunity to provide the Environment Committee with this submission on the COVID-19 Recovery (Fast-track Consenting) Bill (the Bill). The Commission acknowledges that this Bill seeks to address a human rights emergency, by creating employment and thereby promoting the right to decent work<sup>1</sup> while respecting the right to a healthy environment.<sup>2</sup> This submission discusses how human rights and te Tiriti o Waitangi can enhance the effectiveness of this Bill and the recovery that the Bill is designed to support.
2. Pursuant to the Commission's statutory functions, we have supported and scrutinised the Government's response to COVID-19, particularly as it relates to the balance that must be struck between, on the one hand, the rights to life and healthcare and protection, and, on the other hand, other human rights that are restricted or curtailed. In our report *Human Rights and Te Tiriti o Waitangi: COVID-19 and Alert Level 4 in Aotearoa New Zealand*, while recognising that there is much to commend about New Zealand's prompt and effective response to COVID-19, we observed that Te Tiriti and human rights have not been consistently integrated across the response to the pandemic.<sup>3</sup> A copy of the report is provided with this submission for the Committee's reference.
3. The Commission has consistently advocated that the Government incorporate a Tiriti o Waitangi and human rights-based approach into the measures it has taken to prevent and limit the spread of the virus.<sup>4</sup> Now that New Zealand is entering a recovery phase and faces considerable economic and social challenges, we consider that a Tiriti and human rights based approach remains a matter of crucial importance, and will support good decision-making in the recovery.
4. Measures to reset and rebuild New Zealand's economy provide an opportunity to embed human rights and Te Tiriti in the 'new normal'. There are opportunities to positively advance a range of Tiriti and human rights priorities, such as Tiriti-based decision making, accessibility and inclusion for disabled people, equal employment opportunities, children's rights and environmental rights – through economic development projects. Conversely however, if decision-making processes are unduly curtailed and fail to adequately uphold Te Tiriti and human rights, there are risks that current inequities and environmental issues will be further exacerbated. Now is the time to create a solid Tiriti and human rights basis for the recovery.
5. Using a human rights and Tiriti lens and a process that is consistent with these obligations, including Tiriti partnership and meaningful participation by affected communities, will support good decision-making to promote a recovery that is codetermined with tangata whenua and results in equitable outcomes for all, including vulnerable population groups.
6. The premise of the Bill is that it seeks to curtail participation rights in the interests of economic recovery. The Commission acknowledges this imperative and recognises the complex balancing required. We commend the involvement of Iwi advisors in the development of the Bill, and the positive progress that this represents towards a Tiriti partnership approach and consistency with human rights obligations. We commend the many positive provisions in the Bill, including provisions upholding Treaty settlements, protecting wāhi tapu, utilising Te Arawhiti reports, and including several Crown-Iwi partnership projects in Schedule 2. However, we suggest that overall the balance the Bill strikes needs adjustment. We suggest amendments to better support a Tiriti- and human-rights based recovery.

## Structure of this submission

7. **Part one** provides an overview of the applicable human rights and Te Tiriti obligations that should be applied to COVID-19 legislation and policy responses. It suggests amendments to the draft purpose

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<sup>1</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 7.

<sup>2</sup> See the work of the Special Rapporteur on human rights and the environment.

<sup>3</sup> *Human Rights and Te Tiriti o Waitangi: COVID-19 and Alert Level 4 in Aotearoa New Zealand*, page 4.

<sup>4</sup> Including in the report referenced above and provided with this submission (*Human Rights and Te Tiriti o Waitangi: COVID-19 and Alert Level 4 in Aotearoa New Zealand*), and in the Commission's appearance before the Inquiry into the Operation of the COVID-19 Public Health Response Act 2020.

of the Act, a reduced timeframe for the Act, and regular review of the Act's operation. It notes significant shortcomings in relation to Tiriti and Indigenous rights standards and suggests amendments to better comply with te Tiriti o Waitangi.

8. **Part two** examines specific human rights implications arising from the operational aspects of the Bill. The section focuses on the importance of equal employment opportunities and universal design. Universal design means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design.<sup>5</sup>
9. Our **recommendations** are summarised at the end of the submission.

