

Hon Kelvin Davis, Minister for Māori Crown Relations: Te Arawhiti

Te Pire Haeata ki Parihaka/Parihaka Reconciliation Bill and name protection: Proactive release of Cabinet paper and MCR-19-MIN-0014

30 July 2019

These documents have been proactively released:

1. 17 June 2019, Office of the Minister for Māori Crown Relations: Te Arawhiti, *Te Pire Haeata ki Parihaka/Parihaka Reconciliation Bill and name protection* Cabinet paper
2. 17 June 2019, Cabinet Office, *MCR-19-MIN-0014* Cabinet Committee Minute

These documents are released in their entirety.

In Confidence

Office of the Minister for Māori Crown Relations: Te Arawhiti

Chair, Cabinet Māori Crown Relations: Te Arawhiti Committee

Te Pire Haeata ki Parihaka/Parihaka Reconciliation Bill and name protection

Proposal

- 1 This paper seeks Cabinet approval to protect the name Parihaka from potential unauthorised commercial use through the inclusion of additional clauses in Te Pire Haeata ki Parihaka/Parihaka Reconciliation Bill.

Executive summary

- 2 Between 2014 and 2017, the Crown and the Parihaka community engaged in a reconciliation process focussing on improving the Crown-Parihaka relationship. On 9 June 2017, the Crown and the Parihaka Papakāinga Trust signed a Deed of Reconciliation (Te Kawenata ō Rongo). A bill was required to give effect to the Deed of Reconciliation and confirm the commitments made by the Crown and the people of Parihaka, and to record the Crown apology and the Legacy Statement. The Legacy Statement summarises the origins of the community and its principles, describes its history, and sets out its aspirations for the future.
- 3 During the public submissions process on Te Pire Haeata ki Parihaka/Parihaka Reconciliation Bill (the Bill), the Parihaka Papakāinga Trust sought amendments to the Bill to protect the names Parihaka, Tohu Kākahi and Te Whiti o Rongomai (the two prophets), the history of Parihaka and the Legacy Statement against unregulated use.
- 4 There are limitations with providing protection to some of these names and concepts. The name Parihaka itself carries the greatest significance, nationally and internationally, and as such justifies protection. Keeping in mind the need to preserve freedom of expression, I have considered a combination of legislative and non-legislative approaches to protect the name Parihaka. The legislative options are limited to protecting the name Parihaka from unauthorised commercial use only.
- 5 I therefore seek your approval of additional clauses for inclusion in the Bill to protect the name Parihaka from potential unauthorised commercial exploitation. I consider that these additional clauses, combined with non-legislative approaches, will go some way to meeting the interests of the community while preserving general cultural and political freedom of expression for the wider public.
- 6 The proposed clauses (attached as Appendix One) aim to further strengthen the reconciliation process started in 2014 and for the Parihaka community to gain a degree of control over the use of the name Parihaka.
- 7 The Parihaka Papakāinga Trust, on behalf of the Parihaka community, supports the proposed clauses. Officials have worked with the Crown Law Office and the Parliamentary Counsel Office to ensure the proposed clauses constitute a justified limit on the right to freedom of expression and thus comply with the New Zealand Bill of Rights Act 1990.

- 8 The Parihaka community is also able to develop non-legislative approaches, which will enable opportunities to engage with, and educate, members of the public to protect against other potential cultural and political use of names and concepts related to and demeaning Parihaka. Crown agencies can support these non-legislative approaches as appropriate.
- 9 I consider that the significance of the name Parihaka, and the special context of the reconciliation process, necessitates particular Government intervention at this time. I understand that future policy work as part of the Government's response to the Waitangi Tribunal's recommendations in *Ko Aotearoa Tēnei: Report on the Wai 262 Claim (Wai 262)* is expected to consider the need for general legal protection for Māori names of significance and tangible and intangible expressions of Māori artistic and cultural traditions, including appropriate limits on freedom of expression.
- 10 Subject to your approval, the Māori Affairs Committee will review the additional clauses in its report back on the Bill due by 3 July 2019. The Bill will then progress to its second and third readings.

