5 December 2001

ATTORNEY-GENERAL

PRELIMINARY LEGAL ADVICE:

COMPLIANCE WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: LOCAL GOVERNMENT BILL 2001

Background

1. We have considered whether the Local Government Bill (PCO 4366/8) complies with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). We understand that this Bill is to be considered by the Cabinet Legislation Committee on Thursday, 6 December 2001.
2. Our advice has been prepared under significant time-constraints given the timeframe under which this Bill has been prepared. We have only seen version 8 of the Bill and we are understand that this is the first fully completed draft. We have been unable to see earlier versions of the Bill despite requests. We have, therefore, had limited opportunity to comment on this Bill and we are uncertain as to whether our comments have been incorporated. We have, however, based our advice on the understanding that the Department of Internal Affairs has undertaken to incorporate our suggested changes in the Bill.
3. We understand that we will see subsequent versions of the Bill prior to its introduction. We will provide you with further advice once we receive a final draft version of the Bill to confirm our preliminary advice.
4. We have reached the provisional view that the Bill does not appear to be inconsistent with the Bill of Rights Act. A number of the provisions of the Bill do raise issues of consistency, notably around provisions for a Mäori constituency and Mäori wards and the powers of search and seizure and entry onto private land. We consider that these provisions, while appearing to be *prima facie* inconsistent with the Bill of Rights Act, are able to be justified in terms of section 5, or are reasonable in terms of section 21, of that Act.

Purpose of the Bill

5. The purpose of this Bill is to:

    - Establish the role of local authorities in the governance of communities

- Provide an opportunity for diverse communities to participate in the decisionmaking of local authorities
- Enable local authorities to play a greater role in attaining the well-being of their communities
- Encourage greater local government co-operation • Enhance local authority decision-making
- Provide for a more open decision-making process
- Give local authorities more responsibility for sustainable management of the resources in their area.

RELEVANT BILL OF RIGHTS ACT PROVISIONS Section 5

6. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a "reasonable limit" that is "justifiable" in terms of section 5 of the Bill of Rights Act.

7. Section 5 provides:

> *Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

8. In *Moonen v Film and Literature Board of Review,*[7] the Court of Appeal developed a set of guidelines that are of assistance when assessing whether a provision constitutes a "justified limitation". This process is similar to the approach taken by the Supreme Court of Canada in *R v Oakes*.[8]

9. The inquiry under *Moonen* is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and that objective.

Section 6

10. Section 6 provides that:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning. **Section 14**

11. Section 14 provides that:

> *Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form.*

Section 18(1)

12. Section 18(1) provides that:

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[7] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.
[8] *R v Oakes* (1986) 26 DLR (4th) 200.

Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

Section 19(1)

13. Section 19(1) of the Bill of Rights Act states:

Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

14. In our view, the key questions in assessing whether discrimination under section 19(1) 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?

15. If these questions are answered in the affirmative, we consider that the legislation gives rise to a *prima facie* issue of discrimination under section 19(1) of the Bill of Rights Act.

Section 21

16. Section 21 of the Bill of Rights Act provides that:

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

17. In assessing the substantive "reasonableness" of any power of search or seizure, the Ministry of Justice is of the view that section 5 of the Bill of Rights Act is of limited application. In particular, it would appear difficult to use section 5 to justify a search which has already been assessed as unreasonable in terms of section 21. However, a number of the considerations which are relevant in the context of the section 5 inquiry will also be material in assessing the "reasonableness" of a power of search or seizure (for example, the importance of the power's objective, whether there is a rational connection between the power and its objective, and the proportionality of the power).

Section 27(1)

18. Section 27(1) of the Bill of Rights Act provides that:

Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law

Section 27(2)

19. Section 27(2) states

Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

SECTION 14 - RIGHT TO FREEDOM OF EXPRESSION Schedule 3, Clause 53 - Advertising Expenditure Limits

20. Where a local authority is required under the Bill to poll its constituents over a matter affecting the way in which it is organised, it must determine how much money it intends to spend on advertising that promotes or opposes the implementation of the proposed scheme and how that money is to be allocated (Schedule 3 clause 53 refers).

21. The Bill sets out the upper limits for expenditure based on the population size and geographical spread of the authority (Schedule 3 clause 53(3) and (4) refer). While clause 54 of Schedule 3 states that the local authority must also meet the advertising costs of the proponents of the reorganisation scheme up to the limits provided in the Bill, we understand that private interests can exceed these limits through their own fund raising efforts.

22. Subclauses 53(3) and 53(4) and, to the extent that it replicates these restrictions, clause 54 are *prima facie* inconsistent with section 14 of the Bill of Rights Act as they restrict the ability of the authority to communicate with the voters to the fullest extent possible. That is, by imposing limits on the amount of money able to be spent on advertising, and information and other promotional material, subclauses 53(3) and 53(4) concern the placement of restrictions on what information and how much information the authority can impart during an election campaign.

