

16 September 2022

Section (9) (2) (a)

Section (9) (2) (a)

Our ref: OIA 98262

Tēnā koe Section (9) (2) (a)

Official Information Act request: Nature of democracy and the evolution of democracy

Thank you for your email of 10 August 2022 requesting, under the Official Information Act 1982 (the Act), information related to the nature of democracy. Specifically, you requested:

“...all information relating to analysis and advice in regard to the nature of democracy and the evolution of democracy, including but not limited to in relation to the Treaty of Waitangi and co-governance.”

On 19 August 2022, Hayley Denoual, Policy Manager, Electoral and Constitutional Policy, contacted you to clarify the scope of your request. You agreed to the following scope:

“As discussed, I don’t think we will have many specific documents with analysis on the ‘nature of democracy’ or ‘co-governance’ per se. But some of our recent and current work, for example on electoral reform, does contain elements of discussion and Treaty analysis about the impact of the proposed reform on the expression of democratic rights etc. which may be of interest to you. As agreed, we’ll have a look through our policy files for the last 5 years (i.e. since the 2017 election) to see what we may have on file.”

We have identified information relevant to your request that is publicly available. We have also identified seven documents held by the Ministry of Justice within scope of your request that are not publicly available.

I have attached a table to this letter (Table 1), which provides links and information on publicly available documents that I believe are relevant to your request. For some documents, I have provided information on the relevance of the document to your request and highlighted specific pages which may be of interest to you.

I have attached a further table (Table 2), which lists information that is not publicly available. Copies of the documents listed in Table 2 are enclosed. Some information has been withheld under the following sections of the Act:

- section 9(2)(a) to protect the privacy of natural persons;
- section 9(2)(f)(iv) to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials;
- section 9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between Ministers of the Crown or members of an organisation or officers and employees of any public service agency or organisations in the court of their duty.

I am satisfied that there are no public interest considerations that render it desirable to make the information being withheld under section 9 of the Act available.

Some information has been marked as out of scope. This relates to information unrelated to your request.

Please note document 5 has been provided as an excerpt from 'Ministry of Justice estimates Exam 2022/23 – Q&As & Briefings Vote Justice' under section 16(1)(c) of the Act.

Please note that we are still consulting on the release of one document within scope of your request. We will advise you of our decision on release of the document as soon as we are able to.

If you are not satisfied with my response, you have the right to complain to the Ombudsman under section 28(3) of the Act. You can contact the Office of the Ombudsman by emailing: info@ombudsman.parliament.nz.

Nāku noa, nā

pp. *H Denoual*

Kathy Brightwell
General Manager, Civil and Constitutional

Table 1, publicly available information:

Date	Title	Notes
13/8/2019	Proactive release – Electoral Amendment Bill and Referendums Framework Bill	<p>Publicly available here: justice.govt.nz/assets/Documents/Publications/7972-Proactive-release-EAB.pdf</p> <p>This document contains discussion of election-day enrolment in the Electoral Amendment Bill.</p>
17/4/2020	Proactive release – Prisoner Voting	<p>Publicly available here: justice.govt.nz/assets/Documents/Publications/8712-Prisoner-Voting-Redacted.pdf</p> <p>This document contains discussion of Te Tiriti o Waitangi in the context of prisoner voting. As you may be aware, the changes made to the prisoner voting rules followed consideration of the issue of prisoner voting at the Waitangi Tribunal – its 2018 report '<i>He Aha i Pērā Ai? The Māori Prisoners' Voting Report</i>' is publicly available on the Tribunal's website.</p>
13/8/2020	Proactive release – Electoral (Registration of Sentenced Prisoners) Amendment Bill SOP	<p>Publicly available here: justice.govt.nz/assets/Documents/Publications/Proactive-release-Electoral-Registration-of-Sentenced-Prisoners-Amendment-Bill-FINAL.pdf</p> <p>This document contains information about the Electoral (Registration of Sentenced Prisoners) Amendment Bill SOP.</p>
2/11/2020	2020 Briefing for Incoming Minister	<p>Publicly available here: beehive.govt.nz/sites/default/files/2020-12/Justice.pdf</p> <p>This document contains discussion of New Zealand's constitutional arrangements. See in particular, pages 4, 8-9, and 35.</p>
1/3/2022	United Nations Expert Mechanism on the Rights of Indigenous Peoples: New Zealand submission for report on right to self-determination	<p>Publicly available here: tpk.govt.nz/docs/tpk-RP%20EMRIP-self-determination-study-NZ%20submission-march2021.pdf</p>