## **PART ONE: AN OVERVIEW OF HUMAN RIGHTS AND TE TIRITI CONSIDERATIONS**

### **General observations on human rights considerations**

10. A human rights approach necessitates a holistic approach – encompassing civil and political rights; social, economic and cultural rights; Indigenous Peoples' rights; and the right to a safe and healthy environment – and ensuring that both processes and outcomes are consistent with human rights obligations. The relationship between human rights and the environment is much neglected in Aotearoa New Zealand. In his report of January 2018, the UN Special Rapporteur on human rights and the environment provides useful *Framework Principles on Human Rights and the Environment*. The 16 Principles include that “States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities” and sets out how this can be achieved.<sup>6</sup>
11. The Commission appreciates that the Bill seeks to respond to a human rights emergency (as already noted in the introduction, and as discussed further in the below section relating to the draft purpose clause). There is a real need to act swiftly to mitigate negative economic impacts and to protect rights like the right to decent work and to an adequate standard of living. In doing so, a holistic human rights approach will enhance the effectiveness of the Bill and reduce the risks associated with its fast-track nature.
12. The human rights this Bill seeks to promote need to be balanced carefully alongside other human rights, like the rights to non-discrimination and to participation. The balancing should maximise rights, with particular attention to impacts on those who are especially vulnerable to the potential negative impacts of unemployment or of development.
13. The Cabinet Paper associated with this Bill states that “There are no human rights, gender and disability implications associated with this paper.”<sup>7</sup> The Commission considers the Bill to have significant human rights implications – particularly in relation to the right to work. The Commission also considers that gender and disability analysis of COVID-19 recovery spending is vital.

### **Participation rights to enhance decision-making**

14. Human rights, with their emphasis on participation, transparency, non-discrimination, and accountability, can contribute to good decision-making. The right to participate in decision making<sup>8</sup> is important, not only because people have the right to have a say in what affects them, but also because hearing diverse perspectives leads to good decisions, fosters buy-in, and can mitigate against problems arising at later stages. Meaningful participation tends to foster trust and confidence in government. It gives authenticity and legitimacy to decisions.

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<sup>5</sup> Article 2 of the Convention on the Rights of Persons with Disabilities.

<sup>6</sup> <https://undocs.org/en/A/HRC/37/59>

<sup>7</sup> COVID-19 Recovery (Fast-track Consenting) Bill May 2020 [Cabinet Paper](#), at paragraph 121.

<sup>8</sup> Participation is a cornerstone right of democratic government, and is recognised in a range of international human rights instruments See for example <https://www.ohchr.org/EN/Issues/Pages/EqualParticipation.aspx>.

15. Te Tiriti o Waitangi provides a complementary yet distinct set of participatory principles that must be applied in decision-making processes that affect Māori. These principles also improve the quality of decision-making while enabling the Crown to ensure that it is acting consistently with its obligations to tangata whenua under Te Tiriti.
16. The Ihumātao development provides a salutary example of the risks of fast-tracking decision-making at the expense of other concerns.<sup>9</sup>
17. While the urgent nature of this Bill necessarily affects participation rights, we urge the Committee to keep participation rights and their benefits in front of mind when considering this Bill.
18. The Bill provides an opportunity to strengthen decision-making processes, taking into account Waitangi Tribunal recommendations about resource management processes that fall short of Tiriti requirements.<sup>10</sup> (See below section on Te Tiriti o Waitangi.)
19. The Commission also suggests that the Committee consider how the timeframes, participation opportunities and appeal processes in the Bill can be enhanced to best support broad and meaningful participation to promote good decision-making, particularly by tangata whenua.

### **Recommendation 1.**

In reviewing the Bill, the Select Committee should consider enhancing participation opportunities and Tiriti-based decision-making as an enabling factor for good decision-making.

### **Purpose of the Act**

20. The draft purpose of the Act is to “urgently promote employment growth to support New Zealand’s recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.”<sup>11</sup>
21. The Explanatory Note to the Bill further explains that “The Bill seeks to achieve this by establishing new fast-track resource consenting and designation processes for infrastructure and development projects. This Bill also enables specific work on existing infrastructure to occur without the need for a resource consent.”
22. The clause 4 focus is on employment growth, certainty of investment, and sustainable management. The Commission agrees that these are important considerations, particularly in the recovery context. However, we suggest that this purpose clause is incomplete. We suggest making it clear that these purposes are to be pursued consistent with international human rights norms, despite – or because of – the urgency. We suggest elevating Tiriti o Waitangi<sup>12</sup> and human rights in the purpose clause. This would ensure that concerns such as equal employment opportunities, inclusivity, non-discrimination and participation are read into the purposive application of the legislation. This change would not prevent fast-tracking but would enhance its outcomes.
23. We recommend that the Bill should be more explicit about the sort of employment and the sort of recovery that the Act would seek to support. We suggest amendment of the purpose clause to make it clear that the ‘new normal’ promoted by recovery investment should be based on Te Tiriti o Waitangi and human rights.
24. Around the world, COVID-19 has exposed and exacerbated pre-existing and deeply entrenched discrimination or disparities in society.<sup>13</sup> To promote a recovery that counteracts that effect, the Act

<sup>9</sup> See Human Rights Commission (2019), *International human rights perspectives on Ihumātao*

<sup>10</sup> Waitangi Tribunal, (2019), *Stage 2 Report on the National Freshwater and Geothermal Resources Claims*, Wai 2358.

<sup>11</sup> Clause 4 Purpose, COVID-19 Recovery (Fast-track Consenting) Bill.

