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Submission to the Parliament on the Kermadec Ocean Sanctuary Bill.

Introduction

1. This submission, focusing on the size of the proposed sanctuary area in the Bill, and the necessity and viability of protecting an area this large has been prepared by the Wellington Community Justice Project.
2. The Wellington Community Justice Project (WCJP) (www.wellingtoncjp.org) is a student-led organisation at Victoria University of Wellington. The project, formed in 2010, has twin aims: to improve access to justice and legal services in the community; and to provide law students with an opportunity to gain practical experience. It pursues these goals by establishing community-based volunteer projects and working with other organisations that have similar goals.
3. The research for this submission was carried out by students Hannah Kitty Mackenzie (LLB/ BA), Georgia Kathleen Eva Petry (LLB/BA), Kate Slater (LLB/BA) and Rosie Argyle (LLB/BA) as part of volunteer work for the project.

I Introduction

1. This submission concerns the proposed Kermadec Ocean Sanctuary Bill 2016. The focus of this submission relates to the size of the proposed sanctuary area and the necessity and viability of protecting an area this large.

II Importance of Protecting Our Marine Environment

2. The Wellington Community Justice Project (WCJP) supports this Bill in furthering the ambition of the New Zealand Government to become a world leader in the management and protection of our ocean environment.¹ In increasing global environmental degradation, this initiative is paramount to protect our oceans for the benefit of future generations and we hope that it will have a flow on effect for further marine protection initiatives.

3. WCJP further commend this Bill in its goal of providing for the retention of the unique biological and geological diversity of the Kermadecs.² The Ministry for the Environment states; “six million seabirds of 39 different species, 35 different species of whales and dolphins, three species of marine turtle (all endangered) and thousands of species of fish” reside in the Kermadec region.³ Scientists have described studying the Kermadecs as akin to studying life on another planet due to the extreme depth of the area and the fact it contains the longest arc of underwater volcanoes in the world.⁴

¹ (15 March 2016) 712 NZPD 9662.

² *Ibid.*

³ Ministry for the Environment *Regulatory Impact Statement: Establishment of a Kermadec Ocean Sanctuary* (February 2016), at [1].

⁴ *Ibid.*

4. It is vital to preserve these species and geological features for the conservation of the Kermadecs unique marine environment and for furthering scientific studies in the area.

III International Context

5. One aim of the proposed legislation is to bring New Zealand into compliance with our international obligations.⁵ New Zealand ratified the Convention on Biological Diversity in 1993, and has consequently adopted the Strategic Plan for Biodiversity, which includes the Aichi Biodiversity Targets.

6. Target 11 requires that:⁶

By 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes.

7. Currently 0.4 percent of New Zealand's total coastal and marine area (Exclusive Economic Zone and territorial waters) is protected. Following the enactment of this Bill, this will increase to 15 percent.⁷ Criticisms have been raised that exceeding the Aichi target, while commendable, causes unnecessary economic loss.⁸

⁵ (15 March 2016) 711 NZPD 9663.

⁶ *Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets* Convention on Biological Diversity 1760 UNTS 79.

⁷ N Smith *Establishment of a Kermadec Ocean Sanctuary* (Ministry for the Environment, September 2015), at [5] and [12].

⁸ B Moore "Kermadecs just the start as Nick Smith signals intention for more marine reserves" (11 November 2015) Stuff <www.stuff.co.nz>.

8. However, there is a reasonable expectation that following the 2020 deadline for the Aichi Targets a further Strategic Plan will be adopted extending the current targets. This would be consistent with the numerous succeeding (and overlapping) protocols adopted under the United Nations Framework Convention on Climate Change. It is recommended that the Kermadec Ocean Sanctuary be viewed as a starting point rather than a quick-fix for compliance with the Aichi Targets.⁹

9. This Bill has been used as the figurehead for New Zealand's "ambition to be a leader in oceans management."¹⁰ This is evidenced by John Key's announcement of the proposed sanctuary in an address to the United Nations as part of New Zealand's role as a member of the Security Council.¹¹ As an island nation it is entirely appropriate that New Zealand assume a leadership role in marine conservation. Moreover, given New Zealand's EEZ is the fourth largest in the world, any measure implemented can constitute substantial progress towards global marine conservation goals.