Date	Title	Notes
5/4/2022	Regulatory Impact Statement: Temporary change to eligibility criteria for overseas voters for the 2023 General Election	<p>Publicly available here: justice.govt.nz/assets/Documents/Publications/Regulatory-Impact-Statement-Temporary-change-to-eligibility-criteria-for-overseas-voters-2023-General-Election.pdf</p> <p>This document contains Te Tiriti o Waitangi discussion relevant to your request. See in particular, pages 7-9.</p>
5/4/2022	Regulatory Impact Statement: Electoral Amendment Bill – changes to political donations settings	<p>Publicly available here: justice.govt.nz/assets/Documents/Publications/Regulatory-Impact-Statement-Electoral-Amendment-Bill-Changes-to-Political-Donations-Setting2.pdf</p> <p>This document also contains Te Tiriti o Waitangi discussion relevant to your request. See in particular, pages 6-7.</p>
21/7/2022	Proactive release – Electoral Amendment Bill and Electoral Amendment Regulations 2022	<p>Publicly available here: justice.govt.nz/assets/Documents/Publications/Proactive-release-Electoral-Amendment-Bill-Political-Donations-FINAL2.pdf</p> <p>This document contains Te Tiriti o Waitangi discussion relevant to your request. See in particular, page 26, paragraph 54.</p>
28/7/2022	Proactive release – Electoral (Māori Electoral Option) Legislation Bill	<p>Publicly available here: justice.govt.nz/assets/Documents/Publications/Electoral-Maori-Electoral-OptionFINAL.pdf</p> <p>This document contains Te Tiriti o Waitangi discussion relevant to your request. See in particular, pages 32, 49, 57-58, 60, 67, 70 – 75, 78 and 85 (of the PDF).</p>

Table 2, information held by the Ministry of Justice that is not publicly available:

No.	Date	Document type	Title	Notes
1.	13/11/2019	Aide memoire	Prisoner Voting	Released in full.
2.	11/11/2020	Briefing	Briefing - The New Zealand Constitutional System	Some information withheld under s9(2)(a), s9(2)(g)(i) and s9(2)(f)(iv).
3.	19/2/2022	Email chain	RE: Commissioning submission to EMRIP on self-determination	Withheld in full under s9(2)(f)(iv).
4.	19/5/2022	Excerpt from briefing	Excerpt from Ministry of Justice Estimates Exam 2022/23 – Q&As & Briefings Vote Justice.	Provided as an excerpt under s16(1) as remainder of briefing is outside the scope of your request. Some information withheld under s9(2)(g)(i).
5.	5/8/2022	Letter	Proposal to promote referendum petition – wording	Released in full.

Purpose

1. This note provides information on your paper, *Prisoner Voting*, to support you at Cabinet Social Wellbeing Committee. The paper provides four options for Cabinet to consider, if it is minded to change the law on prisoner voting:
 - **option one:** remove any disqualification for sentenced prisoners from enrolling and voting (as recommended by the Waitangi Tribunal)
 - **option two:** return to the pre-2010 law, disqualifying from enrolling and voting only those prisoners serving a sentence of three years or more
 - **option three:** while retaining the ban on prisoner voting, changing the law to suspend sentenced prisoners' enrolment (rather than removing them from the electoral roll), and
 - **option four:** both option two and option three.

Key messages

2. The Ministry of Justice estimates that by December 2020, under the current law, approximately 32,000 New Zealanders would have been removed from the electoral roll since December 2010, with a number of people removed multiple times. Almost 60 per cent of those removed are Māori.

Waitangi Tribunal

3. The Waitangi Tribunal's report *He Aha i Pērā Ai? The Māori Prisoners' Voting Report* found that the 2010 Act disqualifying all sentenced prisoners from voting is a serious Treaty breach. It recommended the Electoral Act 1993 be urgently amended to remove this disqualification, irrespective of sentence. The Tribunal's report drew on Crown evidence that in 2018, Māori were 11.4 times more likely to be removed from the electoral roll than non-Māori as a result of this disqualification.
4. The Tribunal also noted the disqualification of sentenced prisoners is, in practice, acting as a permanent rather than a temporary ban on voting.