23. We have considered whether section 14 applies to local government authorities. Section 29 of the Bill of Rights Act states:

> *Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable,* ***for the benefit of all legal persons*** *as well as for the benefit of all natural persons.* (our emphasis)

Application to Public Sector Organisations

24. The provisions raise the question whether organisations that are bodies that exercise governmental power, can claim rights under the Bill of Rights Act in respect of things done by the legislative arm of government. The conventional understanding of the Bill of Rights Act is that it restrains government from infringing the fundamental rights and freedoms of private individuals and other legal persons; it is not regarded as a constraint on the internal operations of the machinery of government itself. To extend this approach to the organisations affected by the Bill is not, however, entirely straightforward.

25. We consider that organisations like local authorities operate at a greater remove from central government than government departments, and would seem to have a stronger claim to enjoy the protections of the Bill of Rights Act against the exercise of power by the executive.

26. We have, therefore, decided to proceed on the basis that the rights and freedoms affirmed by the Bill of Rights Act would apply for the benefit of local authorities by virtue of section 29, but without reaching a determinative view on the issue.

Section 5 of the Bill of Rights Act Analysis

27. We consider that these clauses comprise a reasonable limit under section 5 of the Bill of Rights Act to section 14 of that Act because:

    - the objective of the provisions are significant and important, being to ensure that parties with a direct interest in the outcome of the poll are not able to exert any greater influence on the outcome of the poll by virtue of their access to economic resources, thereby allowing the poll to be conducted in a manner consistent with expected democratic standards;
    - the clauses appears to be rational and proportionate given that:
        - the measures designed to control expenditure are limited only to those that are able to be enforced practicably and not ineffectually;[3]
        - the measures are designed to ensure that all affected parties are provided with the same degree of opportunity to inform voters of their preferences;
        - the provisions intend to ensure that the process is fair;
        - the measures attempt to limit the freedom of expression to the least degree possible by providing the parties with some parameters within which they can express or articulate information or opinions without infringing on the imposed boundaries.[4]

28. More generally in the context of limiting campaign expenditure, we note that in the Report of the Royal Commission on the Electoral System *Towards a Better Democracy*[5] the Royal Commission stated:

> *It is inevitable that there will be some inequality between individuals and between groups in the extent to which they can afford to spend money on electioneering. However, if elections are to be fair and our democracy is to prosper, it is important that the effects of such inequalities are minimised. Limitations on what candidates, political parties and other interests may spend are an attempt to do this. Expenditure limitations involve, however, balancing the principle of fairness against the rights of political parties and candidates to organise and publicise themselves and their policies. These latter rights have traditionally been included under the rights to free association and free speech.*

Conclusion

29. While clause 53 contained in schedule 3 appears to be *prima facie* inconsistent with section 14 of the Bill of Rights Act, we consider that the restrictions on campaign

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[3] Report of the Royal Commission on the Electoral System *Towards a Better Democracy* December 1986, at page 192.

[4] The restriction on the ability of third parties to publish material aimed at promoting the election of a candidate or candidates "does not amount to a general impediment on the expression of views of single issue pressure groups as there are several alternative methods of expressing their views and convictions on any particular issue." *Bowman v United Kingdom* (1998) 4 BHRC 25, at 38.

[5] Report of the Royal Commission on the Electoral System *Towards a Better Democracy* December 1986, at 190 to 19(1). See also pages 190 to 202 of the Report. The importance of balancing competing rights with regard to general limits on election expenses was accepted by the European Court of Human Rights in *Bowman v United Kingdom* (1998) 4 BHRC 25, at 34 (citing *Mathieu-Mohin v Belgium* (1987) 10 EHRR 1, at 16 to 17 (paragraphs 52 to

54)). See also: *Libman v Quebec (Attorney-General)* [1997] 3 SCR 569; Thomson *Newspapers Co v Canada (Attorney-General) [1998] 1 SCR 877; National Citizens Coalition v Attorney-General for Canada* (1984) 11 DLR (4th)
481; *Reform Party of Canada v Canada (Attorney-General)* 123 DLC (4th) 336; *Buckley v Valeo* (1976) 424; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Lange v Atkinson* [1997] 2 NZLR 22 (HC) (citing *Braddock v Bevins* [1948] 1 KB 580); *Lange v Atkinson* [1998] 3 NZLR 424 (CA).

expenditure form justified limitations under section 5, and are consequently not inconsistent with the Bill of Rights Act.

