

Hon Kris Faafoi

Minister for Broadcasting and Media

Update on draft ANZPM Legislation Cabinet paper and bill

Date:	25 May 2022	Priority:	High
Security classification:	In Confidence	Reference:	BR2022/250

Minister	Action Sought	Deadline
Hon Kris Faafoi Minister for Broadcasting and Media	<p>Note the approach taken to address issues raised during departmental consultation</p> <p>Provide any feedback on the proposed approach by Thursday 26 May 2022</p> <p>Agree to the proposed approach to address concerns about provisions requiring content to be provided free at first transmission, while enshrining free to air access in the legislation</p> <p>Indicate your preference for the select committee the ANZPM bill will be referred to for consideration</p> <p>Note that a final draft of the LEG paper and bill will be provided to you on Friday 27 May for approval and lodgement</p>	26 May 2022

Contacts			
Name	Position	Contact	1 st Contact
Liz Stewart	Director, Strong Public Media Programme	s9(2)(a)	✓
Elisa Eckford	Principal Policy Advisor		

Minister's office to complete

☐ Approved

☐ Declined

☐ Noted

☐ Needs change

☐ Seen

☐ Overtaken by events

☐ See Minister's notes

☐ Withdrawn

Comments:

Purpose

- 1 This paper provides you with an update on our progress in addressing issues raised through departmental consultation on the draft Aotearoa New Zealand Public Media bill [BR2022-239 refers].
- 2 It also proposes an amendment to the bill to address issues raised by the Establishment Board about Cabinet's decision that the entity should provide content free of charge to New Zealanders when it is first published.

Key messages

- 3 Following departmental consultation, we have continued to develop or clarify policy thinking to address the substantive feedback provided by departments. We believe that all these issues have now been resolved, with agreed positions to be reflected in the draft bill and/or the Cabinet Legislation Committee (LEG) paper. Some minor and technical amendments are still being made, none of which are likely to require Cabinet decisions.
- 4 We have updated the table *Proposed approach to departmental feedback* that was previously provided to support the ministerial consultation process to reflect the current position on each issue, and how it has been or will be addressed. (**Appendix One**).
- 5 Consequential updates to the draft LEG paper are set out in **Appendix Two** and **Appendix Three**. The latest version of the draft bill is attached as **Appendix Four**. Please note, some of the amendments referred to in Appendix One are yet to be incorporated into the draft bill.
- 6 Following your office's engagement with the Prime Minister's Office, we have developed a proposed approach to address issues raised by the Establishment Board about Cabinet's decision that all content should be provided free to New Zealanders when it is first published, while ensuring that free to air access will continue to be enshrined in legislation. If you are comfortable with the proposed approach, we will update the LEG paper accordingly to seek the necessary Cabinet decisions.
- 7 We also seek your confirmation on the select committee you wish the bill to be referred to, so this can be reflected in the LEG paper.
- 8 A final draft of the LEG paper and bill will be provided to you on Friday 27 May for approval and lodgement on Wednesday 1 June. We will need to incorporate any changes arising from your consultation with your ministerial colleagues into this version.

Recommendations

- 9 The Ministry for Culture and Heritage recommends that you:

- 1 **note** the approach taken to address substantive feedback received through departmental consultation of the draft Aotearoa New Zealand Media bill **NOTED**
- 2 **provide** any feedback on the proposed approach to address issues raised through departmental consultation, on the current draft LEG paper, or as a result of ministerial consultation by Thursday 26 May for incorporation into the final version of the bill and LEG paper **YES/NO**
- 3 **note** that we will supply you with an updated draft of the bill reflecting all the known changes on Friday 27 May **NOTED**
- 4 **agree** to remove clause 16 (that provides that content must be broadcast free of charge on its first transmission in New Zealand) from the draft bill **YES / NO**
- 5 **agree** to add a sub-clause to clause 12 specifying that the functions of the entity include delivery of content free of charge **YES / NO**
- 6 **note** that this approach would still be subject to PCO's drafting advice **NOTED**
- 7 **indicate** your preference for the bill to be referred to EITHER
the Economic Development, Science and Innovation Committee **YES / NO**
OR
the Social Services and Community Committee **YES / NO**
- 8 **note** that a final draft of the LEG paper and bill will be provided to you on Friday 27 May for approval and lodgement **NOTED**