<sup>12</sup> We acknowledge clause 6 in this context, and suggest elevation to the general

<sup>13</sup> See for example UN High Commissioner for Human Rights, *Disproportionate impact of COVID-19 on racial and ethnic minorities needs to be urgently addressed*, 2 June 2020. Working Group on discrimination against women and

must have the purpose of promoting inclusive employment in decent work,<sup>14</sup> or it risks operating to further entrench inequalities. In terms of the employment growth promoted by the Act, the Commission submits that it is essential that such growth provides equal opportunities for all.

25. An amended purpose section might read, for example (edits in bold):

The purpose of this Act is to urgently promote **inclusive, equitable** employment growth to support a **human-rights and Tiriti-based** recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.

26. An additional subsection could also be added to clause 4, which provides that an additional purpose of the legislation is to uphold the government's Te Tiriti and domestic and international human rights commitments; and promote equal employment opportunities and social inclusion.

27. The inclusion of these factors in clause 4 is also important when considering the Minister's duty to consider certain matters under clause 19 when determining whether proposed work aligns with the purpose of the legislation. The Minister's duty under clause 19 logically flows from clause 4. Many of the factors in clause 19 of the current Bill align with human rights concerns, such as social wellbeing. In Part Two of this submission we also recommend that further human rights related factors are introduced in clause 19. Amending both clause 4 and clause 19 will allow human rights to help to deliver on the aims of the fast-tracked recovery.

### **Recommendation 2**

Amend clause 4 to include the promotion of Te Tiriti and human rights in the purpose clause.

### **Recommendation 3**

Amend clause 4 to introduce a new subsection that provides that a purpose of the legislation is to uphold the government's Te Tiriti and domestic and international human rights commitments; and promote equal employment opportunities and social inclusion for equitable outcomes.

28. For recommendations regarding the Treaty of Waitangi clause (clause 6), see recommendation 7 below in the section "Te Tiriti o Waitangi".

29. In discussing the purpose clauses, clause 10(1) is also relevant. Clause 10 (according to the Explanatory Note) "sets out procedural principles to be applied":

#### **10. Procedural principles**

(1) Every person performing functions and exercising powers under this Act must take all practicable steps to use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions, duties, or powers being performed or exercised.

(2) This includes a duty to act promptly in circumstances where no time limit has been set for the performance or exercise of a function, power, duty, or requirement under this Act.

(3) However, a failure to comply with this section does not of itself invalidate the performance of a function or duty or the exercise of a power under this Act.

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girls, *Responses to the Covid-19 could exacerbate pre-existing and deeply entrenched discrimination against women and girls*, 20 April 2020.

<sup>14</sup> See UN Committee on Economic Social and Cultural Rights General Comment No 18 on the Right to Work *E/C.12/GC/186* at paragraph 7: Decent work "is work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families"; and at 12(c) "Protection of the right to work has several components, notably the right of the worker to just and favourable conditions of work, in particular to safe working conditions, the right to form trade unions and the right freely to choose and accept work."

30. Again, the Commission considers that the clause 10(1) principles are sound but incomplete and can be enhanced to lead to improved decision-making. On its face, clause 10(1) prioritises speed and efficiency above all else. An enhanced purpose clause, as already suggested, could act to make clear that the expedience must not be at the expense of a Tiriti o Waitangi and human-rights based recovery.
31. Accordingly, clause 10 could be amended to make clear that it does not require haste which undermines the quality of decision making and the recovery. For example, clause 10(1) and a new clause 10(2) could read:

#### **10. Procedural principles**

(1) Every person performing functions and exercising powers under this Act must take all **reasonable** steps to use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions, duties, or powers being performed or exercised.

(2) Subsection (1) does not limit the duties of persons performing powers under the Act to act consistently with:

- (a) the purpose of the Act;
- (b) the principles of Te Tiriti o Waitangi
- (c) the government's domestic and international human rights commitments.

#### **Recommendation 4**

Revise clause 10 to ensure that timely, efficient and cost-effective decision-making does not limit the duty of persons performing functions and exercising powers under the Act to do so consistently with the purpose of the Act, the principles of Te Tiriti o Waitangi and the government's domestic and international human rights commitments.

#### **Timeframe and review**

32. The COVID-19 response is necessarily fast-moving. The Commission is concerned that any limits on public participation in democratic processes should be minimised. We supported the reduction in the duration of the COVID-19 Public Health Response Act, and the establishment of a Select Committee inquiry to provide an opportunity for scrutiny of the operation of the Act. We suggest that this exceptional legislation should similarly be of relatively short duration and should be subject to regular review while in operation.
33. The Select Committee review should consider whether the Bill is operating in a way which promotes a Tiriti o Waitangi and human rights-based recovery. The first review should take place within 90 days to six months of the Act's commencement.

#### **Recommendation 5.**

Amend clause 3 to reduce the duration of the Bill to one year and require periodic review by Parliamentary Select Committee during its operation.