Background

Significance of Parihaka and reconciliation initiatives

- 11 The name Parihaka is of symbolic importance to the Parihaka community, many iwi and New Zealanders. When the Crown invaded Parihaka in 1881, it was the single most populous Māori settlement in New Zealand. It rapidly became the most important centre of peaceful Māori resistance in New Zealand, led by Tohu Kākahi and Te Whiti o Rongomai (the two Parihaka prophets). The profile of Parihaka, as a symbol of peaceful non-violent protest and as a shameful example of Crown actions, is well known within New Zealand and around the world. The Parihaka community was visited by descendants of Gandhi and Martin Luther King in 2003 in recognition of Parihaka's contribution to peace and it regularly hosts international visitors who wish to learn about its history and legacy.
- 12 Between December 2014 and June 2017, the Crown and the Parihaka community engaged in a reconciliation process. Cabinet approved the reconciliation package in November 2016 [CAB-16-Min-0609 refers] and on 9 June 2017, a Deed of Reconciliation was signed. The Bill was introduced in August 2017 to give effect to the Deed of Reconciliation, to confirm the commitments made by the Crown and the people of Parihaka, and to record the Crown apology and the Legacy Statement. The Legacy Statement represents Parihaka's principles. It is a statement written by Parihaka about Parihaka, summarising the origins of the community and its principles, describing its history, and setting out its aspirations for the future.

The issue

- 13 The name Parihaka (as well as the name of the two Parihaka prophets, the history of Parihaka and the Parihaka legacy) have been used for a range of purposes (for example for political advertising). Some of these uses are deemed inappropriate by the Parihaka community and used without their prior consent. The Parihaka Papakāinga Trust (the Trust) regularly fields requests related to the use of the name Parihaka, Tohu Kākahi and Te Whiti o Rongomai, the history of Parihaka and the Legacy Statement (the names and concepts). It takes a considerable amount of time and effort to consider each request and to educate the requester about what is appropriate and what is not.
- 14 During the development of the Deed of Reconciliation, the Trust advised the Crown that a high priority was to explore intellectual property and copyright issues and potential options. Subsequently, the Ministry for Business, Innovation and Employment (MBIE) held a workshop with the Trust in May 2018 to discuss intellectual property matters.

- 15 The Bill was referred to the Māori Affairs Committee for consideration after receiving its first reading in March 2018. During the public submissions process on the Bill, two submissions (from the Trust and the Trust's Secretary) sought amendments to the Bill to protect the names and concepts.
- 16 The submitters were concerned these names or concepts are used without any consultation, authorisation, or consent from the community. They noted that the names and concepts are widely used by others for their own purpose, gain or benefit without any engagement, consultation or approval by the community. They asserted that more and more people want to use the story of Parihaka, but they do not have proper knowledge or understanding of the significance of the history.
- 17 The submitters considered the community should have control over who and how the names and concepts associated with Parihaka and its legacy are being accessed and used by the public. They wanted to ensure that any user understands the history of Parihaka and the legacy that has been upheld for over 100 years. The submitters sought provisions that no person may, without a written authorisation from the Trust carry on trade activities under the names and concepts associated with Parihaka. They also wanted the ability to seek orders or remedies through the courts.
- 18 Because of its high profile, the name Parihaka is increasingly being used for a range of purposes and it justifies some level of protection. There are limits to what can be done and there is currently a gap in the New Zealand legislative system for such protection.

What is not covered in the proposal

- 19 I have explored options to provide protection for the names Parihaka, Tohu Kākahi and Te Whiti o Rongomai, the history of Parihaka and the Legacy Statement. While they are of great significance to the Parihaka community, there are limitations with providing protection to some of the names and concepts.
- 20 In the case of the name of the prophets, there is no precedent for protecting personality rights, i.e. the right of an individual to control the commercial use of his or her name, image, likeness, or other unequivocal aspects of one's identity. Another complication is there are likely to be instances where these names have been bestowed on other people, in honour of the prophets. Providing protection to the names of the two Parihaka prophets may place unreasonable limits on the right to freedom of expression or charges of perceived censorship.
- 21 Equally, protecting the history of Parihaka may place unreasonable limits on the right to freedom of expression.
- 22 Protecting the Legacy Statement under the Copyright Act 1994 would not meet the aspirations of the Parihaka community as it would not prevent individuals from misrepresenting the history, legacy and story of Parihaka.