Liz Stewart
Director, Strong Public Media
Programme

Hon Kris Faafoi
Minister for Broadcasting and Media

_____ / _____ / 2022

Development and clarification of policy matters

Changes resulting from work with Te Puni Kōkiri and Te Arawhiti

10 We have worked with Te Puni Kōkiri (TPK) and Te Arawhiti to clarify the intent of specific clauses that set out the responsibilities of the entity in relation to Māori. The focus of this work was on ensuring that the bill gives effect to Cabinet's intent and reflects a strong commitment to the principles of the Treaty of Waitangi - while not imposing unclear or impractical obligations on the entity, or impacting on the entity's ability to make independent decisions on editorial matters. The following amendments have been made to the bill as a result:

- a. the inclusion of a specific Te Tiriti o Waitangi/Treaty of Waitangi clause (cl 5). This clause has now been agreed with Te Arawhiti and TPK. The LEG paper will seek agreement to its inclusion, as Cabinet has not previously agreed to a specific Treaty clause
- b. a clarification that clause 14(1)(b) seeks to commit the Board to ensuring the entity engages with specific Māori stakeholders and interest groups on key strategic areas, rather than broad engagement on all operations and decisions. The updated clause provides a clear direction, without placing an overly onerous burden on the entity
- c. an amendment to clause 12(2)(a)(ii) to include reference to iwi and hapū and reword reference to "taonga content" (which TPK and PCO advised was unclear). This focuses the clause on giving iwi/hapū access to content specific to that iwi/hapū, in line with the policy intent
- d. an amendment to clause 13(1)(b), which relates to how Māori perspectives are reflected in the development and delivery of content and services. This change clarifies both what content and services are covered by this clause, and that participation in the development and delivery of this content and these services is one way in which a Māori perspective will be reflected.

Other amendments to the charter requiring Cabinet decisions

11 In addition to the above amendments, Cabinet agreement will be required for two further changes to the charter in response to departmental feedback:

- a. Based on advice from the Ministry of Foreign Affairs and Trade the draft bill has clarified the entity's function in relation to its international relationships to Pacific Island countries. This amendment better reflects the nature of those relationships.
- b. The wording of clause 13(1)(f) has been amended to align with the amended clause 13(1)(b) above, to ensure consistency across the operating principles.

12 The attached table provides more information on these changes.

Free access to content

- 13 Cabinet agreed that the Bill require the entity to provide content free of charge to New Zealanders when it is first published, while maximising access to public media content [CAB-SUB-0034 refers].
- 14 The Bill currently has two provisions that relate to the provision of free access to content:
- within the Charter, the functions of the entity are specified as broadcasting *freely available, accessible and high-quality content across a range of genres* (cl12(1))
 - clause 16, which is a requirement to *broadcast content free of charge on the content's first publication in New Zealand*
- 15 As you are aware, the Establishment Board raised concerns about the impact of clause 16 - in particular that it may limit the commercial opportunities open to the entity and potentially work against its ability to ensure that all New Zealanders can easily access content.
- 16 We understand that your office has received feedback from the Prime Minister's office (PMO) that supports the Board's view that there should be sufficient flexibility for the entity to consider other models for providing content, alongside providing content free of charge. However, we understand that PMO would still like to see free access to content enshrined in the bill.
- 17 The bill could provide for this by:
- a. deleting current clause 16 to remove the specific requirement that all content must be broadcast free of charge on its first publication in New Zealand
 - b. adding a sub-clause to the current clause 12 (which sets out the entity's functions as part of its charter) to require the entity to provide content that is free of charge.
- 18 This approach would mean that the entity has to provide content that is free of charge but doesn't limit it to only providing content that is free of charge. This approach is similar to the current Television New Zealand Act that requires TVNZ to *include the provision of channels that are free of charge and available to audiences throughout New Zealand* – but does not prevent it from charging for content or services.
- 19 There would still be a strong obligation on the entity to maximise New Zealanders' access to content – given that the overarching requirement set in clause 12 requires content to be freely available and accessible. This means that if the entity did decide to charge for some content, they would have to show how this contributed to the overall availability and accessibility of public media content.