Court findings

5. The Tribunal's report follows the High Court's declaration (upheld in the Court of Appeal and the Supreme Court) that the disqualification is inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA).

Timing

6. The paper proposes that if Cabinet decides to change the law, that this be progressed before the 2020 election. Prisoner voting changes would need to be progressed in a separate Electoral Amendment Bill (not the current Electoral Amendment Bill or the Electoral Amendment Bill (No. 2) about foreign donations).
7. Depending on Cabinet's legislative priorities and what option is chosen, it may prefer to progress law change after the 2020 election. For example, if there is no change to voting rights of prisoners but the suspended roll is chosen (option three), there may be less need to make the change before the 2020 election. (The funding for this option would come from Budget 2021).

8. However, if there is a change to allow some or all prisoners to vote (option one, two or four), we would recommend making this change before the 2020 election to enable prisoners to participate.

Option one - remove any disqualification for sentenced prisoners from enrolling and voting (no funding required)

9. The disqualification could be removed entirely, returning New Zealand's law to the position that existed in 1975 - 1977. This is what the Waitangi Tribunal has recommended and removes the disproportionate impact the current law has on Māori. This option is consistent with NZBORA, New Zealand's international human rights obligations and the Crown's Treaty obligations.
10. This option would be a simple legislative change to draft and implement. There would be periodic extra costs for the Electoral Commission and Corrections in delivering increased voting services and access to prisons. Extra funding is not required; however Corrections may seek some additional funding as part of future cost pressure funding bids.

Option two - return to the pre-2010 law (no funding required)

11. Under the Electoral Act 1993, before the 2010 amendment, all prisoners serving sentences of less than three years' imprisonment were able to enrol and vote. Reverting to the pre-2010 law would still disproportionately affect Māori but less so than the current law. This option would be less inconsistent with NZBORA although there is still a possibility it could result in a section 7 report.
12. As with option one this would be a simple legislative change to draft and implement and extra funding would not be required at this stage.

Option three - changing the law to suspend sentenced prisoners' enrolment (funding required)

13. Rather than changing who is disqualified from voting, the law could be changed to avoid removing sentenced prisoners from the electoral roll. Currently sentenced prisoners are removed from the roll and must take active steps to re-enrol on release. The law could be changed to suspend prisoners' enrolment through creation of a new suspended roll.
14. This change would not address the inconsistency with NZBORA or the disproportionate impact on Māori. However, this option would attempt to address the problem identified by the Tribunal that the disqualification of sentenced prisoners from voting is operating as a permanent rather than a temporary ban.
15. Creating a new roll type would be relatively complex, both in terms of drafting the legislative change and for the Electoral Commission to implement. It would require new ICT changes for the Electoral Commission which would have a cost of \$1.5 million, sought as a tagged operating contingency from Budget 2021. Although the necessary legislative amendments for suspended roll could be put in place prior to the 2020 general election, it could not be implemented in time for the election.
16. If Cabinet wants something in place before the 2020 election, an interim option could be implemented of automatically re-enrolling prisoners upon release without any change to

the Electoral Commission's ICT functionality. As the suspended roll is still a better long-term solution, this would only be temporary, and the legislation would need to provide for both the interim option and the permanent suspended roll option. This would add significant complexity to the legislative drafting process.

Option four - both option two and option three (*funding required*)

17. A fourth option is to do both option two and option three so that:

- prisoners serving sentences of less than three years' imprisonment can enrol and vote (the pre-2010 law), and
- other sentenced prisoners are placed on a suspended roll while in prison.

18. This option would both lessen the disproportionate impact on Māori and make the current ban on sentenced prisoners from voting more temporary in nature. There would be a cost of \$1.5 million for the Electoral Commission for the suspended roll.

19. The complexity of the legislation for this option could be reduced if Cabinet chooses to agree to a suspended roll (implemented after the 2020 election), with no interim option of automatic enrolment.