Proposed clauses for inclusion in the Bill

- 23 It is possible to support some of the aspirations of the Parihaka community by protecting the name Parihaka against potential unauthorised commercial use through the legislation while preserving rights of expression in other (non-commercial) areas.
- 24 I consider the name Parihaka requires protection through the Bill because:
 - 24.1 Parihaka has significance as a vivid symbol of New Zealand's colonial past and a prominent international symbol of non-violent action against injustice;

- 24.2 all iwi of Taranaki, as well as other iwi throughout New Zealand and many other New Zealanders, have connections to Parihaka and its community; and
- 24.3 the community's relationship with the place and its legacy is particularly strong – commemorations are held every month at Parihaka.
- 25 Officials have worked alongside the Trust to develop protection clauses (attached as Appendix One) for inclusion in the Deed of Reconciliation and the Bill to protect the name from potential unauthorised commercial use that demeans the name Parihaka. These clauses are adapted from the name protection clauses provided under the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (Te Awa Tupua Act). While Parihaka differs from Te Awa Tupua (one is a geographical settlement and the other a legal entity established through legislation), their significance to their community is comparable.
- 26 The proposed clauses are akin to an intellectual property right. They will protect against the commercial exploitation (including registration of trade marks and company names, and other uses in trade) of the name Parihaka without the authorisation of the Trust.
- 27 Under this proposal:
- 27.1 the protection is focussed on preventing unauthorised commercial exploitation and would not limit artistic and political freedom of expression;
- 27.2 no written authorisation is required if, in accordance with honest practices in industrial or commercial matters, a person uses the name to indicate the geographical origin of the body, business, occupation or product or service and does not intend to mislead or deceive people that they or their product is associated with Parihaka;
- 27.3 the authorising entity (the Trust) can withhold the requested authorisation if the proposed use demeans Parihaka;
- 27.4 in the case of unauthorised commercial use of the name Parihaka, the Trust can apply to the Court to seek a declaration that the use of the name is unauthorised and ask the Court to make an order for the use of the name to cease; and
- 27.5 Parihaka is carefully defined to avoid any confusion with other other geographic place names that include Parihaka in their title, such as Mount Parihaka (in Northland) and Parihaka Stream (in the Coromandel).

Compliance with the New Zealand Bill of Rights Act 1990

- 28 The Crown Law Office has advised that the proposed clauses constitute a justified limit on the right to freedom of expression under section 5 of the New Zealand Bill of Rights Act 1990 (BORA) (in relation to reasonable limits to the rights and freedoms) and is consistent with BORA.

Inclusion of an additional statement in the Bill

- 29 During the Select Committee process on the Bill, the Trust sought an amendment to clarify that the community wrote the Legacy Statement. I have agreed to include an additional statement in the Bill to recognise that the Legacy Statement originates from the Parihaka community to summarise the origins of the Parihaka community and its principles, to describe its history, and to set out its aspirations for the future.

Non-legislative mechanisms

- 30 Inclusion of the above clauses alone will not meet all the aspirations of the Parihaka community. Officials from MBIE will discuss with the Trust non-legislative measures, to be led by the community, designed to encourage members of the public considering using the names or concepts associated with Parihaka to follow a set process that has been approved and published by the community.
- 31 Options could include the development by the community of a set of guidelines covering the use, including for commercial purposes, of the names and concepts (and any additional elements deemed appropriate by the community), the use of social media to publicise the guidelines, or the development of a certification mark that the Trust can use to authorise when and how individuals or bodies use the names and the concepts. Similar guidelines have been developed with Ngāti Toa to explain when attribution is required under the Haka Ka Mate Attribution Act 2014 and how to comply with the Act. These guidelines are also intended to explain why the haka Ka Mate is of such cultural importance to Ngāti Toa.