20 If you are comfortable with this approach, we will update the LEG paper to seek agreement to the policy change, and provide drafting instructions to PCO (noting that the specific wording of the sub-clause would be subject to PCO drafting).

Referral to select committee

21 We are also seeking your preference on which select committee you would like the bill to be referred to, so this can be provided for in the LEG paper. The options are the Economic Development, Science and Innovation Committee or the Social Services and Community Committee.

Next steps

22 A final draft of the LEG paper and bill will be provided to you on Friday 27 May. We will need to incorporate any changes arising from your consultation with your ministerial colleagues into this version.

23 At this point, your agreement will be sought to lodge the paper for consideration at LEG Cabinet committee on 9 June 2022.

Appendices

Appendix 1: *Updated table: Proposed approach to departmental feedback*

Appendix 2: *Draft Legislation Cabinet paper [tracked change version]*

Appendix 3: *Draft Legislation Cabinet paper [clean version]*

Appendix 4: *Draft ANZPM bill*

Appendices 2-4 are withheld under s9(2)(g)(i). Final versions of papers are available on the Ministry's website at: <https://mch.govt.nz/strong-public-media>.

Agency	Comment	Manatū Taonga view	Status as at Wednesday 25 May
TPK, Te Arawhiti	<p>Te Arawhiti and PCO raised the issue of whether the bill should contain a Treaty clause and whether such a clause should be general (i.e. impose a general obligation) or specific (set out specific ways in which ANZPM will reflect the Crown's Treaty obligations). Following conversations with Te Arawhiti, PCO included a specific Treaty clause in the bill (clause 5)</p> <p>TPK's feedback in response to that was that:</p> <ul style="list-style-type: none"> clause 5 doesn't sufficiently reflect move towards stronger Māori-Crown relationships particularly in areas of great importance to Māori such as the use of public media to support, strengthen and grow te reo Māori, tikanga Māori and mātauranga Māori. in light of this, consideration should have been given to the option of a general, operative Treaty clause and this should have been considered as an option during the policy development stage. they would expect a direct reference to providing for the Crown's Treaty obligations in such a clause, with a reasonably high standard of giving effect to the Treaty and its principles. 	<p>Manatū Taonga did consider, and advised against, the use of a general Treaty clause during the policy development phase. Based on initial advice from the Legislation Design Advisory Committee and subsequent work (including consultation with both Te Puni Kōkiri and Te Arawhiti), our recommended approach was to reflect the entity's obligations in specific ways, rather than as a broad obligation. The specific obligations Cabinet agreed to are set out in the bill.</p> <p>However, following the recent release of new guidance by Te Arawhiti, our view is that specific Treaty clause will help to clearly show how ANZPM will recognise and respect the Crown's responsibility to give effect to Treaty principles (through a set of specific obligations in the bill), and will ensure the bill aligns with the guidelines and expectations around modern legislation.</p>	<p>Both Te Arawhiti and Te Puni Kōkiri are now comfortable with the inclusion of a specific clause.</p> <p>The clause summarises the relevant obligations for the entity and links them to the Crown's responsibility to give effect to the principles of the Treaty of Waitangi, to ensure that the Crown's Treaty responsibilities are given appropriate recognition.</p> <p>The LEG paper should seek agreement for its inclusion as previous Cabinet decisions did not include agreement to a specific Treaty clause.</p>
TPK, DPMC	<p>Both TPK and DPMC raised concerns about the breadth of clause 14 (1)(b) and the ambiguity as to who "Māori" refers to and what would be considered "relevant operations and decision making" requiring engagement. This should be clarified to ensure the legislation doesn't commit the entity to more than was intended.</p>	<p>We agree that the provision is likely too vague – even though it gives effect to a decision made by Cabinet.</p> <p>The intent behind this provision was to commit the Board to ensuring the entity engages with specific Māori stakeholders and interest groups on key strategic areas of interest ('relevant matters' in the Cabinet paper). It was not intended to require the entity to engage broadly on all operations and decision-making.</p>	<p>We have agreed with TPK that the clause should refer to engagement <i>on relevant strategies and policies</i> to ensure it is not seen as a requirement to engage on specific operations and decisions. This will avoid constraining the entity's decision-making (including potentially impacting on its editorial independence), and placing an overly onerous burden on the entity – while ensuring engagement is happening at a strategic level.</p> <p>TPK expressed a preference for the clause to require the board to ensure ANZPM engage with <i>iwi, hapū and Māori</i>. We disagreed with this approach because it is not consistent with the intent that key stakeholders/representatives of groups with relevant expertise/interested would be engaged with, rather than a broad range of people. Again, such an obligation would likely place an overly onerous burden on the entity.</p> <p>TPK has now agreed to the proposed wording of <i>the board must ensure that ANZPM engages with Māori on relevant strategies and policies</i>, and we have instructed PCO accordingly.</p>
TPK	<p>TPK raised questions about clause 12(2)(a)(ii) (<i>to preserve and enable Māori to have access to taonga content</i>)</p> <p>TPK had asked what 'taonga content' and 'Māori' referred to in this clause.</p>	<p>The clause was updated to read: <i>to preserve and enable Māori to have content about and by Māori</i>. However, this lost the intended meaning that this relates to particular content that is valuable to particular Māori content.</p> <p>We agree with TPK's view that the focus of 12(2)(a)(ii) is on Māori as tangata whenua (Article 2 of the Treaty) and therefore should specify iwi and hapū. Māori as citizens (Article 3 of the Treaty) are captured by 12(2)(a)(i).</p>	<p>On the basis of our discussions with TPK, we have agreed that PCO be instructed with the following wording: <i>to enable iwi and hapū to have access to content by and about themselves, and to ensure this content is preserved</i></p>