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Hon Kris Faafoi, Minister of Justice

The New Zealand Constitutional System

Date	11 November 2020	File reference	CON 03 02 03
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Action Sought	Timeframe/Deadline
Note the Ministry intends to provide you with additional briefing material about electoral law and the human rights framework.	N/A
Indicate if you would like to discuss any of the matters raised in this briefing in more detail.	At your convenience

Contacts for telephone discussion (if required)

Name	Position	Telephone		First contact
		(work)	(a/h)	
Andrew Kibblewhite	Secretary for Justice	s9(2)(a)	s9(2)(a)	<input type="checkbox"/>
Rajesh Chhana	Deputy Secretary Policy	04 494 9909	s9(2)(a)	<input type="checkbox"/>
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584	s9(2)(a)	<input checked="" type="checkbox"/>

Minister's office to complete

Noted Approved Overtaken by events
 Referred to: _____
 Seen Withdrawn Not seen by Minister
Minister's office comments

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IN-CONFIDENCE

Purpose

1. This briefing describes your role as the Minister responsible for the constitutional system, how we support you in that role, and constraints on longer-term constitutional work.
2. We will provide you with specific briefings on government priorities in the constitutional system, including electoral law and the human rights framework so this briefing will not discuss those matters in detail.

Key messages

3. As the Minister of Justice, you are responsible for policy matters related to our constitutional system. The constitutional system encompasses those laws and practices that relate to the institutions of government and the exercise of public power. It is underpinned by fundamental principles such as respect for Te Tiriti o Waitangi, the rule of law, democratic accountability, the separation of powers, and human rights.
4. We can respond to stated Government priorities in constitutional and human rights, including electoral law reform, extending legal protections for groups that experience hate speech, prohibiting discrimination on the ground of gender identity, banning conversion therapy, developing a national plan of action against racism, and considering the length of term of Parliament.
5. There are other emerging issues in the constitutional system, which could be addressed over the longer-term. The most significant constitutional issue is how we move towards constitutional law and practice that is truly grounded in Te Tiriti o Waitangi. Other constitutional issues include the possibility of a written constitution, whether New Zealand should become a republic, and legally affirming the importance of economic, social, cultural and environmental rights.
6. We can do more to build and maintain a strong and resilient constitutional system, but our ability to go further in constitutional matters is constrained by three factors:
 - 6.1. s9(2)(g)(i)
 - 6.2. s9(2)(g)(i)
 - 6.3. constitutional change requires longer public deliberation than other regulatory change, but our level of engagement with the public to help build understanding about constitutional issues is low.
7. We intend to invest in our long-term capacity for regulatory stewardship as well as our policy capability to engage with the public sector and the public about human rights, the rule of law, Te Tiriti o Waitangi and other constitutional matters. s9(2)(g)(i)

New Zealand has unique constitutional arrangements

8. The introduction to the Cabinet Manual, written by Sir Kenneth Keith, describes the constitutional system as "...about public power, the power of the state. It describes and establishes the major institutions of government, states their principal powers, and regulates the exercise of those powers in a broad way."
9. Nearly all countries have their core constitutional arrangements in a single document that is supreme law (i.e. it can be used to override or 'strike-down' other laws). New Zealand is sometimes said to have an unwritten constitution because, although much of our constitutional arrangements are in writing, they are not found in a single document.
 - 9.1. Our constitutional system has its foundations in Te Tiriti o Waitangi, which established a constitutional relationship between Māori and the Crown. It recognises the kawanatanga (governance) of the Crown to as well as the tino rangatiratanga (right to self-determination or sovereignty) of Māori
 - 9.2. Much of our constitutional arrangements are set out in legislation for which you are the responsible Minister. The Constitution Act 1986 is the main Act dealing with our constitutional arrangements, including the core functions of the Executive, Legislature and Judiciary. Other constitutional Acts include the Electoral Act 1993, the New Zealand Bill of Rights Act 1990, and the Official Information Act 1982.
 - 9.3. New Zealand's constitutional arrangements include the prerogative powers of the Monarch, relevant decisions of the courts, and well-established practices known as conventions of the constitution. Governmental institutions can also be bound by international treaties or other international obligations and standards.
10. Fundamental human rights are also an essential part of our constitutional system. They help define the acceptable limits of public power and the core functions of the state. They are central to our notions of fairness, equality and human dignity but they depend on our system of law and government to be fully realised. In New Zealand, human rights are affirmed by the common law and legislation such as the New Zealand Bill of Rights Act. Increasingly, human rights obligations are found in international instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and the Political Rights and International Covenant on Economic, Social and Cultural Rights.