Risk assessment and mitigation

Perceived limitation of the right to freedom of expression

- 32 There is a risk of negative reaction from the public who may perceive the clauses as limiting freedom of expression. I consider the risk of an adverse reaction from the public to be low because the proposed clauses only apply to unauthorised commercial use and do not restrict other cultural, artistic or political uses. The clauses will only apply to unauthorised commercial use demeaning of the name Parihaka and I do not anticipate reasonable requests to use the name to be declined. I consider the limitations to freedom of expression are proportionate to the objective of the clauses.
- 33 The aim of the clauses is to balance the strong interest of the Parihaka community with the commercial interests of other parties. This approach is consistent with one of the recommendations of the Waitangi Tribunal in the Wai 262 report which recommended creating a mechanism to prevent any commercial use of taonga works or mātauranga Māori unless there had been consultation and (if appropriate) consent.
- 34 Name protection clauses are included in the Te Awa Tupua Act and they have not received any negative reaction. I do not anticipate significant negative reaction from the wider public with providing protection over the commercial use of the name Parihaka.

Precedent

- 35 Adding name protection clauses to the Bill may also be perceived as strengthening the precedent set in the Te Awa Tupua Act. It is possible that further requests for name protection will arise in future Treaty settlement negotiations.
- 36 I acknowledge that, in general, establishing legal protection for names on an ad-hoc basis is not desirable. I understand that future policy work as part of the Government's response to the Waitangi Tribunal's Wai 262 recommendations is expected to consider the need for general legal protection for Māori names of significance and taonga works, including appropriate limits on freedom of expression. This work is being led by the Minister for Māori Development. Until the Crown responds to the Waitangi Tribunal's Wai 262 report, this solution is appropriate in the current circumstances. I therefore consider that the great significance of the name Parihaka, and the context of the reconciliation process, justifies Government intervention at this time.

- 37 Should name protection aspirations be raised by claimant groups in the future, they will need to be assessed on a case-by-case basis until there is policy development in this area. A range of factors will need to be considered and name protection may only be afforded to names with a high national significance.

Next steps

- 38 Subject to your approval, the Māori Affairs Committee will review the additional clauses in its report back on the Bill due by 3 July 2019. The Bill will then progress to its second and third readings.

Consultation

- 39 The proposed clauses have been drafted by the Parliamentary Counsel Office and have been reviewed by the Crown Law Office to ensure they constitute a justified limit on the right to freedom of expression and comply with the BORA. The following departments were consulted on this paper: MBIE, the Ministry for Culture and Heritage, and Te Puni Kōkiri.
- 40 The Parihaka Papakāinga Trust supports the proposed clauses.

Regulatory Impact Analysis

- 41 The Treasury Regulatory Quality Team has determined that the proposal outlined in this paper to protect the name Parihaka from potential unauthorised commercial use is not subject to the Regulatory Impact Analysis requirements on the basis that they will have no or minor impacts on businesses, individuals or not-for-profits.

Proactive release

- 42 I intend to proactively release this paper, making any necessary redactions, within 30 business days of Cabinet approval.

Recommendations

- 43 The Minister for Māori Crown Relations: Te Arawhiti recommends that the Committee:
- 1 note the issues of name protection faced by the Parihaka community in relation to the use of the name Parihaka;
 - 2 note the proposed name protection clauses would protect the name Parihaka from unauthorised commercial use;
 - 3 note the Crown Law Office has reviewed the proposed clauses and confirmed they constitute a justified limit on the right to freedom of expression under the New Zealand Bill of Rights Act 1990; and
 - 4 approve the inclusion of clauses in Te Pire Haata ki Parihaka/Parihaka Reconciliation Bill to protect against unauthorised commercial use of the name Parihaka.