Agency	Comment	Manatū Taonga view	Status as at Wednesday 25 May
		<p>This means that:</p> <ul style="list-style-type: none"> Māori (or anyone else) wanting to access Māori content that reflects/tells general Māori stories have that provided for through 12(2)(a)(i). Iwi/hapū wanting to access content specific to that iwi/ hapū have that provided for in 12(2)(a)(ii). 	
TPK	TPK raised a question over the clarity and coverage of the operating principle; <i>ensure the participation of Māori and the presence of a significant Māori voice in the development and delivery of content and services</i> (clause 13(1)(b)).	<p>Through the drafting process, the wording had moved away from the original intended meaning – that the entity is meant to operate in a way that seeks and reflects a Māori perspective so it can deliver its functions in cl 12(c),(d),(e) and 12(a)(ii); and fulfil its objectives in 11(1)(b) and 11(2)(c), (d), (e).</p> <p>However, the Cabinet decision could have been read as setting an overly onerous undertaking that there would be Māori participation in all decisions/process relating to the delivery of all content and services.</p> <p>Our view is the clause should be amended to clarify that it relates to the expectation that a Māori perspective is brought to bear (including through participation) on content and services related to Māori.</p>	We have agreed with TPK that PCO be instructed with the following wording: <i>ensuring Māori perspectives are reflected in the development and delivery of content and services for and about Māori, including by providing opportunities for Māori participation.</i>
PCO, TPK	s9(2)(h)	We agree there should be consistency of approach across 13(1)(b) and 13(1)(f)	We propose to make a similar change to 13(1)(f) to <i>ensuring the perspectives of underserved and underrepresented audiences are reflected in decisions about content and services, including by providing opportunities for participation by these audiences.</i>
Establishment Board	The Establishment Board has raised the issue that current clause 16 (relating to content needing to be free to air on first transmission) will significantly limit the entity's commercial opportunities.	<p>The current wording reflects Cabinet's decision.</p> <p>Following a discussion between the Minister's office and PMO, we understand that one possibility is to remove clause 16 while enshrining some provision for free to air content in the legislation.</p> <p>There are two relatively straightforward ways that free to air could be 'enshrined' in the legislation while still providing the flexibility for other models.</p> <p>Current clause 12 of the bill (which forms part of the charter) says that the functions of ANZPM are to broadcast (and select, commission or produce) freely available, accessible and high-quality content across all genres that informs, enlightens and entertains, including content that... The sub-clauses sitting under this clause then provide a (non-exhaustive) list of all the types of content the entity must produce.</p> <p>One option is to add in a sub-clause to 12 that says something like: content that is free of charge (cf the current TVNZ Act that requires</p>	Clause remains unchanged. If you are comfortable with the approach proposed in the briefing, we will update the LEG paper to seek agreement to the policy change and provide drafting instructions to PCO.