10. Furthermore, it should be considered whether the New Zealand's term on the Security Council could be used to further marine conservation goals. The Kermadec sanctuary will be one of the largest marine reserves and the largest contiguous area of ocean in which all fishing will be prohibited. Nonetheless international law places limitations on such reserves. This is evident in the labelling of the protected area as the Kermadec Ocean sanctuary and not marine reserve because of the conflict between the activities prohibited in a marine reserve and New Zealand's obligations to allow such activities within our

⁹ Protecting 30 percent of the ocean has many benefits, study suggests (21 March 2016) University of York <www.york.ac.uk>.

¹⁰ New Zealand Government "NZ aims to improve oceans management" (press release, 2 October 2015).

¹¹ J Key, Prime Minister of New Zealand "New Zealand Statement" (speech to the United Nations General Assembly, New York, 1 October 2015).

Exclusive Economic Zone (EEZ) under the United Nations Convention on the Law of the Sea (UNCLOS).¹²

11. While implementing measures, such as this Bill proposes within, the confines of current international law will certainly have some conservation effect. It is suggested that New Zealand could make use of our position on the Security Council and strong international partnerships to advocate for change in international law. Necessary changes include establishing an exception in the UNCLOS that justifies prohibition of certain activities (otherwise protected as rights) being undertaken within marine reserves such as exchanges of ballast water and marine discharges from ships and yachts, as well as laying of submarine cables, all activities which are hazardous to the ecosystems the marine reserve exists to protect. This would allow states to form fully protected marine reserves within their EEZs, which can be expected to lead to an increase in area set aside for conservation. The WCJP recommends to the Committee on this point that while the Kermadec Ocean Sanctuary is fully supported it would be preferable for the area to be designated a full marine reserve with the associated enhanced protections.

III Viability of Protecting the Kermadec Area

12. The purpose of the Sanctuary as stated in the Bill is “to establish a new marine protected area in New Zealand’s exclusive economic zone around the Kermadec Islands and to preserve it in its natural state.”¹³

¹² (1 March 2016) 711 NZPD 9204.

¹³ Kermadec Ocean Sanctuary Bill 2016, 2016 No 120-1, Explanatory note, General policy statement, at 1.

13. A 2012 report by the PEW Environment Group on the Pitcairn Islands (a larger marine reserve in the United Kingdom) suggested enforcement would be an issue:¹⁴

Pitcairners... have sighted foreign vessels in the vicinity of the islands that do not respond to any radio contact. However, without an airstrip or access to a fast patrol boat, they currently have no means of policing their territorial waters effectively.

14. The Pitcairns area relies on satellite technology to track illegal activity.¹⁵ However, there appears to be no similar proposed measures to aid enforcement in the Kermadecs.

15. The Bill states that the Environmental Protection Authority will be responsible for regulating access for scientific purposes or international obligation compliance, while the Department of Conservation (DOC) will be responsible for its day-to-day management, with the support of key partners like the navy.¹⁶ The Hon. Ruth Dyson raised concerns with the lack of funding for the DOC to carry out its obligations under the Bill.¹⁷ Dyson claiming that even now, DOC is struggling to fulfil its statutory obligations due to a lack of funding.¹⁸ This Bill would impose a significantly larger amount of work with no proposal of additional funding. We suggest that the current proposal be amended to ensure the protections in this Bill are put into effective practice now, and in the future.

¹⁴ R Irving and T Dawson *The Marine Environment of the Pitcairn Islands* (The Pew Environment Group, A report to Global Ocean Legacy, August 2012) at 42.

¹⁵ Satellite Applications, "Satellite technology to underpin establishment of world's largest fully protected marine reserve" (19 March 2015) Catapult Satellite Applications <www.sa.catapult.org.uk>.

¹⁶ NZPD, above n 1, at 9662; Ministry for the Environment, above n 3, at [145].