The Minister of Justice is responsible for constitutional policy

11. As the Minister of Justice, you are responsible for policy matters related to New Zealand's constitutional system and democratic systems. This means you look after the health of our constitutional arrangements and the fundamental principles that underpin them.
12. A strong and resilient constitutional system is essential to the wellbeing of any country and its people. It helps protect the rights of everyone to be safe and enjoy an adequate standard of living. It supports our economic wellbeing by giving people confidence to invest, knowing that the legal system will uphold contracts and other legal responsibilities. The COVID-19 pandemic is an example of the value of strong constitutional arrangements. It has helped make us resilient in a crisis and preserved public support for the government response, even as the pandemic has made life incredibly difficult for many people.

You can lead discussions about changes to our constitutional arrangements

13. One aspect of your role is ensuring the laws establishing our constitutional framework remain effective and credible, adapt to changing circumstances, and promote the wellbeing of everyone. From time to time, the parts of our constitution in statute require review or amendment to address problems or improve their operation. You lead this work, including developing proposals for change.
14. This can be a long and deliberative process because changes to our system of government need broad support to maintain the legitimacy of the system. Constitutional change is usually preceded by lengthy public discussion about the reasons for change and the alternatives available. For example, the shift to the Mixed-Member Proportional (MMP) electoral system was preceded by a Royal Commission report in 1986, a public information campaign, and two referendums (in 1992 and 1993) before MMP was used for the first time in 1996.
15. The Ministry of Justice assists you with this task, including through its role in regulatory stewardship. Regulatory stewardship is the responsibility of government agencies to adopt a whole-of-system approach to regulation and actively monitor the regulatory systems for which they have policy or operational responsibilities.
16. Regulatory stewardship is important for all regulatory systems, but it is particularly important for the constitutional system. Constitutional problems cannot be allowed to develop into a constitutional crisis that threatens the legitimacy of the whole system of government. We need to actively identify and address problems that could undermine the legitimacy of our constitutional arrangements.

You have a constitutional leadership role in Government

17. The health of our constitutional system relies not only on good regulatory stewardship but on the actions and advice of the broader public sector. Respect for fundamental constitutional principles is as much about how people exercising public functions behave as it is about the law. Policy advice from government agencies, and their own administrative practices, must be informed by our constitutional values including respect for Te Tiriti o Waitangi, the rule of law, democratic accountability, separation of powers, open and transparent government, and human rights.
18. The Cabinet Manual requires Ministers to consult you about all proposals affecting New Zealand's constitutional arrangements (paragraph 5.14). This means you should be consulted about policy proposals that could alter our constitutional arrangements or impact any constitutional principles. In this role, you work with all your ministerial colleagues but particularly the Attorney-General, who the Cabinet Manual notes has particular responsibility for maintaining the rule of law. The Attorney-General must notify Cabinet of any proposals or government actions that do not comply with existing law and propose a remedy (paragraph 4.3).
19. We support you in this role by advising you on policy proposals that could have significant constitutional implications. We also support government agencies on constitutional matters. For example, the COVID-19 Public Health Response Act 2020 requires the Minister of Health to consult you before making Orders under that Act. The response to COVID-19 has

involved the use of extraordinary powers, which has highlighted the critical role of the Minister of Justice in constitutional and human rights matters.

The Government has some clear policy priorities in constitutional and human rights

20. These are the areas of work that we understand are Government priorities in the constitutional system:
- 20.1. continue to protect the integrity of New Zealand elections, and voters' access to the polls, including a review of financing rules
 - 20.2. extend legal protections for groups that experience hate speech, including for reasons of religion, gender, disability or sexual orientation by ensuring that we prohibit speech that is likely to incite others to feel hostility or contempt towards these groups under the Human Rights Act 1993
 - 20.3. review the Human Rights Act to better protect communities from discrimination and prejudice, including amending the Human Rights Act to prohibit discrimination on the grounds of gender identity
 - 20.4. pass legislation to ban conversion therapy
 - 20.5. create and implement a national plan of action to ensure tangible steps for government and all New Zealanders to take to help eliminate everyday racism and discrimination.
21. We also understand the Government intends to work with political parties from across Parliament (including the opposition) on issues that affect our democracy, including the Electoral Commission's 2012 recommended changes to the MMP electoral system, electoral finance law, and the length of the Parliamentary term.
22. Existing work in the constitutional system includes the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill, which is currently being considered by the Privileges Committee. A declaration of inconsistency is a statement by one of the senior courts or the Human Rights Review Tribunal that an Act appears to be inconsistent with the New Zealand Bill of Rights Act. The Bill requires the Attorney-General to present declarations of inconsistency to the House of Representatives so that Parliament can consider the views of the Court or Tribunal.
23. These are all areas that we have the policy capability to work on, s9(2)(g)(i)
- . We will provide you with separate briefings on these topics, partly to seek feedback on the scope of the proposed changes (particularly for changes to electoral law and New Zealand's human rights framework).