Authorised for lodgement

Hon Kelvin Davis
Minister for Māori Crown Relations: Te Arawhiti

Appendix One: Proposed name protection clauses

The following clauses are subject to a review by the Māori Affairs Committee in their report back on the Bill and final drafting by the Parliamentary Council Office.

Protection of name

- (1) No person may, unless they have made a written request to the trustees of the Parihaka Papakāinga Trust (the trustees) and received written authorisation from the trustees,—
 - (a) cause an incorporated or unincorporated body to be formed or registered under any name, title, style, or designation that includes the name Parihaka:
 - (b) carry on trade activities under any name, title, style, or designation that includes the name Parihaka:
 - (c) in relation to any commercial goods or services, display, exhibit, or otherwise use in any business, trade, or occupation, a name, title, style, or designation that includes the name Parihaka.
- (2) Subsection (1) does not apply to—
 - (a) any person using the name for genuine creative, educational, or historical purposes; or
 - (b) any of the following, if carried out in accordance with honest practices in commercial or industrial matters to indicate the geographic location of the body, business, trade, occupation, goods or services:
 - (i) an incorporated or unincorporated body located at or near Parihaka:
 - (ii) a business, trade, or occupation located at or near Parihaka:
 - (iii) goods or services produced or provided at or near Parihaka.
- (3) Subsection (1) applies to the use, in the manner described in subsection (1)(a) to (c), of any other name, title, style, or designation that so resembles the name Parihaka as to be likely to mislead, confuse, or deceive a person into believing that there is an association with Parihaka.
- (4) Subsection (5) applies to any request under subsection (1) for written authorisation.
- (5) The trustees may withhold the requested authorisation if the proposed use would demean the name Parihaka.
- (6) If the trustees consider that the name Parihaka is being used in a manner contrary to subsection (1) or (3), they may—
 - (a) use any relevant statutory process to object to the use of the name; and
 - (b) give written notice to any person—
 - (i) stating that the name Parihaka is being used in a manner contrary to subsection (1) or (3); and
 - (ii) requesting that person to cease further use of the name in that manner; and
 - (c) apply to a court for—
 - (i) a declaration that the use of the name Parihaka by the person to whom notice was given under paragraph (b) is contrary to subsection (1) or (3); and
 - (ii) an order that the person cease the relevant use of the name.
- (7) In this section, Parihaka means the settlement in South Taranaki at 39°17'18.4"S 173°50'24.9"E, as it generally exists from time to time and is referred to in Te Kawenata ō Rongo.



Cabinet Māori Crown Relations: Te Arawhiti Committee

Minute of Decision

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Te Pire Haeata ki Parihaka/Parihaka Reconciliation Bill and Name Protection

Portfolio **Māori Crown Relations: Te Arawhiti**

On 11 June 2019, the Cabinet Māori Crown Relations - Te Arawhiti Committee:

- 1 **noted** the name protection issues faced by the Parihaka community in relation to the use of the name Parihaka, described in the paper under MCR-19-SUB-0014;
- 2 **approved** the proposed legislative clauses attached as Appendix one to the paper under MCR-19-SUB-0014 to protect against unauthorised commercial use of the name Parihaka;
- 3 **noted** that the Crown Law Office has reviewed the proposed clauses described in paragraph 2 above and confirmed that they constitute a justified limit on the right to freedom of expression under the New Zealand Bill of Rights Act 1990;
- 4 **authorised** the Minister for Maori Crown Relations: Te Arawhiti to make minor technical amendments to the clauses, if required, prior to them being considered by the Maori Affairs Select Committee for inclusion in Te Pire Haeata ki Parihaka/Parihaka Reconciliation Bill.

Rachel Clarke
Committee Secretary

Present:

Rt Hon Winston Peters
Hon Kelvin Davis (Chair)
Hon Grant Robertson
Hon David Parker
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Shane Jones
Hon Peeni Henare
Hon Eugenie Sage

Officials present from:

Office of the Prime Minister
Officials Committee for MCR

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