

10 August 2000

ATTORNEY GENERAL

LEGAL ADVICE
COMPLIANCE WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990
THE BAY OF PLENTY REGIONAL COUNCIL (MAORI
CONSTITUENCY EMPOWERING) BILL

1. We have considered whether the Bay of Plenty Regional Council (Maori Constituency Empowering) Bill complies with the New Zealand Bill of Rights Act 1990. This Bill is a local bill introduced into the House by Mita Ririnui MP.
2. The bill is intended to establish a Maori constituency for the election of councillors to the Bay of Plenty Regional Council. The number of Maori seats will be determined with reference to the number of eligible voters enrolled on the Maori roll.
3. The bill raises a potential issue in relation to section 19, although we conclude that it is consistent with the Bill of Rights Act overall.

SECTION 19 OF THE BILL OF RIGHTS

4. As the bill seeks to establish specific Maori constituencies, the question of its consistency with section 19 (freedom from discrimination) of the Bill of Rights Act arises.
5. In our view the key questions in assessing whether discrimination under section 19 exists, are:
 - i. Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
 - ii. Does the distinction involve disadvantage to one or more classes of individuals?

Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?

6. Clause 5 (2) of the bill proposes that the Bay of Plenty region will be divided into a number of constituencies including at least one Maori electoral district for the purpose of local government representation. The bill therefore draws a distinction on the prohibited ground of race.

Does the distinction involve disadvantage to one or more classes of individuals?

7. The inclusion of at least one Maori electoral district does not lessen or reduce the possibility of non-Maori being elected to the Regional Council; the electoral districts

supplements the existing constituencies rather than detract from them. It therefore appears that this provision does not operate to the detriment of suitably qualified persons who are not Maori and who are not entitled to positions on the dedicated seats because they are reserved for Maori. There might be an argument made that the proposal might enhance their prospect of election by reducing the number of prospective candidates for the general seats.

8. It might be argued therefore that Clause 5 of the bill does not give rise to an issue in terms of compliance with section 19(1) of the Bill of Rights.
9. However, if our assessment is incorrect and one or more classes of individuals are disadvantaged by this proposal, in any event the Ministry of Justice considers that the limitation on the right to be free from discrimination may be considered a justifiable limitation in accordance with section 5 of the Bill of Rights Act.

SECTION 5 OF THE BILL OF RIGHTS ACT

10. In the Court of Appeal's recent decision, *Moonen v Film & Literature Review Board* [2000] 2 NZLR 9, the Court considered the process for determining whether a limit imposed on a right or freedom affirmed by the BORA is justified in terms of section 5 of the Act. In *Moonen*, the Court of Appeal set out the relevant process as follows:

- first identify the objective which the legislature was endeavouring to achieve by the provision in question;
- assess the importance and significance of that objective;
- the way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective;
- the means used must also have a rational relationship with the objective;
- in achieving the objective there must be as little interference as possible with the right or freedom affected;
- the limitation involved must be justifiable in the light of the objective.

11. In essence the enquiry in *Moonen* is twofold: first, whether the provisions in question serve an important and significant objective; and second, whether there is a rational and proportionate connection between those objective and the provisions.

The objective

12. We note that the stated aim of this bill is to establish a Maori constituency for the election of councillors at a regional level. We would infer from this objective that the purpose is to ensure that there is proportionate representation of Maori and therefore an effective Maori voice at governance level. This might have the ancillary benefit of evoking greater participation by Maori in regional government issues, and give greater credibility to the Crown/Maori partnership precept.

The implementation of that objective

13. The bill attempts to ensure that the number of Maori electoral districts is representative of both Maori and the Bay of Plenty area generally. Clause 6 (2) of the bill provides that the

number of Maori electoral districts is to be determined with reference to a formula that takes into account:

- the number of voters in the region enrolled on the Maori electoral roll for parliamentary purposes;
- the total number of voters in the region enrolled on all rolls for parliamentary purposes; and,
- the number of members of the Council.

14. Meanwhile clause 6 (4) provides that the size of the Maori electoral districts would be determined by reference to the number of voters in each district, communities of interest and tribal affinity.

15. We consider that having seats dedicated to qualified Maori candidates is rationally connected to the objectives set out above and is proportionate in terms of the manner in which it is implemented. Thus, we are of the view that, even if it is inconsistent with section 19 (1), this measure is likely to constitute a justified limitation in terms of section 5 of the Bill of Rights.

16. We note as a final point that clause 4 of the bill provides that this bill is to be read in conjunction with the Local Government Act 1974 and Local Elections and Polls Act 1976. We understand that changes are currently being considered to the system of local body elections under these Acts, including the issues of Maori representation and a proportional representation system of election.

CONCLUSION

17. We are of the view that although the bill might raise issues in terms of section 19 of the Bill of Rights Act, it is generally consistent with the Act.

18. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. A copy of this opinion is also attached for referral to Mita Ririnui MP if you agree.

Allison Bennett
Acting Team Leader

Boris van Beusekom
Legal Adviser

cc MINISTER OF JUSTICE
MITA RIRINUI MP
Copy for your information