We can do more to build and maintain a strong and resilient constitutional system

24. In New Zealand, trust in government is relatively high when compared internationally. In 2019 Transparency International ranked New Zealand first equal (with Denmark) for the perception as the least corrupt country in the world. However, this high level of trust is not shared by everyone and it should not be taken for granted. Government institutions can

lose legitimacy if they do not support participation by as many people as possible, and are not seen as representing the interests of all sectors of the community.

25. Perhaps the most significant constitutional issue in New Zealand is how we move towards constitutional law and practice that is truly grounded in Te Tiriti o Waitangi. Te Tiriti o Waitangi has increasing influence on how we approach constitutional policy. In 2015, Matike Mai Aotearoa (the independent working group on constitutional transformation) produced a report bringing together three years of engagement and conversations. The Waitangi Tribunal intends to conduct a Kaupapa Inquiry¹ into constitutional issues, which could assist with a broader public conversation. The Ministry of Justice is the lead agency on the policy approach the Crown takes to the inquiry.

26. s9(2)(f)(iv)

s9(2)(g)(i)

¹ A Kaupapa Inquiry focusses on a broad thematic issue (such as health or constitutional arrangements) rather than a specific claim from a claimant group.

Next steps

33. As discussed above, we will provide additional briefings on specific Government priorities in the constitutional system.
34. We also intend to invest in our long-term policy capability to engage with the public sector and the public about fundamental human rights, the rule of law, and other constitutional matters, including Te Tiriti o Waitangi.

Recommendations

35. It is recommended that you:

- 1. **Note** the Ministry intends to provide you with additional briefing material about electoral law and the human rights framework; and

- 2. **Indicate** if you would like to discuss any of the matters raised in this briefing in more detail. **YES / NO**



Rajesh Chhana
Deputy Secretary, Policy

APPROVED SEEN NOT AGREED

Hon Kris Faafoi
Minister of Justice

Date / /

Co-governance & Equal voting

Why are you continuing to support the idea of co-governance? s9(2)(g)(i)

The government upholds democratic principles by working hard to ensure that all people have an equal opportunity to engage in civil discourse. Te Tiriti o Waitangi is a founding document of New Zealand that obliges the Crown to, among other things, partner with Māori and ensure participation in decisions that affect them. This ranges from consultation through to co-governance for matters where that is appropriate. As the government looks at ways to improve outcomes for all New Zealanders, it will continue to recognise Te Tiriti obligations.

Is the Minister comfortable with explicitly moving away from equal voting rights? As was demonstrated in the Rotorua members Bill, and now with the Canterbury Regional Council Bill?

The government is committed to every New Zealander having the right to participate in our democracy on a fair and equal basis. The bills mentioned are both local bills; they are not a reflection of government policy and I have no Ministerial responsibility for them. I am supporting regional democracies where their elected representatives have presented these bills to the House.

Why did Rotorua Member's Bill get a s7 but not Ngāi Tahu Bill?

It is Attorney-General's role to bring Parliament's attention to any provision in a Bill that appears to be inconsistent with the New Zealand Bill of Rights Act 1990.

As Minister of Justice I do not have responsibility for Bill of Rights Act vetting.

The Ministry of Justice vets Bills provides Bill of Rights advice direct to the Attorney-General. The Attorney-General then decides whether to issue a report under section 7 of the Bill of Rights Act.

Advice on consistency of Bills is available on the Ministry's website.

Background information

Canterbury Regional Council (Ngāi Tahu Representation) Bill

The Canterbury Regional Council (Ngāi Tahu Representation) Bill is a local bill promoted by the Canterbury Regional Council. The Bill proposes a bespoke representation arrangement, with the appointment of two non-elected Ngāi Tahu members to Environment Canterbury's governing body. The Bill was reported back by the Māori Affairs Committee on 2 June and is currently awaiting the Committee of the whole House.