SECTION 18(1) - RIGHT TO FREEDOM OF MOVEMENT Clause 5.5 - Power to Make Bylaws Governing Liquor in Public Places

30. Clause 5.5(1)(m) of the Bill provides that a territorial authority or regional council may make bylaws for the purposes of regulating the consumption of liquor in public places, the bringing of alcohol into public places, or the possession of liquor in public places.

31. Clause 5.5 raises the prospect that bylaws with wide-ranging effect may be made that will effectively prevent any person, for example, carrying alcohol in the street to their private homes, or drinking alcohol responsibly in a public reserve.

32. The powers in clause 5.5 are sufficiently broad to raise the suggestion that the provision itself is inconsistent with section 18(1) of the Bill of Rights Act.

33. We have previously formed the view that the right to freedom of movement transcends matters of immigration,[9] although it has not been wholly settled whether the "freedom of movement" referred to in section 18(1) is limited by issues of immigration that permeate the remainder of section 18.

34. We are, therefore, reliant on the District Court judgment in *Kerr v Attorney-General*[10] where the Court found that the right to freedom of movement extended to the right to move freely down highways.[11] We consider that the right to the freedom of movement probably also includes not being forced to move to, or from, a particular location.[12] The right transcribed into detail would also include the right of an individual to move at any time he or she chooses.[13]

35. In earlier advice,[14] we also commented that the *prima facie* right to freedom of movement encompassed by section 18 of the Bill of Rights Act is likely to include[15]:

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[9] See advice to Attorney-General, dated 21 November 2000 *Compliance with the New Zealand Bill of Rights Act 1990: Civil Aviation Amendment Bill*.

[10] *Kerr v Attorney-General* [1996] DCR 951.

[11] There is Canadian case law that states that the right of an individual to use the public highways is a right which comes within the concept of the right to liberty; see *Re Rowland and the Queen* 10 DLR (4th) 724 13 CCC (3d) 367, 33 Alta L.R. (2d) 252; *Re Gresham Produce Co. Ltd and Motor Transport Board* 14 DLR (4th) 722 varied 22 DLR (4th) 520.

[12] Such a thesis is consistent with the application of other provisions of the Bill of Rights Act: for example, the right to freedom of expression has been held to include the right not to speak, and the right to freedom of association has been held by this Ministry to mean the right not to associate.

[13] *Police v Geiringer* [1990-92] 1 NZBORR 331, at 338. See also, the decision of the Supreme Court on appeal in *Melser & Ors v Police* [1967] 2 NZLR 437.

[14] Legal Advice From Ministry of Justice to Attorney-General dated 21 November 2000, *Compliance with the New Zealand Bill of Rights Act 1990: Civil Aviation Amendment Bill.*

[15] Subject to any lawful prohibition or any other limitation prescribed by law that is justifiable in terms of section 5 of the Bill of Rights Act.

- The right to travel through public areas;
- The right to enter and leave any public space

36. We consider that, because the proposed bylaws may prevent a person from entering a public place, or require them to depart from a public place, on the grounds that they have in their possession, or are consuming alcohol, clause 5.5 raises a potential issue in respect of section 18(1) of the Bill of Rights Act.

37. However, we consider that clause 5.5 can be read consistently with section 18(1) by virtue of section 6 of the Bill of Rights Act, for the reasons set out below:

38. Firstly, the authority can only make such bylaws for the limited purposes of:

    - protecting the public from nuisance;
    - protecting, promoting, and maintaining public health and safety; and
    - preventing offensive behaviour in public places (clause 5.4 refers).

    Clause 5.4, therefore, places significant restrictions on the scope of the power to make bylaws governing the possession and consumption of liquor in public places.

39. Secondly, the authority making the bylaw, must give consideration to whether the proposed bylaw is likely to give rise to inconsistencies with the Bill of Rights Act (clause 5.11 refers). This suggests that the Bill anticipates that the bylaws will be consistent with the Bill of Rights Act.

Conclusion

40. We consider that clause 5.5(1)(m) of the Bill is able to be read consistently with the Bill of Rights Act and, therefore, does not limit the right to freedom of movement under section 18(1) of that Act.