#### **Te Tiriti o Waitangi**

34. It is imperative that COVID-19 recovery efforts are undertaken in a way that upholds Te Tiriti o Waitangi. While the objectives of economic recovery and employment growth are worthy and necessary, if the Bill fails to properly uphold Te Tiriti, then it risks perpetuating existing inequities and misses a valuable opportunity to strengthen the Crown-Māori relationship and work together to rebuild the economy in genuine partnership. That type of approach would recognise that the role of Māori Tiriti partners is not merely as stakeholders to be consulted with, but as equal partners in determining the direction and actions Aotearoa New Zealand takes to recover and rebuild.
35. The premise of this Bill is that it seeks to curtail participation rights in the interests of economic recovery. However, unduly restricting participation rights and disregarding Tiriti partnership and rangatiratanga risks flawed decision-making. If mana whenua voices are not adequately heard and



projects undertaken without their support, there is potential for projects to be delayed, for example, by legal action or other forms of opposition. Goals of efficiency will be better advanced by enabling iwi and hapū participation in decision-making from the outset. Potential problems and delays could be avoided if a partnership approach is taken from the outset, and obligations of ‘free, prior and informed consent’ are upheld.

### Tiriti obligations

36. Under te Tiriti, Māori are guaranteed tino rangatiratanga in relation to their whenua, kāinga and taonga katoa. Rangatiratanga stems from inherent rights of Tangata Whenua and whakapapa connections to land and the natural environment. It entails the authority and ability to exercise Kaitiakitanga rights and responsibilities, uphold intergenerational obligations and maintain spiritual connections to lands and waters. Its underpinning core values speak to an indivisible relationship between Māori and whenua. These inherent rights are affirmed in the guarantees of Te Tiriti and are further reinforced by international human rights, including the UN Declaration on the Rights of Indigenous Peoples (the Declaration).
37. A Tiriti o Waitangi-based approach includes that: Māori as Tiriti-partners are part of decision-making; Māori are able and supported to exercise rangatiratanga and self-determination and to lead solutions; and equity for Māori is central to responses. To help ensure this, Te Tiriti and the Declaration should be central to all planning and decision-making.
38. Te Tiriti provides for co-existing systems of governance authority – Crown kāwanatanga authority and Iwi and hapū rangatiratanga. The Waitangi Tribunal has found that those who signed Te Tiriti envisaged a sharing of power and authority and a partnership of equals<sup>15</sup>, yet the Bill assigns significant decision-making power to the Minister, and gives virtually no recognition to the rangatiratanga authority of Māori. In 2019 the Waitangi Tribunal found that the participatory arrangements of the RMA are not consistent with Tiriti partnership or the guarantee of tino rangatiratanga.<sup>16</sup> The Bill’s curtailing of those existing provisions represents a further backwards step.
39. Throughout the COVID-19 crisis Iwi and Māori communities were proactive in exercising their rangatiratanga to look after their communities and rohe, yet there is little acknowledgement in the Bill of the valuable leadership role of Iwi and Māori in the recovery phase.

### International human rights

40. The Declaration complements and reinforces Te Tiriti.<sup>17</sup> Articles of the Declaration elaborate on the guarantees of Te Tiriti and provide guidance on how these may be implemented in practice. The Declaration recognises the fundamental importance of land and other natural resources to Indigenous Peoples’ identity and the need to respect indigenous knowledge, cultures and traditional practices contributing to sustainable and equitable development and proper management of the environment.<sup>18</sup> It affirms that Indigenous Peoples have the right to the lands and resources they have traditionally owned or used,<sup>19</sup> the rights to maintain and strengthen their spiritual relationship with land and to uphold responsibilities for future generations.<sup>20</sup> The Declaration explicitly recognizes the right of Indigenous Peoples to the conservation and protection of the environment<sup>21</sup>

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<sup>15</sup> Waitangi Tribunal, (2014), *He Whakaputanga me te Tiriti: Report on stage 1 of the Te Paparahi o te Raki Inquiry*, Wai 1040, at p529.

<sup>16</sup> Waitangi Tribunal, (2019), *Stage 2 Report on the National Freshwater and Geothermal Resources Claims*, Wai 2358, at p 528.

<sup>17</sup> New Zealand courts and the Waitangi Tribunal have interpreted Te Tiriti and the Declaration alongside one another, for example, see: *New Zealand Māori Council v Attorney-General* [2013] NZSC 6. Waitangi Tribunal, (2014), *Whāia te Mana Motuhake: Report on the Māori Development Act Claim*, Wai 2417.

<sup>18</sup> Preamble of the Declaration

<sup>19</sup> Article 26 of the Declaration.

<sup>20</sup> Article 25 of the Declaration.