Agency	Comment	Manatū Taonga view	Status as at Wednesday 25 May
		<p>TVNZ to include the provision of channels that are free of charge and available to audiences throughout New Zealand). This will mean that the entity has to provide content that is free of charge, but doesn't limit it to just providing content that is free of charge.</p> <p>If more prominence is wanted, then clause 12 could itself be amended to something like broadcast (and select, commission or produce) freely available, accessible and high-quality content across all genres that informs, enlightens and entertains, including content that is free of charge, and including content that... This is probably not ideal from a drafting point of view, but could be seen to slightly elevate the requirement (I don't think there would be a significant difference in terms of legal effect though). Again, because of the word including, the entity would be able to pursue other models.</p> <p>Note as well that the overarching requirement in clause 12 that content is freely available and accessible will mean that, if the entity did decide to charge for content, they would have to show how this contributed to the overall availability and accessibility of content – so it would still act as a limit on the entity's ability to charge for content.</p>	
TSY, TPK	Cl 10: Discussion is currently underway to ensure the requirement for MoF's agreement to Board appointments does not create a conflict in relation to appointments made in consultation with the Minister for Māori Development.	Current wording proposes that the Minister of Finance's role relates to overall board composition rather than an ability to 'veto' or otherwise disagree with appointments consulted on with the Minister for Māori Development. However, we are waiting feedback from Treasury on the drafting in the latest version. PCO is consulting with Treasury, TPK and Te Arawhiti (given the potential impact on the Crown's Treaty obligations) directly.	The clause has been redrafted to focus on MoF's role in relation to overall board composition rather than individual appointments, Treasury, TPK and PCO are all comfortable with the revised drafting.
Public Service Commission	Sch 1, cl 20: PSC queried the need for a 'test' that the Board would apply to determine whether to dissolve RNZ/TVNZ -rather than leaving it to their discretion.	Dissolution should be able to happen at the discretion of the board. However, there may be constitutional reasons why a test is needed to ensure the Board has made this decision appropriately (since the Board is effectively amending primary legislation)- PCO is to advise.	<p>Current drafting enables the Board to set the dissolution only when satisfied that, if any international agreement remains in force, ANZPM has been accepted as party to it by the other party to the international agreement.</p> <p>We are still working on finalising this clause with PCO. PSC is unlikely to raise an issue with this as long as the intent/purpose of this clause is clear.</p>
DIA	Cl 12(2)(b) DIA raised concerns that this clause does not include the qualifier 'content held by ANZPM' which is included in s 12(2)(b). This could be viewed as implying that (2)(a) may extend to a collecting function in relation to content that reflects NZ History. Is this an intention of the clause?	Agree the clause should clarify it is in relation to content held by or on behalf of ANZPM. It is not intended to create a wider function or responsibility for the entity to be a collector of content held by other organisations (except when it is specifically held on behalf of ANZPM).	The wording of the draft bill has been updated to give clarity that this clause only relates to content held by/on behalf of ANZPM.
MFAT	CL 12 (2)(b) MFAT raised concerns that, since the Radio NZ Pacific service will no longer be guaranteed by the Charter of the new entity, and is instead subject to Ministerial direction, this could be at risk of being discontinued in the future.	Cabinet made the decision to take a principles-based approach to the delivery of particular services and functions (such as the RNZ Pacific Service), instead of prescribing specific services that must be provided for. However, Cabinet also agreed that the Minister should direct the entity to continue to provide an international service to the South Pacific. The ability to provide this direction is reflected in the Bill.	No proposed change to the Bill. Current drafting gives effect to Cabinet's decision to take a principles-based approach. Cabinet has also agreed that the responsible Minister will direct the entity, once it is operational to provide an international service to the South Pacific in both English and Pacific languages.

