

21 June 2022

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Local Government Electoral Legislation Bill**

### **Purpose**

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1. We have considered whether the Local Government Electoral Legislation Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 23530/5.5). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression). Our analysis is set out below.

### **The Bill**

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4. The purpose of the Bill is to improve the processes by which individuals and communities are represented through, and can participate in, local government elections.
5. The Bill proposes to:
  - a. change the process followed by councils every six years to decide their representation arrangements, by making consideration of specific Māori representation (through Māori wards or constituencies) the first step of this process;
  - b. change the current restriction on the number of councillors on Auckland Council;
  - c. simplify the process for unitary authorities to adjust local board boundaries;
  - d. update the process for when an election is tied; and
  - e. enable all candidates to submit electronic nominations.
6. The Bill amends the Local Electoral Act 2001, the Local Government Act 2002, and the Local Government (Auckland Council) Act 2009. It also makes consequential amendments to the Local Electoral Regulations 2001 and the Bay of Plenty Regional Council (Māori Constituency Enabling) Act 2001.

## Consistency of the Bill with the Bill of Rights Act

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### Section 14 – Freedom of expression

7. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>1</sup>
8. The Bill contains several information-requiring provisions, which can be broadly split into three categories:
  - a. A requirement to give public notice, or otherwise notify, certain matters (clauses 8<sup>2</sup>, 14<sup>3</sup>, 27<sup>4</sup>, 29<sup>5</sup>, 44(5)<sup>6</sup>, Sch 2<sup>7</sup> and Sch 3<sup>8</sup> of the Bill);
  - b. A requirement to provide certain information to another entity (clauses 13<sup>9</sup>, 18<sup>10</sup>, 32(11)<sup>11</sup>, Sch 2<sup>12</sup> of the Bill);
  - c. A requirement to prepare public documents, within which the contents are prescribed (Sch 3<sup>13</sup> of the Bill).
9. Accordingly, on its face the Bill appears to engage section 14 of the Bill of Rights Act.
10. However, these information-requiring provisions are all imposed on public actors – local authorities, the Local Government Commission, electoral officers, District Court Judges, and the Government Statistician. Therefore, before considering whether any limits on section 14 may be justified, we have first considered whether public actors can invoke the benefit of rights protected under the Bill of Rights Act.
11. 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. To extend this approach to the organisations affected by this Bill, however, is not straightforward. Commentary suggests that whether public actors can invoke the benefit of rights under the Bill of Rights Act is subject to the concepts of “practicability”

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<sup>1</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4<sup>th</sup>) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>2</sup> New section 19GA(7) of the Local Electoral Act 2001.

<sup>3</sup> Amended section 19M of the Local Electoral Act 2001.

<sup>4</sup> New section 90A(3)(b) of the Local Electoral Act 2001.

<sup>5</sup> New section 92B(2), (8) of the Local Electoral Act 2001.

<sup>6</sup> New clause 21A(3) of schedule 7 of the Local Government Act 2002.

<sup>7</sup> New regs 58(6), 62(b)(iia), 79(6), 81(b)(iia) of the Local Electoral Regulations 2001.

<sup>8</sup> New clauses 4(1)(c)-(e), 10, 12(1)(a), 12(2), 15(2), 15(3), 17(5)(a), 17(6)(a) of schedule 3A of the Local Government Act 2002.

<sup>9</sup> Amended section 19L of the Local Electoral Act 2001.

<sup>10</sup> Amended section 19Q of the Local Electoral Act 2001.

<sup>11</sup> New clause 7(1) of schedule 1A of the Local Electoral Act 2001.

<sup>12</sup> New section 9(1) of the Bay of Plenty Regional Council (Māori Constituency Empowering) Act 2001, new regs 66(1)(aa), 84(1)(aa) of the Local Electoral Regulations 2001.

<sup>13</sup> New clauses 6(1), 6(6), 13 of schedule 3A of the Local Government Act 2002.

and “reasonable limits”. For example, natural justice rights may be invoked by a public actor in a criminal prosecution.<sup>14</sup>

12. In this case, where the Bill prescribes how these specified public actors may do the work they are required to do, it is hard to see why the Bill engages section 14.
13. In any case, to the extent that section 14 is engaged by the Bill, we consider any limit on this right is justified under section 5 of the Bill of Rights Act because:
  - a. The objective of ensuring the processes relating to local democracy are subject to a robust level of scrutiny, transparency and accountability, is sufficiently important to justify some limitation on s 14;
  - b. Requiring public actors to provide and/or publish information to the public, and other public bodies for oversight, is rationally connected to that objective;
  - c. The provisions impair s 14 no more than is reasonably necessary and are in due proportion to the importance of the objective, noting that these provisions are generally limited in nature – the information that must be provided is generally factual in nature and will be of limited expressive value (such as election results, a decision by a local authority or the Local Government Commission, or when a local authority meeting will be held). Additionally, these provisions generally either expand the scope of existing legislative provisions, or are otherwise broadly similar to existing requirements.

## **Conclusion**

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14. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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<sup>14</sup> Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* 2nd Edition (online ed, LexisNexis NZ), at [5.12.2], [5.12.3].