¹⁷ NZPD, above n 1, at 9662.

¹⁸ *Ibid.*

16. The Hon Ruth Dyson, makes another important recommendation in the need for a robust Environmental Protection Authority (EPA) criteria that ensures research, recreation, tourism and international activity is conducted in a way that respects the purpose of the sanctuary and ensures its protection.¹⁹ The purpose of the Sanctuary (to maintain the Kermadecs in their current state) may be undermined if the EPA allows for too much, or not enough of the aforementioned activities.

17. A 2015 report by SeaStates US regarding the United States' protected marine areas claims that marine *reserves* are better at protecting marine environments as there are too many limitations to the protections marine *protected areas* can offer. The report claims:²⁰

...an onshore underground pipeline ruptured off of California's coast, leaking thousands of gallons of crude oil into the Pacific Ocean. Sea life and important ocean habitat found in four marine protected areas located close to the oil leak were critically impacted and threatened. Catastrophes both natural and the result of human error and ignorance will inevitably happen outside of and within protected areas. However, marine reserves are more resilient to threats than unprotected areas and provide a life insurance policy for marine life well beyond their borders.

18. The Ministry for the Environment outlines the difference between marine reserves and sanctuaries. “[N]o fishing or mining applies to both the sanctuary and marine reserve”.²¹ “[M]arine discharges”, “submarine cables” and the “exchange [of] ballast water” can occur in the Sanctuary but not in the marine reserve.²² With regard to the above suggestions that marine reserves offer greater protection, the

¹⁹ *Ibid.*

²⁰ SeaStates US “How well does your state protect your coastal waters?” (July 2015) Marine Conservation Institute, MPAtlas <www.marine-conservation.org>.

²¹ Ministry for the Environment “About the Kermadec Ocean Sanctuary” (March 2016) <www.mfe.govt.nz>.

²² *Ibid.*

current arrangements of 7,500 square kilometres of marine reserve area around the Kermadec Islands may better address the aforementioned conservation purposes.²³

19. Iwi have received minimal consultation on this proposal and the Ministry for the Environment claims it would be inconsistent with biodiversity and sustainability goals to allow customary fishing.²⁴ However, there is evidence that iwi and commercial fishing currently occurs in the area at sustainable levels.²⁵ Will the creation of the sanctuary enhance the amount of marine protection offered to the Kermadec Islands enough to warrant the confiscation of these iwi fishing rights and other smaller commercial fishing rights?

20. Another consideration as mentioned by the Hon. Damien O’Conner, is the ‘spill over’ effect.²⁶ Will a zone this big, recognised as an important migratory pathway for many species, encourage overseas companies to take advantage of the flourishing biodiversity within the zone and fish just outside these zones? How does this Bill intend to stop them?

IV Economic and Opportunity Loss

21. The Kermadec islands and surrounding area is one of ten New Zealand fisheries management areas known as FMA10.²⁷ These zones are protected as a Benthic Protection Area, which means no contact with the seabed is allowed; all dredging and bottom trawling is prohibited.²⁸ A total of approximately 20

²³ *Ibid.*

²⁴ Ministry for the Environment, above n 3, at [53].

²⁵ Ministry for the Environment, above n 3, at [35] and [55]; NZPD, above n 1, at 9662.

²⁶ NZPD, above n 1, at 9662.

²⁷ “About the Kermadec Ocean Sanctuary.” (March 2016) Ministry for the Environment <www.mfe.govt.nz/>.

²⁸ “Region – Kermadec (FMA10).” New Zealand Fisheries Information <www.fs.fish.govt.nz>.

tonnes of fish are caught there annually. This equates to approximately \$165,000 of fisheries being precluded from the area if the Bill is passed.²⁹

22. This Bill proposes that no compensation will be payable by the Crown for loss of fishing opportunity or loss of livelihood. All species of fish currently caught in the zone are highly migratory and include swordfish, tuna and blue shark. There are around three months where tuna can only be found in the Kermadec zone, and in no other fisheries along the New Zealand coast.