<sup>21</sup> Article 29 of the Declaration.

and to determine and develop priorities and strategies for the development or use of their lands or resources.<sup>22</sup>

41. UN human rights bodies have highlighted the need for special protection of Indigenous communities and have urged States to work in partnership with Indigenous Peoples in responding to COVID-19 and its impacts. The UN Special Rapporteur on the Rights of Indigenous Peoples has expressed concern that some States' emergency responses "are exacerbating the marginalisation of indigenous communities" and that environmental protections and consultation mechanisms were being "abruptly suspended in order to force through megaprojects."<sup>23</sup> The Special Rapporteur has affirmed the continued importance of upholding Indigenous Peoples' rights in times of emergency, stating:

Now, more than ever, Governments worldwide should support indigenous peoples to implement their own plans to protect their communities and participate in the elaboration of nationwide initiatives to ensure these do not discriminate against them. ...

The rights to development, self-determination and lands, territories and resources must be ensured in order for indigenous peoples to manage these times of crisis and to advance the worldwide goals of sustained development and environmental protection.

The pandemic is teaching us that we need to change: we need to value the collective over the individual and build inclusive societies that respect and protect everyone.

42. Similarly, the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has called on States to work in partnership with Indigenous peoples and reaffirmed that in responding to COVID-19, "[a]s with the adoption of any measures that may affect indigenous peoples, their free, prior and informed consent, grounded in the right to self-determination, should be sought."<sup>24</sup> The EMRIP has also specifically urged States to uphold Indigenous Peoples land rights as a vital component of response efforts and to contribute to recovery after the crisis.
43. The Declaration provides that States must consult and cooperate with Indigenous Peoples in good faith and endeavour to obtain their free, prior and informed consent prior to the approval of any project affecting their lands or resources.<sup>25</sup> The EMRIP has provided further guidance on how the obligations of free, prior and informed consent are to be applied in practice.<sup>26</sup> This includes respecting Indigenous Peoples' ' decision-making processes<sup>27</sup>. States should ensure that Indigenous Peoples have the information<sup>28</sup>, resources and capacity to effectively engage in consultation processes.<sup>29</sup> The obligation to "consult and co-operate" with Indigenous Peoples denotes a right to influence the outcome of decision-making processes affecting them, not just the right to be involved in such processes or have their views heard.<sup>30</sup> The objective of consultations should be to achieve agreement and consent.<sup>31</sup>

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<sup>22</sup> Article 32 of the Declaration.

<sup>23</sup> UN Special Rapporteur on the Rights of Indigenous Peoples, "COVID-19 is devastating indigenous communities worldwide, and it's not only about health" – UN expert warns', 18 May 2020. Accessible at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25893&LangID=E>.

<sup>24</sup> EMRIP (2020), 'COVID-19 yet another challenge for indigenous peoples', 6 April 2020. Accessible at: <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2020/04/EMPRIP-English.pdf>

<sup>25</sup> Articles 19 and 32(2) of the Declaration.

<sup>26</sup> Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/39/62, (10 August 2018).

<sup>27</sup> Ibid, Annex at para 9.

<sup>28</sup> Ibid., at para 7.

<sup>29</sup> Ibid., Annex at para 9.

<sup>30</sup> Ibid., at para 15.

<sup>31</sup> Ibid., Annex at para 6.

## Application to present Bill

44. While the Bill includes a number of positive measures, in the Commission’s view the limited opportunities for mana whenua participation do not adequately reflect Tiriti partnership, and do not adequately uphold rangatiratanga or the obligations of free, prior and informed consent. This is both a significant flaw of the Bill, and a missed opportunity to build a recovery in partnership with tangata whenua in a Tiriti-based way. It also misses an opportunity to strengthen existing resource management decision-making through the recovery, by building in joint decision-making processes and mechanisms.
45. Bearing in mind these inherent challenges, the following comments and recommendations seek to identify possible amendments that could enhance the alignment with Tiriti and human rights standards without compromising the purpose of the Bill.
46. In terms of specific positive steps, the Commission particularly welcomes the involvement of Iwi advisors in the development of this Bill, and the positive progress that this represents towards a Tiriti partnership approach and consistency with human rights obligations.
47. In line with the obligations of free, prior and informed consent noted above, it is important that this input has had a meaningful influence on the final form of the Bill. This also reflects the need to uphold and support rangatiratanga. We recommend that the Select Committee give particular attention to submissions from Iwi and what they say about the extent that Iwi views have been reflected in the final bill.

### **Recommendation 6**

That the Committee give particular attention to submissions from Iwi and the extent that Iwi input has been reflected in the final Bill.