SECTION 19 – FREEDOM FROM DISCRIMINATION Clauses 1.6, 4, 4.3, 4.4, 4.7, and Schedule 7, Clauses 1 and 23 – Consultation and Decision-Making Principles

41. A number of clauses in the Bill set out principles which expressly seek to ensure that Mäori have the opportunity to participate in local authority decision-making processes. For example:

    - Clause 1.6(f) (principles relating to local authorities) provides that local authorities must endeavour to provide appropriate opportunities for Mäori to contribute to decision-making processes;
    - Clause 4 (Treaty of Waitangi) states that, in order to recognise and respect the principles of the Treaty of Waitangi, Part 4 of the Bill provides mechanisms to enable Mäori contributions to local authority decision-making;
    - Clause 4.3(b) (principles of decision-making) provides that local authorities must take into account the relationship of Mäori, their culture and traditions with their ancestral land, water, flora, fauna and taonga when making significant decisions regarding land and bodies of water;

- Clause 4.4(1) (contributions to decision-making by Mäori) provides that local authorities must establish processes to provide opportunities for Mäori to contribute to decision-making, and must consider ways of developing Mäori capacity to contribute to local authority decision-making;
- Clause 4.7(c) (principles of consultation) provides that, when carrying out any consultation, local authorities must have in place appropriate processes for consulting with Mäori;
- Schedule 7, clause 1(d)(ii) (long-term plan overview) provides that a local authority's long-term plan must outline how the local authority will work with Mäori in furthering the community outcomes and priorities;
- Schedule 7, clause 23 (annual reports) provides that a local authority's annual report must include a report on activities undertaken to provide opportunities for Mäori participation in decision-making, and regarding how the local authority might foster the capacity of Mäori to contribute to decisionmaking processes.

42. We have considered the above clauses for consistency with section 19(1) of the Bill of Rights Act.

Do the Clauses Discriminate?

43. We consider that, read as a whole, the above clauses do not have discriminatory effect. The above provisions clearly give express recognition to Mäori interests and the need for Mäori involvement in local government decision-making processes. As such, the above clauses draw a distinction between Mäori and other identifiable racial, and ethnic or national groups. We consider, however, that this does not result in disadvantage to other groups. In forming this view, we note that the above clauses do not require consideration of Mäori interests, or consultation with Mäori, to the exclusion of the consideration of the interests of all other groups. The view that, when taken as a package, the clauses are inclusive rather than exclusive is reinforced by several of the clauses themselves. For example:

- Clause 1.6(e) provides that local authorities must provide appropriate opportunities for the involvement of its community in decision-making, and to consult its community on significant decisions;
- Clause 4.3(a) provides that local authorities must consider community views when making significant decisions;
- Clause 4.4(2) provides that the requirements contained in clause 4.4(1) to provide opportunities for Mäori to contribute to decision-making, and to consider ways of developing Mäori capacity to contribute to local authority decision-making do not limit the ability of local authorities to take similar action in respect of any other population group;
- Clause 4.7(b) provides that local authorities must take steps to enable particular communities of interest to participate effectively in the decisionmaking process, and clause 4.7(d) provides that local authorities must ensure that consultation is meaningful by giving due consideration to views expressed in submissions;
- Schedule 7, clause 1(d) provides that a local authority's long-term plan must also outline how the local authority will work with other territorial and

regional organisations, central government, non-governmental organisations, and the private sector.

Conclusion

44. We, therefore, consider that the above clauses can be read consistently with section 19(1) of the Bill of Rights Act.

45. For completeness, however, we note that if the above clauses were found to constitute *prima facie* discrimination in terms of section 19(1) of the Bill of Rights Act, we consider that they would be justifiable in terms of section 5 of that Act. In forming this view, we note that the objective of the above clauses is to increase and enhance Mäori participation in local government decision-making processes, and to further the Crown's obligations to its partner under the Treaty of Waitangi. We consider these objectives to be significant and important.

46. In addition, we consider that the above clauses are rationally connected to their objectives. The Department of Internal Affairs advises that Mäori representation and participation in local government has traditionally been, and continues to be, disproportionately low. The above clauses aim to ensure that local authorities take steps to increase Mäori participation in and contributions to local government. We also consider the above clauses to be proportionate, as they do not require Mäori perspectives to be privileged above all others, and do not preclude consideration of the interests and needs of other ethnic and racial groups who experience similarly low levels of participation and representation in local government.

47. We, therefore, conclude that, if the above clauses are considered discriminatory under section 19(1) of the Bill of Rights Act, they are likely to be justifiable in terms of section 5 of the Bill of Rights Act.

Schedule 4, Clause 29 – Good Employment Principles

48. This clause requires local authorities to be "good employers". Clause 29 mirrors the definition of "good employer" in section 56 of the State Sector Act 1988 and provides that local authorities must operate personnel policies that require:

    - Recognition of the aims and aspirations of Mäori people, the employment requirements of Mäori people, and the need for greater involvement of Mäori people as employees (paragraph (d));
    - Recognition of the employment requirements of women (paragraph (g));
    - Recognition of the employment requirements of persons with disabilities (paragraph (h)).