23. Due to the inability to catch tuna elsewhere during this period, there could be further economic consequences for our fishing industry, which are yet to be investigated. Marama Fox MP explains that consistent catch throughout the year is “important for the high-value niche markets involved.”³⁰

24. The current fishing restrictions in place ensure that there is no harm to the area’s seabed. A process of tuna long lining is currently used to capture the fish, which tuna fishing leader Charles Huffett maintains has no effect on resident Kermadec fish.³¹ Thus arguably the fishing occurring is not harmful to the area or its resident marine life.

25. Presently, there is only a small amount of fishing occurring in the Kermadec zone. Though the oceans around the world continue to face pressure from habitat destruction and overfishing.³² Implementing this Bill ensures that future detrimental effects on this area can be avoided. This means

²⁹ “About the Kermadec Ocean Sanctuary”, above n 1.

³⁰ (15 March 2016) 712 NZPD 9662.

³¹ B Moore “Government off course in Kermadecs, says tuna fishing leader Charles Hufflett.” (October 2015) Stuff Business Day <www.stuff.co.nz>.

³² (15 March 2016) 712 NZPD 9662.

that measures will need to be implemented to ensure that the Department of Conservation is able to uphold this Bill and continuously monitor the area.

26. Due to the small quota of fish currently caught and the restrictions already in place in this zone, the Bill may not have a significantly adverse effect on the fisheries. The small size of catch caught in this fishery does not justify the decision to provide no compensation to those who make their living from this fishery.

27. The Bill proposes for 620,000 square kilometres of ocean will be closed off to all fishing activities – recreational and commercial. Currently, New Zealand's Quota Management System (QMS) is in place to help ensure sustainable utilisation of fisheries resources in our economic zone.

28. Surprisingly, there has been no mention of an adjustment to the QMS of total allowable catch in light of the proposed Bill. The government is closing off such a sizeable area without regard for a change in total quota. This means that more pressure will be put on other fisheries around the country. Furthermore, this concentration will likely be exasperated each year during the aforementioned three months when tuna is only found in the Kermadec region.

29. This Bill is definitely an ambitious and commendable step by the New Zealand Government for the protection of our ocean environment. Though the lack of discussion surrounding compensation and adjustments to the QMS is concerning.

30. There has been no mention of the possibly favourable effects of providing compensation or ‘buying out’ the people who previously privately benefitted from fishing in this area. No compensation combined with no change to the QMS of total allowable catch will incentivise people to catch the same amount of fish within a reduced number of fisheries. This concentration on other fisheries could result in a step backwards, rather than forwards, in the name of conservation.

III Treaty of Waitangi Principles

31. Finally, the Waitangi Tribunal has established principles of the Treaty of Waitangi, which are to be followed by both Treaty partners. Of these principles two are of most importance in this case: partnership, and good faith. Underlying these principles is the imperative idea that the relationship between the Crown and Iwi is reciprocal, with obligations and mutual benefits flowing both ways.³³ The Crown is acting against its duties as a good treaty partner by not consulting, nor acting in good faith by providing compensation for the extinguishment of such rights.

32. Partnership between treaty partners is central. In an analogous case to the present *Ngai Tahu Maori Trust Board v Director – General of Conservation*³⁴ Justice Cooke observed:³⁵

“Certainly it is so linked to taonga and fisheries that a reasonable Treaty partner would recognise that Treaty principles were relevant. Such issues are not to be approached narrowly... and the Crown is not right in trying to limit those principles to consultation.. since.. it has been

³³ J Hayward “The Principles of the Treaty of Waitangi” <www.justice.govt.nz>, at 1.3.(2).

³⁴ *Ngai Tahu Maori Trust Board v Director – General of Conservation* [1995] 3 NZLR 553.

³⁵ *Ibid.*, at 28.

established that principles require active protection of Maori interests. To restrict this to consultation would be hollow.”