48. The Commission notes that some positive steps have been taken in the Bill to reflect and uphold Tiriti obligations. The Commission strongly supports the inclusion of a Te Tiriti provision in clause 6, explicitly requiring treaty consistency in the exercise of functions and powers under the Act. This provision is particularly crucial given the potential impacts of the Bill on Tiriti rights and obligations and we welcome this advancement on the current equivalent RMA provision. The Commission therefore welcomes and supports clause 6. In our view, the clause could be even further strengthened by referring to Te Tiriti, and directly to the texts, rather than treaty principles.
49. The Commission also agrees that consistency with previous Treaty settlement agreements made with iwi and hapū is essential to upholding Te Tiriti and maintaining positive Crown-Māori relationships. The Commission therefore welcomes the provisions in the Bill aimed at preserving and upholding those settlements. However, we note that a Tiriti-based approach is broader than the settlements that have been negotiated to provide redress for previous rights breaches. It extends to protect the rights of iwi and hapū who have not reached settlements with the Crown. The Commission suggests an addition to clause 6 to recognise the importance of the broader, ongoing Tiriti relationship between Māori and the Crown, and require that the implementation of the Act is consistent with “promoting Tiriti partnership and strengthening the Crown-Māori relationship”.

### **Recommendation 7**

Amend clause 6 to refer to “Te Tiriti o Waitangi” rather than “the principles of the Treaty” in subclause (a). Add a further subclause “(c) promoting Tiriti partnership decision-making and strengthening the Crown-Māori relationship”.

50. This commitment to Tiriti partnership should also be affirmed by adding a reference to it in the matters the Minister must consider under clause 19. Further discussion and recommendations relating to clause 19 are set out in Part 2 below.

**Recommendation 8**

Add a new provision to clause 19(d) to include “strengthening authentic Tiriti partnership and Crown-Māori relationships” as a public benefit to be considered by the Minister.

51. We also note that the Bill includes several positive steps to provide for Tiriti obligations and iwi involvement or comments at various points in the process.
52. Requirements under clause 17 for the Minister to obtain and consider a report by Te Arawhiti outlining certain Treaty and customary rights considerations, are positive. The Commission suggests that these measures would be enhanced by enabling the Minister to also hear from Iwi directly at this point in the process. The Minister’s decisions could be enhanced by hearing the views of affected iwi and hapū directly, identifying and addressing any issues at this early stage rather than leaving this solely to expert panels once the matter has progressed further through the process.

**Recommendation 9**

Amend clause 17 to provide for engagement with Iwi prior to any decisions by the Minister to refer a project to a consent panel.

53. The Commission also welcomes the explicit exclusion of wāhi tapu or culturally significant sites from ‘permitted activities’ (clause 31) and the requirement for agencies to engage with iwi/hapū (clause 32). However, we note the very short (30 day) timeframe for this engagement. We suggest extending this to at least 60 days, and, at a minimum, provision is made in the Bill to extend this timeframe when necessary, for example in circumstances where concerns are raised by iwi or hapū that require further time to investigate.

**Recommendation 10**

That clause 32 is amended to require an engagement period of 60 days, and at a minimum, to provide for extensions to the iwi and hapū engagement process when necessary.

54. The Waitangi Tribunal’s recent freshwater report highlighted that under-resourcing is a barrier to iwi participation in RMA processes in normal circumstances.<sup>32</sup> These factors will be exacerbated when timeframes are shortened further. To this end, the Commission welcomes the ability for iwi and hapū to recover costs in relation to identifying wāhi tapu and culturally significant sites. However, on its own this is unlikely to address the ongoing issue of under-resourcing, and we note the importance of continued attention to this issue.
55. In relation to the expert consent panels, the Commission supports the inclusion of at least one iwi-nominated representative under clause 3, Schedule 5. We recommend that Te Tiriti partnership would be better reflected by providing for an equal number of iwi/non-iwi members. (cf clause 4, Schedule 5). The Commission supports the requirement for panels to include members with expertise in tikanga and mātauranga Māori (clause 8, Schedule 5). We also recommend that the latter provision is further strengthened by adding Tiriti expertise to the collective skillset required of panels.

**Recommendation 11**

Amend clause 3, Schedule 5 to provide for an equal number of iwi- and Crown-nominated members.

**Recommendation 12**

Amend clause 8, Schedule 5 to include a requirement for Tiriti expertise.

56. The Bill requires panels to seek comment from certain persons, including iwi authorities, treaty settlement entities, or any other the person the Panel considers appropriate. While welcoming that

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<sup>32</sup> Waitangi Tribunal, (2019), *Stage 2 Report on the National Freshwater and Geothermal Resources Claims*, Wai 2358, at p 523, 528, 561.

this provides some opportunity for mana whenua to have input into the consent process, the Commission notes with concern the very short period for comment (10 days), particularly in light of the under-resourcing issues noted above. The right to ‘free, prior and informed consent’ requires adequate time and resource to engage effectively. We also note that while there is provision for the Panel to hold a hearing if they choose, there is no requirement for them to do so. This further curtails the ability for mana whenua to present their views, ensure they have been understood, and have meaningful influence on the decision.

57. The Commission also welcomes that several of the identified listed projects in Schedule 2 of the Bill involve partnerships between Crown agencies and Iwi. However, we note with concern that by effectively giving legislative approval to listed projects, this aspect of the represents a significant curtailment of the participatory rights guaranteed under Te Tiriti and committed to under human rights treaties and declarations.
58. Our above recommendations seek to enhance the alignment of the Bill with Te Tiriti and human rights obligations. However, we note that overall the Bill falls far short in terms of Tiriti partnership and the free, prior and informed consent obligations affirmed in the Declaration.