Agency	Comment	Manatū Taonga view	Status as at Wednesday 25 May
MFAT/MPP	CI 12(2)(b) MFAT and MPP queried the intent of this provision and what international obligations are being referred to.	<p>The provision in the charter around the entity needing to reflect New Zealand's international obligations in the Pacific is intended to clarify that the new entity will continue to have a role in relation to the Pacific, but without enshrining what such a role might look like in the future (it will also ensure that, when the Minister directs the entity to provide a service to the South Pacific, that direction is consistent with the charter).</p> <p>However, we don't want the drafting to suggest that NZ has particular international obligations if this is not the base.</p>	<p>MFAT provided suggested wording that has been incorporated into the bill that more accurately reflects the nature of the relationships. Clause 2(b) now states:</p> <p>(2) ANZPM also has the following functions: <i>(b) to provide, or support the provision of, content and services that recognise New Zealand's strong and enduring relationships with Pacific Island countries (and New Zealand's interest in promoting and protecting Pacific languages)</i></p>
TSY	<p>Subpart 6 – Reporting and review:</p> <p>Treasury noted that provision for MOF's ability to request financial performance information, per paragraph 95.2 of the February 2022 Cabinet paper, has not been provided for.</p>	The Cabinet decision is not reflected in the bill – this is an oversight.	PCO has now provided for this in the current bill.
TSY	Treasury's view is that the responsibility of MOF when reviewing the SOI should be in relation to financial and commercial aspects of the entity.	An avoidance of doubt clause could be used to ensure the MoF can only provide comment on the Statement of Intent where it relates to financial matters.	PCO has provided for this in the current bill (noting that the focus is on financial performance not commercial performance, in line with the not-for-profit focus of the entity).
TSY	Treasury noted that a similar provision to the above should also be provided for the Statement of Performance Expectations.	Agree.	PCO has been instructed to include provision for the MoF to provide comment on the Statement of Performance Expectations in relation to financial matters.
TSY	Sch 2: Treasury questioned why the bill carries over exemptions to financial restrictions set out in sections 161 - 165 of the Crown Entities Act.	As the financial model has not been finalised for the new entity, it is possible the exemptions will still be required, therefore are preserved to ensure maximum flexibility.	No change proposed.
MBIE/DIA	MBIE raised concerns that the definition of "broadcasting" in clause 4 seems a bit narrow. and it might be better to use a definition of "broadcasting" adapted from the definition of "communicate" in the Copyright Act 1994. DIA also raised concerns that the definition may not capture content that is downloaded then played later.	<p>The approach taken by PCO is to slightly update the Broadcasting Act definition rather than introduce a new definition – given the entity will continue to be subject to that Act in relation to content regulation etc.</p> <p>The legislative definition is clear all content will be treated in the same way regardless of the platform it utilises. While different regimes will apply for the purposes of media content standards and the BSA regime, this can be managed from an operational perspective until the content regulation review is completed.</p> <p>PCO are confident that the clause covers the full range of activity needed, however, are happy to put in an avoidance of doubt clause to make sure the activity flagged by DIA is captured</p>	PCO has inserted a subclause (2) into the interpretation clause, clause 4. This reads: <i>for the purposes of the definition of broadcasting, transmitting content includes transmitting it after making it available on-demand.</i>

Please note this table does not include all feedback received through departmental consultation. Matters that can be resolved outside of the legislative process or are minor/technical in nature have not been included.