Te Tari Ture
o te Karauna
Crown Law

2 May 2022

Attorney-General

Electoral (Māori Electoral Option) Legislation Bill [PCO 21160/1.14] – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/353

1. We have assessed the Electoral (Māori Electoral Option) Legislation Bill (**the Bill**)[1] for consistency with the New Zealand Bill of Rights Act 1990 (**the Bill of Rights Act**). We advise the Bill appears to be consistent with the Bill of Rights Act.

Nature of the Bill

2. This is an omnibus Bill proposing amendments to:

   2.1 the Electoral Act 1993 as it relates to when and how frequently Māori voters can exercise the option to move between the Māori and general rolls (**the Māori electoral option**); and

   2.2 the Electoral Act 1993 and the Local Electoral Act 2001 as they relate to calculating the Māori electoral population.[2]

Overview of the Māori electoral option

3. Māori voters can choose to enrol on the Māori roll or the general roll. The choice of roll is called the Māori electoral option. This is a core feature of New Zealand's constitutional arrangements.

4. The number of Māori enrolled on the Māori electoral roll is key to determining the Māori electoral population. This, in turn, is used to determine:

   4.1 for parliamentary elections, the setting of electorate boundaries and number of Māori seats; and

   4.2 for local elections, representation reviews by local authorities including calculating the number of councillors in Māori wards or constituencies (if such exist).

5. Roll-choice also determines eligibility to vote for candidates in those Māori electorates, and in Māori wards or constituencies where they exist.

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1 PCO 21160/1.14

2 The Māori electoral population is the number of people who have registered to vote in Māori electoral districts, plus a figure to represent an appropriate proportion of the estimated number of people of Māori descent who have not registered as electors at all or who are under 18 years of age (s 3 Electoral Act).

6. A Māori voter may exercise the Māori electoral option at the time they first register as an elector. As it stands, the only other time they can exercise the option is during a four-month period specified by notice in the *New Zealand Gazette,* which occurs once every five years when a census of the population is undertaken. It is not possible to move between the rolls at any other time.

What the Bill will do and its significance

7. The Bill proposes removing restrictions on when, and how frequently, Māori voters can elect to exercise the Māori electoral option. The key aspect of this is that the Bill will replace the current four-month period prescribed in the *Gazette* notice with a "continuous option model", enabling Māori voters to change between rolls at any time and as often as they wish, subject to an exception for by-elections.[3] That exception prohibits changing between the Māori and general rolls where, by changing rolls, a voter would be placed into a different electorate in which a parliamentary by-election is being contested (**by-election exception**).

8. The amendments to the Māori electoral option are important because they overcome the current restrictions on the timing and frequency of exercising the option. Those restrictions are significant barriers to full and effective Māori electoral participation, because:

   8.1 Māori voters are locked into their roll choice for long periods of time—four to six years—during which period up to two general and local elections may take place. This is out of step with other developments in enabling more flexible electoral participation, for example enrolment on election day.

   8.2 Māori voters cannot therefore choose to vote on the roll that best reflects their views, which may vary with time and between local and general elections and, increasingly, where new Māori wards have been established.

   8.3 Electors have found the current settings confusing and difficult to understand. For example, it is evidently not widely known that voters may only change between the Māori and general rolls in the four-month window every four to six years.

9. By adopting a continuous option model, the Bill aims to better effect Māori electoral participation. As we have explained, the Māori electoral option is key to the determination of Māori seats. Māori seats may be seen as a mechanism through which Māori exercise tino rangatiratanga, recognised under article 2 of te Tiriti o Waitangi; and the continuous option model could also assist with active protection of Māori political representation, the suffrage recognised in article 3.

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[3] The Bill also amends s 61(2) of the Electoral Act to enable eligible Māori voters to exercise the Māori electoral option as a special voter ahead of or on polling day for general elections, and consequently s 21 of the Local Electoral Act to enable Māori voters to vote as a special voter in a local election, if they have exercised the Māori electoral option under the Electoral Act (in the period after the electoral roll closes and before polling day) and as a result are named on the wrong roll for a ward, local board area, community or constituency in which they are qualified to vote.

Amendments relating to calculation of Māori electoral population

10. The Bill also changes the means and timing of obtaining the numbers to calculate the Māori electoral population. As above, the Māori electoral population is important for the setting of electorate boundaries and determining the number of Māori seats under the Electoral Act; and for representation reviews by local authorities, which include calculating the number of councillors elected for Māori wards or constituencies under the Local Electoral Act.

11. Presently, the Māori electoral population is calculated at the end of the four-month period specified in the *Gazette* notice. This period will no longer exist with the introduction of the continuous option model, so a different reference point for calculating the Māori electoral population is needed. The Bill proposes changes to the Electoral Act so as to calculate the Māori electoral population on the day of the census or, if a general election is held in the same year as the census, on 1 April in the following year; and changes to the Local Electoral Act so as to calculate the Māori electoral population only as at the day of the census.

12. The changes relating to calculating the Māori electoral population pose no concerns.

Bill of Rights Act compliance

13. The amendments in the Bill will enhance Māori voters' ability to exercise the Māori electoral option, and so enhance Māori rights to political representation. This may be regarded as supporting the right to equal suffrage under s 12 of the Bill of Rights Act.

14. We have also considered whether the amendments in the Bill could be considered to discriminate against people of non-Māori descent. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to be free from discrimination on the grounds set out in s 21 of the Human Rights Act 1993, which include race. Legislation may give rise to discrimination under s 19(1) if it draws a distinction between comparable groups based on one of the prohibited grounds of discrimination, and the distinction involves material disadvantage to one or more classes of individuals.

15. While the Bill continues the current distinction drawn between people of Māori and non-Māori descent (in that only Māori can exercise the Māori electoral option), we do not consider that freedom from discrimination is engaged, because the changes in the Bill do not cause any material disadvantage for non-Māori groups.

16. The continuous option model does not confer a material advantage on Māori voters by enabling them to change between rolls to vote in a by-election, even if that was not the roll they intended to be on for the general election. The Bill specifically addresses this possibility through the by-election exception. And nor does it confer a material advantage by enabling Māori voters to change to the Māori electoral role prior to the census, in order to boost numbers and thereby increase the number of Māori seats, then immediately change back to the

general electoral roll. Any risk of this happening is theoretical only and too remote to constitute material disadvantage on those who cannot change rolls.[4]

Review of this advice

17. In accordance with Crown Law's policies, this advice has been peer reviewed by Helen Carrad, Crown Counsel.

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Noted / Approved / Not Approved

Hon David Parker
Attorney-General
3 / 5 /2021

Encl.

[4] The Court of Appeal in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456, (2012) 9 HRNZ 572 at [106] in formulating the appropriate test as to the kind of differential treatment that amounts to "material disadvantage", cited the High Court decision *Child Poverty Action Group Inc v Attorney-General HC Wellington* CIV-2009-404-273, 25 October 2011 at [83] which commented "if the concept of disadvantage was entirely unqualified, it would raise the prospect of theoretical, innocuous or *de minimus* disadvantages qualifying as prohibited discrimination, and that indeed would risk trivialising the right protected by s 19."