Rotorua District Council (Representation Arrangements) Bill

The Rotorua District Council (Representation Arrangements) Bill is a local bill promoted by the Rotorua District Council (operating as Rotorua Lakes Council). The Bill aims to provide for representation arrangements for Rotorua that would not otherwise be permitted under the formula in the Local Electoral Act 2001. The Bill is currently before the Māori Affairs Committee.

Further background info for Minister Allan about the two Bills and Ministry of Justice advice:

The Canterbury Regional Council (Ngāi Tahu Representation) Bill would provide for Te Rūnanga o Ngāi Tahu to recommend non-elected appointment at Council level. The explanatory note states that this was an alternative to establishing Māori Wards, which the Council did not consider appropriate for its circumstances.

The Ministry's advice considered that section 19 (the right to be free from discrimination on the grounds set out in s21 Human Rights Act) was not engaged in relation to the Ngāi Tahu Bill due to it not meeting the second limb of the legal test for discrimination.

That test is:

- does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act; and if so,
- does the distinction involve disadvantage to one or more classes of individuals? (also called a 'comparator group')

There appeared to be a distinction on the grounds of 'race' or 'ethnic origin' (both prohibited ground in s21 Human Rights Act). But the Bill did not meet the second limb of the test. The proposal did not limit the right to freedom from discrimination as there is no comparator group that can be said to be disadvantaged by the appointment of the Ngāi Tahu non-elected members. While there was a distinction on the basis of ethnicity, the Ministry did not consider that there was likely to be disadvantage caused to any comparable group by this arrangement as no group had a similar status in Canterbury.

In the Rotorua District Council (Representation Arrangements) Bill the proposal creates a difference in voting weight between those on the Māori roll and those on the general roll. An individual's ability to enrol on the Māori roll is determined by ethnicity. On the face of it, the proposal can be said to draw a distinction on the basis of 'race' or 'ethnic origin'. In respect of the second limb of the test, the general roll is around 2.5 times the size of the Māori roll, but the general ward has an equal number of Council seats as the Māori ward. For those voting for general ward seats, their individual vote would hold less weight than those voting for Māori ward seats.

Equal representation is a key principle of a representative democracy so those on the general roll (and who can only ever be enrolled on the general roll i.e., non-Māori) are disadvantaged by this distinction. As s 19 of the Bill of Rights Act was engaged, and the proposal limited the right to freedom from discrimination, the Attorney General then considered whether the limitation was justified.

The Attorney-General's report was based on publicly available information from the Council. He noted that he did not have full knowledge of the complex history that had led to the Council's decision to promote the Bill.

5 August 2022

Bevan Rogers
Parliamentary Officer (Parliamentary Law and Practice)
Bevan.Rogers@parliament.govt.nz

Tēnā koe Mr Rogers

Proposal to promote referendum petition - wording

I refer to David Wilson's letter of 29 June 2022 to Andrew Kibblewhite, in which the Ministry of Justice is invited to comment on the wording of an indicative referendum. I have been asked to respond.

The proposed wording is:

Should New Zealand implement co governance at every level of representative democracy, where Maori elect half of all elected representatives & non Maori elect the remaining half?

I note that feedback will be provided to the promoter of the petition. The Ministry has considered the proposed wording and would like to offer the following observations:

- The proposed wording is quite broad, as a result it is unclear what is meant by "co governance at every level of represented democracy".
- Co-governance may be most understood to mean a structure which describes arrangements for negotiated decision-making between a group and central government. The wording implies that it is also a method to elect representatives (which we submit is outside the normally understood meaning). Therefore, it is unclear if the question is asking about the structure (half of all seats are Māori seats) or method (existing seats are voted on by Māori). In merging the two independent topics it may lead to confusion about what the question is and does not lend itself to a 'yes / no' answer.
- The spelling of the word "Maori" should be changed to "Māori".

It is the Ministry's view that drafting a more clearly defined question would increase clarity and reduce the risk of misinterpretation.

Thank you for the opportunity to comment.

Nāku noa, nā



Kathy Brightwell
General Manager, Civil and Constitutional Policy

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