33. The Crown in the present case must grasp that they have a responsibility to engage with the principles of the Treaty. The least that this government must do is engage with the most fundamental principle of consultation, giving 10 hours notice to Te Ohu Kaimoana of the proposed sanctuary is a far flung perception of consultation, an adequate consultation about the affected rights should have occurred in which both iwi and the Crown should have sat down and discussed at length the affects of extinguishing all fishing in the FMA10 area.³⁶

34. It is alarming that the government has disregarded these fundamental principles so easily. If this Bill progresses without the government rectifying and addressing these breaches, it will set a template by which the government will continue to act in pushing future laws.

A Treaty of Waitangi (Fisheries Claims) Settlement Act 1992

35. The Crown has not only acted as a bad Treaty partner but has also breached the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (The Sealord Deal).

36. In 1992, a full and final agreement was reached between the Crown and iwi, to settle commercial fishery claims under the Treaty of Waitangi.³⁷ The Act also changed the status of customary fishing rights, so that the Crown now has an obligation to act in accordance with the Treaty principles. Under

³⁶ “NZ Fisheries InfoSite” Ministry for Primary Industries <www.fs.fish.govt.nz>.

³⁷ Treaty of Waitangi (Fisheries Claim) Settlement Act 1992.

this agreement the government guaranteed that they would involve iwi in statutory decisions regarding fisheries. Fisheries were allocated by quota. The Maori Fisheries Commission received 20% of each quota, which went into the QMS. This includes quota in the Kermadec Islands Quota Management Area 10.³⁸ Iwi have both commercial and non-commercial fishing rights in this area. The Ocean Sanctuary Bill extinguishes all of these rights.

37. From a public law perspective, the government is entitled to legislate inconsistently with a previous Act as the newest Act will automatically overrule the previous Act. If the government is capable of overruling such a momentous victory for Maori rights in the form of the Sealord Deal, what will stop the government from overruling other previous settlements that delegate rights to iwi. This is the same if the government were to overrule the Central North Island Forests Land Collective Settlement Act 2008, by extinguishing iwi rights to these forests in which iwi hold shares in.³⁹

38. It must be noted that under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, it was a pan-iwi agreement with the Crown. This means all Maori have rights to the fishing zone and the special interests that Te Auporui and Ngati Kuri have, do not negate this.⁴⁰

IV Conclusion

39. The WCJP supports the ambition of the New Zealand Government to protect this important area. We recognise the importance of taking responsibility for ensuring protection of our oceans and the unique

³⁸ “Fisheries” Treaty2U <www.treaty2u.govt.nz>.

³⁹ Central North Island Forests Land Collective Settlement Act 2008.

⁴⁰ Te Ohu Kaimoana “Te Ohu Kaimoana’s preliminary comments on the Governments consultation document “A New Marine Protected Areas Act” (January 2016) Te Ohu Kaimoana –Maori Fisheries Trust <www.teohu.maori.nz>.

biological and geological diversity of the Kermadecs. The furthering of scientific research and the Sanctuary's significance for future generations is also necessary. In a world where environmental degradation is occurring at unprecedented levels, this protection is paramount.

40. However, the provisions for the Sanctuary's maintenance need to ensure the purpose of the Sanctuary can be fully realised with regard to the enforceability issues mentioned above. The EPA and DOC must then be provided with adequate resources to ensure the worthwhile protection of the area.

41. The Sanctuary must also be deemed to be a better alternative than the status quo in order to warrant the infringement on Maori and commercial fishing interests. Kermadec marine reserves may offer better marine protection than protected areas.

42. WCJP suggest that there be reconsideration of the decision to provide no compensation for lost income and fishing opportunity. Furthermore, we suggest that there be greater consideration regarding the Department of Conservation's task of monitoring this area. Finally we also suggest that there be discussions about an adjustment in the QMS, and to recognise the impact that no adjustment would have on other fisheries around New Zealand.

43. We also believe the government must undertake adequate consultation with all Iwi who feel their rights are being infringed in this proposed Bill. We think the Waitangi Tribunal should evaluate this bill to make recommendations on which Treaty principles have been breached and how these can be rectified. This Bill is not just about an Ocean Sanctuary; it is about the erosion of hard fought for Iwi rights.