49. We have considered the above provisions for consistency with section 19(1) of the Bill of Rights Act.

50. We consider that the above provisions do not constitute *prima facie* discrimination for the purposes of section 19(1) of the Bill of Rights Act. The provisions clearly draw distinctions on the basis of race, ethnic origin, sex and disability. However, we are of the view that the provisions do not disadvantage other classes of individuals. In our view, a requirement to recognise the aims, aspirations and employment requirements of the groups concerned does not, of itself,

disadvantage other classes of individuals. In other words, we consider these provisions to be inclusive, rather than exclusive. This approach is reinforced by paragraph (f) of clause 29, which provides that the personnel policies must also require "recognition of the aims and aspirations, and the cultural differences, of ethnic or minority groups".

51. Importantly, paragraph (c) also requires the "impartial selection of suitably qualified persons for appointment". We consider that this provides a sufficient counterbalance to any potentially discriminatory effect of these provisions.

Conclusion

52. In our view, therefore, clause 29 in Schedule 4 is able to be read consistently with section 19(1) of the Bill of Rights Act.

Clause 12.4 - Mäori Wards and Mäori Constituencies

53. Clause 12.4 of the Bill proposes to amend the Local Electoral Act 2001 by providing, amongst other things, a mechanism under which a territorial authority or regional council can review representation of Mäori for the purpose of determining whether it is necessary or desirable to establish Mäori wards or constituencies. Proposed new sections 19Z to 19ZI of the Local Electoral Act set out what is required in order to establish these wards and constituencies.

54. The following are the three ways in which Mäori wards or constituencies can be established under the Bill:

    - A territorial authority or regional council may pass a resolution to establish Mäori wards or constituencies. If they do so they must subsequently give public notification to the community of the right to demand a public poll on the issue to countermand the resolution; or
    - A community has the right to demand a public poll on the issue; or
    - A territorial authority or regional council may pass a resolution to hold a public poll on the question of whether Mäori wards or constituencies should be established.

55. The result of any public poll is binding on the community and local authority for the next two triennial general elections.

56. Schedule 14 of the Bill, proposed new schedule 1A of the Local Electoral Act, includes a formula for calculating the number of members to be elected to Mäori wards or constituencies, which must be proportionate with the Mäori population in that locality.

57. Once a decision is taken to establish Mäori wards or constituencies, the Bill provides that those electors on the Mäori parliamentary roll will be considered to be a Mäori elector for local government elections.

Does the Clause Discriminate?

58. The above proposal clearly draws a distinction between Mäori and other racial, ethnic or national groups by providing a mechanism under which territorial authorities and regional councils can establish Mäori wards or constituencies to improve Mäori representation on local authorities.

59. This distinction would appear to disadvantage other identifiable racial, ethnic and national groups who are similarly under-represented in local government, and for whom a mechanism is not provided to improve their representation through special wards or constituencies.

60. We, therefore, consider that the proposed new sections 19Z to 19ZI contained in clause 12.4 of the Bill appear to give rise to *prima facie* discrimination on the grounds of race, and ethnic or national origins. We have gone on to consider whether this is justifiable in terms of section 5 of the Bill of Rights Act.

Section 5 of the Bill of Rights Act Analysis

61. The main objective of the proposal is to improve direct Mäori representation on local authorities through the establishment of Mäori wards or constituencies. More

    broadly, the proposal aims to increase Mäori access and participation in local government decision-making.

62. Importantly, the proposal also aims to further the Crown's obligations to its partner under the Treaty of Waitangi by improving and maintaining the Crown/Mäori relationship at local government level. The "Review of the Local Government Act: Consultation Document" specifically identifies that, "Meaningful relationships between government (at all levels) and Mäori are ongoing, take many forms, and are critical to our democratic processes."[16]

63. We consider that these objectives are significant and important.

64. In considering whether there is a proportionate connection between the proposals and the objectives, it is relevant that there is currently a discrepancy between the Mäori population in many districts or regions, and Mäori participation and representation on local authorities. The Consultation Document also identified that, although the nationwide figures indicate a marginal increase[17] in the number of

    Mäori elected members to 5.5% in 1998, this figure

    > *…masks significant local discrepancies even in areas where Mäori elected members exist, (e.g. Gisborne District Council 13% of Council are Mäori compared to the 42% of the population, Kawerau District Council 22% of Council are Mäori compared to 58% of the population.)*[18]

65. The proposal provides a mechanism under which a territorial authority or regional council may establish Mäori wards or constituencies, which will improve Mäori representation in local government by ensuring that Mäori representation is proportionate to the Mäori population in an area. We, therefore, consider that the proposal is rationally connected to its objectives.