## PART TWO: HUMAN RIGHTS IMPLICATIONS ARISING FROM THE ACT'S OPERATION

### Achieving the purpose of the Act

59. Clause 19 is a crucial provision within the Bill as it establishes the factors the Minister must take into account when considering whether a project fits with the purpose of the legislation.
60. Under the current version of clause 19, the Minister may consider the economic costs and benefits as well as social and cultural wellbeing of current and future generations. This can involve not only looking at *what* benefits are being proposed, but also *who* will reap those benefits. Similarly, in relation to costs, the Minister can consider *what costs* are being proposed *and* whether they will be disproportionately felt by already marginalised communities or create further disparities.
61. While a number of the current subclauses allow the Minister to consider factors relevant to the realisation of human rights, such as social and cultural wellbeing and environmental impacts, this section could be strengthened to provide better and more equitable opportunities for the recovery.
62. Given that the current purpose of the Bill is to promote employment growth to support New Zealand’s recovery from both the economic and social impacts of COVID-19, it is important to recognise the disproportionate impact that the pandemic had on already vulnerable communities.
63. It follows that the duty of the Minister to consider the matters set out in clause 19 should be mandatory. This requires the changing of the current word “may” to “must”. This ensures these matters are mandatory relevant considerations, rather than merely permissive. Given that this Bill is legislation that authorises decision-making that engages the national interest, it is appropriate that the Minister is required to consider these factors.

#### **Recommendation 13.**

Amend Clause 19 to impose a mandatory duty upon the Minister to consider the factors listed therein, as follows - “...for the purpose of section 18(3), whether a project will help to achieve the purpose of this Act, the Minister **must** consider any or all of the following matters...”

### Inclusivity and equal employment opportunity

64. A number of international treaties codify the right for all persons to work.<sup>33</sup> However we know that even prior to the pandemic, some communities were more likely to be impacted by unemployment,

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<sup>33</sup> International Covenant on Economic, Social and Cultural Rights (Articles 6 & 7), Convention on the Elimination of All Forms of Discrimination Against Women (Article 11); the Convention on the Rights of Persons with Disabilities (Article 27); the Convention on the Elimination of All Forms of Racial Discrimination (Article 5); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 25).

low-paid employment or unstable employment, for example women, Māori, Pacific peoples, persons with disabilities, migrants, older persons, youth and those in the rainbow community.

65. While time will tell what the full impacts of COVID-19 will be on New Zealand's economic situation, some of the early evidence is already showing the disproportionate impact on Māori<sup>34</sup> and other ethnicities<sup>35</sup> as well as people under 30.<sup>36</sup>
66. An economic and social recovery founded in human rights principles should recognise and address the structural inequalities in existing systems which create disproportionate outcomes.
67. A lens of accessibility and inclusion can fit within the Minister's assessment under clause 19. Inclusive employment practices which encourage equal employment opportunities for all to be involved in the recovery projects are also critical.

#### Accessible projects

68. The COVID-19 recovery is an opportunity to help build an inclusive society for Aotearoa. Making sure that projects take accessibility into account will make a significant contribution to realising this opportunity.
69. Accessibility is a precondition for disabled people to live independently and participate fully and equally in society.<sup>37</sup> It is related to disabled people's right to participate and be included in their communities<sup>38</sup> and to be free from discrimination.<sup>39</sup>
70. Universal design means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design.<sup>40</sup> Universal design can provide measurable economic and social benefits for everyone – particularly older people, children, disabled people and people with access needs, and culturally and linguistically diverse groups.
71. When considering projects for fast-track, the Minister should consider how closely the project conforms to or promotes universal design principles and accessibility. This is a chance to ensure that the opportunities missed in the Christchurch rebuild are taken during this reset and recovery.

#### **Recommendation 14.**

Include the following paragraphs in clause 19:

- (x) Whether the project is being developed with and for people or communities who are more vulnerable or have been more severely impacted by the COVID-19 epidemic.
- (xi) the degree to which the project will deliver equitable social and economic recovery of people and communities disproportionately affected by COVID 19.
- (xii) Whether the project promotes or improves accessibility and universal design.

#### Expert Consenting Panel

##### Extending the experience of Panel members

72. We note that schedule 5, clause 8 provides that Panel members are required to have the knowledge, skills, and expertise relevant to resource management issues; the technical expertise relevant to the project; and expertise in tikanga Māori and mātauranga Māori.

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<sup>34</sup> Almost 50,000 Māori were accessing the Jobseeker benefit in May 2020, making then 40% of those accessing the benefit in May 2020, Ministry of Social Development, [Monthly Benefits Update – May 2020](#).

<sup>35</sup> Non- Māori, non-Pākehā, non-Pacific peoples accessing the Jobseeker benefit increased by 72% according to the Ministry of Social Development, [Monthly Benefits Update – May 2020](#).