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[16] Department of Internal Affairs, "Review of the Local Government Act: Consultation Document", August 2001, p.34

[17] 1992 -2.5% of elected members identified as Mäori; 1995 - 2.5% of elected members identified as Mäori; and in 1998 5.5% of elected members identified as Mäori

[18] Department of Internal Affairs, "Review of the Local Government Act: Consultation Document", August 2001, p.35

66. We consider that the proposals contained in the Bill are also proportionately connected to the objectives. In determining this, the following points were of particular relevance:

    - The mechanism is not a compulsory measure. Establishment of Mäori wards or constituencies is one option that can be employed to enhance the representation opportunities of Mäori on local authorities, if it is the wish of that council and/or community.
    - There are significant opportunities for the community to be involved in the determining whether Mäori wards or constituencies should be established, specifically, through the public poll mechanism contained in proposed new sections 19ZA to19ZG.
    - To ensure that representation is proportionate to the Mäori population of a district or region, and the electorate size, a calculation formula is set out in Schedule14 of the Bill, (proposed new schedule 1A of the Local Electoral Act 2001). This formula requires consideration of:

      − the Mäori electoral population of the district/region; and

      − the general population of the district/region; and

      − the proposed number of members of the local authority, (excluding the Mayor).

Conclusion

67. While clause 12.4, (proposed new sections 19Z to 19ZI of the Local Electoral Act) appears to be *prima facie* inconsistent with section 19(1) of the Bill of Rights Act. We consider that the discrimination is justifiable under section 5, and is consequently not inconsistent with the Bill of Rights Act.

SECTION 21 – UNREASONABLE SEARCH AND SEIZURE Clauses 6.6 and 6.6A – Seizure of Property Involved in the Commission of an Offence

68. Clauses 6.6 and 6.6A of the Bill empower an enforcement officer to seize and impound property that is materially involved in the commission of an offence. Clause 6.6 empowers the seizure of property that is not on private land, and clause 6.6A empowers entry and the seizure of property on private land. We have considered these clauses for consistency with section 21 of the Bill of Rights Act.

69. In our view, the powers of seizure provided in clauses 6.6 and 6.6A appear to be reasonable in terms of section 21 of the Bill of Rights Act. In forming this view, we note that the powers are necessary and important to enable enforcement officers to remove property which is involved in the commission of an offence, and which may also be creating a danger to health and safety. In addition, we note that the Bill provides appropriate limitations and protections around the exercise of the powers. In particular, in respect of the power contained in clause 6.6, the Bill provides that:

    - The power only extends to the seizure of property which is <u>not</u> on private land;

- The power may only be exercised if it is reasonable in the circumstances to seize and impound the property;
- Before seizing the property, the enforcement officer must provide the person committing the offence with a reasonable opportunity to stop committing the offence. We understand that the enforcement officer will also be required to notify the person that the property is liable to be seized if they do not stop committing the offence;
- As soon as practicable after seizing the property, the enforcement officer must notify the owner or person who was in possession of the property that the property has been seized;
- The owner or person who was in possession of the property may request that the local authority concerned return the property. If the local authority refuses to return the property, the person concerned may apply to the District Court for a review of the local authority's decision.

70. In respect of the power contained in clause 6.6A, the Bill provides that:
    - The enforcement officer must obtain a warrant to enter and seize property on private land;
    - A warrant may only be issued if the judicial officer is satisfied that the property is materially involved in an offence, it is reasonable in the circumstances to seize the property, and that the enforcement officer has given the person committing the offence a reasonable opportunity to stop committing the offence;
    - The enforcement officer exercising the warrant must be accompanied by a member of the Police;
    - The enforcement officer must produce the warrant and evidence of his or her identity and authority when entering the land and whenever reasonably requested to do so.
    - The owner or person who was in possession of the property may request that the local authority concerned return the property. If the local authority refuses to return the property, the person concerned may apply to the District Court for a review of the local authority's decision.
71. We therefore consider that the powers of seizure provided in clauses 6.6 and 6.6A of the Bill are reasonable in terms of section 21 of the Bill of Rights Act.

Clause 6.7 – Power to Search for and Seize Liquor

72. Clause 6.7 of the Bill will enable the police to search a person's vehicle and bags for liquor. We understand that the clause will be modelled on existing section 709H of the Local Government Act 1974, and will apply only to people in a public place in respect of which bylaws made under clause 5.15 are in force. The clause will also enable the police to seize any liquor found in contravention of the bylaws.
73. On the basis of information provided by the Department of Internal Affairs regarding the proposed content of the clause, we have considered whether the proposed power is likely to be consistent with section 21 of the Bill of Rights Act.

74. We understand that clause 6.7 will allow a search to be conducted in the absence of a warrant, and in the absence of reasonable grounds to believe or suspect that the person possesses liquor. The Department of Internal Affairs advises, however, that the police require the power to search the vehicle and bag of every person in a public place to ensure that liquor restrictions can be effectively and expeditiously enforced. In light of this, we understand that there would be significant practical and administrative difficulties in requiring the police to obtain a search warrant in each case.

75. In addition, in considering whether the proposed search power is reasonable in terms of section 21, we have balanced individuals' expectations of privacy against the safety, rights and interests of other people using the public space. The proposed search power aims to ensure that people do not possess or consume alcohol in a public place in order to achieve a safe and orderly environment for the enjoyment of all members of the public. In this context, we consider that people in a public place or attending a public event have a lower expectation of privacy in respect of their bags and vehicles than might be the case in other situations.

76. Further, we note that existing section 709H of the Local Government Act provides that, before exercising the search power, the police must inform the person that the police are not empowered to search any vehicle or container that the person refrains from taking into, or removes from, the public space. The police are also required to

    give the person reasonable opportunity to remove the vehicle or container from the public space before exercising the search power. These requirements ensure that any person who takes a vehicle or container into a public place that is subject to liquor restrictions does so with knowledge of the fact that they are liable to be searched. This reinforces the view that individuals entering a public space or attending a public event in these circumstances have a lower expectation of privacy in respect of their vehicles and bags.

77. Finally, we note that proposed clause 6.7 will not confer a power to search the person, nor will the clause confer a general power to search for liquor or other items. The power will be limited to searching the bags and vehicles of persons in a public place in respect of which bylaws regulating the possession of liquor are in force.

Conclusion

78. In light of these factors, we consider that, on balance, the proposed search and seizure power is likely to be considered reasonable for the purposes of section 21 of the Bill of Rights Act. We note, however, that the exercise of the power in each individual case will also need to be reasonable in terms of section 21 of the Bill of Rights Act.

Clause 6.8 – Power of Entry for Enforcement Purposes

79. Clause 6.8 provides that an enforcement officer may enter land for the purposes of detecting a breach of a bylaw or the commission of an offence under the Bill. We have considered this power for consistency with section 21 of the Bill of Rights Act.

80. In our view, the power provided in clause 6.8 is reasonable in terms of section 21. In reaching this view, we note that:

    - The power may only be exercised if the enforcement officer has reasonable grounds for suspecting that a breach of a bylaw or the commission of an offence has occurred on the land;
    - The enforcement officer must give reasonable notice of the intended entry to the occupier of the land, if practicable;
    - The power may not be exercised to enter a dwellinghouse unless authorised by a warrant given by a District Court Judge;
    - The enforcement officer must produce evidence of his or her identity and authority to exercise the power on first entering the land and whenever reasonably requested to do so.

Conclusion

81. We, therefore, consider that the power of entry provided in clause 6.8 of the Bill is reasonable in terms of section 21 of the Bill of Rights Act.

Clause 6.12 – Power of Entry to Check Utility Services

82. Clause 6.12 provides that a territorial authority may enter any land or building for the purpose of checking utility services. For example, the clause empowers a territorial authority to enter land or buildings to ascertain whether water supplied from waterworks or a water race is being wasted or misused, or whether drainage works are being misused. We have considered clause 6.12 for consistency with section 21 of the Bill of Rights Act.

83. In our view, the power provided in clause 6.12 is likely to be considered reasonable in terms of section 21. In forming this view, we note in particular that:

    - The power is necessary to enable territorial authorities to fulfil their functions as providers and operators of services (such as water supply and drainage);
    - The Department of Internal Affairs has agreed that territorial authorities will only be able to exercise the power of entry under clause 6.12 if they have reasonable grounds to believe that water or drainage is being wasted or misused on the property;
    - The Department of Internal Affairs has agreed that territorial authorities will be required to give notice of their intended entry under the clause, if practicable;
    - The Bill requires persons exercising a power of entry to produce evidence of their identity and authority when entering land or buildings, and whenever reasonably required to do so;
    - The clause will not empower councils to enter dwellinghouses.

Conclusion

84. In light of these factors, we consider that the power of entry in clause 6.12 appears to be consistent with section 21 of the Bill of Rights Act.

SECTION 27(1) – RIGHT TO OBSERVANCE OF PRINCIPLES OF NATURAL JUSTICE Clause 8.12A – Application for Removal Order

85. Clause 8.12A enables a territorial authority or the police to apply to the District Court, without notice, for a removal order requiring a property owner or occupier to remove any structure or vegetation. We consider that this clause appears to be prima facie inconsistent with section 27(1) of the Bill of Rights Act, which affirms the right to the observance of the principles of natural justice, because the property owner or occupier is not provided with an opportunity to contest the reasons for the order before it is made. An important principle of natural justice is the opportunity for a person to have notice of, and to be heard in, any proceedings against him or her.