<sup>36</sup> Under 30's accessing the Jobseeker benefit were 45% of those accessing the benefit in May 2020, Ministry of Social Development, [Monthly Benefits Update – May 2020](#).

<sup>37</sup> Article 9 of the Convention on the Rights of Persons with Disabilities.

<sup>38</sup> Article 10 of the Convention on the Rights of Persons with Disabilities.

<sup>39</sup> Article 5 of the Convention on the Rights of Persons with Disabilities.

<sup>40</sup> Article 2 of the Convention on the Rights of Persons with Disabilities.

73. While the Commission supports the inclusion of these factors, we consider that it is also important that Panel members have skill and knowledge in Te Tiriti, human rights, and broad experience.
74. We suggest that skill, knowledge and experience in accessibility and universal design principles is vital, given the likely impact of large-scale infrastructure and development projects on the rights of disabled people. The government has a duty to ensure that new projects and infrastructure works conform with the accessibility and universal design requirements of the Convention on the Rights of Persons with Disabilities. In its General Comment on the right to accessibility under article 9 of the Convention on the Rights of Persons with Disabilities, the UN Committee of the Rights of Persons with Disabilities has held that States Parties must ensure, among other things that:

*All new objects, infrastructure, facilities, goods, products and services have to be designed in a way that makes them fully accessible for persons with disabilities, in accordance with the principles of universal design.*<sup>41</sup>

**Recommendation 15.**

Amend schedule 5, clause 8 to require that Panel Members must collectively have skills, experience and knowledge in universal design and accessibility; are representative of the diverse range of groups in the community; and demonstrate an understanding of Te Tiriti and human rights.

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<sup>41</sup> Committee on the Rights of Person with Disabilities, General comment No. 2 (2014) Article 9: Accessibility, CRPD/C/GC/2, paragraph 24

## SUMMARY OF RECOMMENDATIONS

### **Recommendation 1.**

In reviewing the Bill, the Select Committee should consider enhancing participation opportunities and Tiriti-based decision-making as an enabling factor for good decision-making.

### **Recommendation 2.**

Amend clause 4 to include the promotion of Te Tiriti and human rights in the purpose clause.

### **Recommendation 3.**

Amend clause 4 to introduce a new subsection that provides that a purpose of the legislation is to uphold the government's Te Tiriti and domestic and international human rights commitments; and promote equal employment opportunities and social inclusion for equitable outcomes.

### **Recommendation 4.**

Revise clause 10 to ensure that timely, efficient and cost-effective decision-making does not limit the duty of persons performing functions and exercising powers under the Act to do so consistently with the purpose of the Act, Te Tiriti o Waitangi and the government's domestic and international human rights commitments.

### **Recommendation 5.**

Amend clause 3 to reduce the duration of the Bill to one year and require periodic review by Parliamentary Select Committee during its operation.

### **Recommendation 6.**

That the Committee give particular attention to submissions from Iwi and the extent that Iwi input has been reflected in the final bill.

### **Recommendation 7.**

Amend clause 6 to refer to "Te Tiriti o Waitangi" rather than "the principles of the Treaty" in subclause (a). Add a further subclause "(c) promoting Tiriti partnership decision-making and strengthening the Crown-Māori relationship".

### **Recommendation 8.**

Add a new provision to clause 19(d) to include "strengthening authentic Tiriti partnership and Crown-Māori relationships" as a public benefit to be considered by the Minister.

**Recommendation 9.** Amend clause 17 to provide for engagement with Iwi prior to any decisions by the Minister to refer a project to a consent panel.

**Recommendation 10.** Amend clause 32 to require an engagement period of 60 days, and at a minimum provide for extensions to the Iwi and hapū engagement process when necessary.

**Recommendation 11.** Amend clause 3, Schedule 5 to provide for an equal number of Iwi- and Crown-nominated members.

### **Recommendation 12.**

Amend clause 8, Schedule 5 to include a requirement for Tiriti expertise.

### **Recommendation 13.**

Amend Clause 19 to impose a mandatory duty upon the Minister to consider the factors listed therein, as follows - *"...for the purpose of section 18(3), whether a project will help to achieve the purpose of this Act, the Minister must consider any or all of the following matters..."*

### **Recommendation 14.**

Include the following paragraphs in clause 19:

- (x) Whether the project is being developed with and for people or communities who are more vulnerable or have been more severely impacted by the COVID-19 epidemic.
- (xi) The degree to which the project will deliver equitable social and economic recovery of people and communities disproportionately affected by COVID 19.
- (xii) Whether the project promotes or improves accessibility and universal design.

### **Recommendation 15.**

Amend schedule 5, clause 8 to require that Panel Members must collectively have skills, experience and knowledge in universal design and accessibility; are representative of the diverse range of groups in the community; and demonstrate an understanding of Te Tiriti and human rights.