86. We consider that further information is required from the Department of Internal Affairs in order to determine whether the clause is consistent with the Bill of Rights Act. In our view, ex parte proceedings are more likely to be justifiable in situations where an interim order is required urgently in order to protect a person's interests, or to maintain a particular state of affairs. We note that in this case, however, the order does not necessarily take effect immediately. This is because clause 8.12C enables any person to object to a removal order, and the objection operates as a stay of the order pending the court's decision on the objection. We are, therefore, unsure of the need and justification for ex parte proceedings in this context.

87. We will provide further advice regarding this issue once we have received further justificatory material from the Department of Internal Affairs.

SECTION 27(2) – RIGHT TO APPLY FOR JUDICIAL REVIEW Clause 6.9 – Covering Watercourses

88. Clause 6.9 enables a territorial authority to enclose and cover in any watercourse if the authority considers that, because of a pollutant in the watercourse, the watercourse is a nuisance or dangerous to public health. A territorial authority may only exercise this power if authorised by a resolution of the authority, and if copies of the proposed resolution have been served on all affected landowners.

89. Clause 6.9 also provides that a landowner or occupier affected by the proposed work may apply to the District Court for an order preventing the authority from undertaking the work before the resolution comes into force. Clause 6.9(11) provides, however, that an order of the District Court is final.

90. Clause 6.9(11), therefore, precludes judicial review of the territorial authority's decision to cover in a watercourse. The clause therefore appears to be *prima facie* inconsistent with section 27(2) of the Bill of Rights Act, which affirms the right to judicial review.

91. We consider, however, that clause 6.9(11) is likely to be justifiable in terms of section 5 of the Bill of Rights Act. In forming this view, we have taken into account the fact that an authority may only authorise the enclosure of a waterway if the waterway is a nuisance or danger to public health. In such situations, we understand that there may be some urgency to commence work on the waterway. It is, therefore, considered inappropriate and undesirable to allow time for judicial review of the authority's resolution. In addition, we note that the clause does not preclude effected landowners from challenging the authority's resolution, as there

is an express right to apply to the District Court for an order preventing the proposed work.

Conclusion

92. In our view, while clause 6.9(11) is *prima facie* inconsistent with section 27(2) of the Bill of Rights Act, it is justifiable in terms of section 5 of that Act, and is, therefore, consistent with the Bill of Rights Act.

CONCLUSION

93. We have had an opportunity to consider version 8 of the Local Government Bill and have been able to provide you with preliminary advice on the consistency of the Bill with the Bill of Rights Act.

94. Several of the clauses of the Bill raise issues of consistency with the Bill of Rights Act. We have set these out as follows:

- **Schedule 3 Clause 53** concerning the restrictions on the ability of local authorities to expend resources on information about local authority issues and policies to the voting public. Issue raised under **section 14: Right to freedom of expression;**
- **Clause 12.4** concerning the ability of local authorities to establish Maori wards and constituencies for the purpose of providing Maori with direct representation on local authorities and improving access to local authority decision-making. Issue raised under **section 19(1): Right to be free from discrimination**
- **Clause 6.9** concerning the limitation on the ability of a landholder or occupier of property to apply for judicial review of a decision taken by a local authority to undertake work in relation to water courses found on that property. Issue raised under **section 27(2): Right to apply for judicial review.**

We consider that these clauses are able to be justified as reasonable limitations under section 5 of the Bill of Rights Act.

We have also considered the following clauses:

- **Clauses 6.6, 6.6A, 6.8, 6.12** concerning the ability of local authorities to authorise the exercise of powers of search and seizure, or exercise powers of entry in relation to private land. Issue raised under **section 21: Right to be secure against unreasonable search and seizure;**

We consider that the powers of search and seizure are reasonable for the purposes of section 21 of the Bill of Rights Act.

95. We have, therefore, reached the provisional view that the Bill does not appear to be inconsistent with the Bill of Rights Act

96. We have also considered **clause 8.12A** and the ability of local authorities to apply for interim ex parte orders authorising the removal of structures and vegetation from private property. We are waiting for further information from the Department of Internal Affairs on this issue. We are, therefore, unable to come to a clear

conclusion at this time as to whether the clause appears to be consistent with section 27(1) and the right to the observance of the principles of natural justice.

97. We will continue to consider further versions of the Bill as we receive them, and will confirm our advice to you prior to the Bill's introduction into the House.

98. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. We also attach a copy for referral to the Minister of Local Government, if you agree.

Pauline Zumbach
Acting Manager
Bill of Rights/Human Rights Team

Boris van Beusekom
Legal Adviser
Bill of Rights/Human Rights Team

cc Minister of Justice
Minister of Local Government
For your information