

16 September 2019

Attorney-General

**Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters)  
Amendment Bill (PCO21150/14) – consistency with New Zealand Bill of Rights Act  
1990**

**Our Ref: ATT395/299**

1. We have considered Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (**the Bill**) for consistency with the New Zealand Bill of Rights Act 1990.<sup>1</sup> We advise the Bill appears to be not inconsistent with the rights and freedoms affirmed in that Act.

**THE BILL**

2. The Bill makes amendments to Te Ture Whenua Maori Act 1993 (**the Act**). The Act and the Bill sit within the historical context of colonialism, Te Tiriti o Waitangi, and extensive alienation of Māori land, as well as ongoing difficulties in retention and development of the remainder of Māori freehold land due to complex ownership structures and regulations. Māori freehold land comprises some 5 per cent of all land in New Zealand. Ahakoa he iti he pounamu – despite being small, it is precious. The preamble of the Act provides:

Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.

3. The General Policy Statement provides that the Bill seeks to ensure that the laws governing Māori land work better for whānau by making practical and technical changes to reduce the complexity and compliance requirements that Māori encounter when they engage with the courts about their Māori land. Specifically, the amendments within the Bill are designed to:

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<sup>1</sup> The Bill is due to be considered by the Cabinet Legislation Committee on 17 September 2019.

- enhance the intergenerational well-being of owners of Māori land, supporting opportunities for owners to use their land to meet their aspirations;
  - simplify the complexity and requirements that owners of Māori land encounter when engaging with the Māori Land Court, while preserving the integrity of the Māori land tenure system;
  - promote the efficient operation of the Māori Land Court, decrease the costs of resolving issues relating to Māori land, and ensure that the remedies available to enforce a decision are practical and effective; and
  - ensure that the Māori land tenure system is fit-for-purpose, clear, user-friendly, and future-proofed.
4. This advice address three aspects of the Bill:
- 4.1 clarifying that the tikanga of the relevant iwi or hapū will determine whether whāngai children have a relationship of descent in order to succeed;
  - 4.2 limiting the life interest of a surviving spouse or partner to allow descendants to exercise voting rights earlier; and
  - 4.3 limiting the rights of appeal in certain circumstances.

## **BILL OF RIGHTS ASSESSMENT**

### **Whāngai – descent relationship on the basis of tikanga**

5. The Act defines whāngai as “person adopted in accordance with tikanga Māori”.<sup>2</sup> The Act provides that the Māori Land Court may determine whether a person is a whāngai child of a deceased owner, and then determine:
- 5.1 whether the whāngai child can succeed to a beneficial interest in Māori freehold land;
  - 5.2 whether the whāngai child can succeed to a lesser interest in Māori freehold land; or
  - 5.3 whether the whāngai child cannot succeed to a beneficial interest at all.<sup>3</sup>
6. The Act provides the Māori Land Court cannot make an order that falls within the jurisdiction of the High Court under the Law Reform (Testamentary Promises) Act 1949 or the Family Protection Act 1955.<sup>4</sup>
7. Clause 27 of the Bill inserts new section 114A. New section 114A provides that, for any provision of the Act or the Family Protection Act 1955 that relies on a relationship of descent for the purposes of succession, the following applies:

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<sup>2</sup> Te Ture Whenua Maori Act 1993, s 2 definition of “whangai”.

<sup>3</sup> Section 115.

<sup>4</sup> Section 116.

- (3) For any child who is a whāngai, the tikanga of the relevant iwi or hapu determines whether there is a relationship of descent between the child and one or both of the following types of parent for the purposes of that provision:
- (a) the child’s birth parents (as defined by section 2 of the Adult Adoption Information Act 1985);
  - (b) the child’s new parents after the child became a whāngai.
8. Clause 28 inserts new sections 115 and 116. New section 115(1) allows the Māori Land Court to determine if:
- (a) a child is a whāngai of certain parents;
  - (b) a child who is a whāngai has a relationship of descent with certain parents.
9. New section 116 allows the Māori Land Court to provide for whāngai children for whom no relationship of descent is found in the application of the relevant tikanga. The Court may make orders in respect of occupation rights or rights to income and grants if it considers the order is required to prevent an injustice and the claim is not within the Law Reform (Testamentary Promises) Act 1949 or the Family Protection Act 1955.
10. In effect, new sections 114A, 115 and 116 re-enact the current legislative scheme in relation to whāngai children, but clarify that the Māori Land Court must employ the tikanga of the relevant iwi or hapū in determining whether a whāngai child is eligible to succeed to interests in Māori freehold land.

### *Whāngai – limitation to s 19*

11. Section 19 of the Bill of Rights Act prohibits discrimination on the grounds contained in the Human Rights Act 1993. One of those grounds is family status, which includes “being a relative of a particular person”.<sup>5</sup> The definition of relative includes someone who is related by “blood, marriage, civil union, de facto relationship, affinity, or adoption”.<sup>6</sup> Taking a generous and purposive approach to that definition, family status can include whāngai children.
12. Whāngai children are treated differently to natural born children in that they are not automatically considered eligible to succeed to interests in Māori freehold land. Whāngai children are materially disadvantaged because they have to meet additional legal tests in order to succeed to a full beneficial interest. This is an example of intra-ground discrimination,<sup>7</sup> which limits the right in s 19 of the Bill of Rights Act.

### *Whāngai – justified limitation*

13. Limits on rights fall to be considered under s 5 of the Bill of Rights Act, in accordance with the *Oakes* test.<sup>8</sup> That is:<sup>9</sup>

<sup>5</sup> Human Rights Act 1993, s 21(1)(l)(iv).

<sup>6</sup> Section 2.

<sup>7</sup> *B v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823 at [101] n 121.

<sup>8</sup> *R v Oakes* [1986] 1 SCR 103; adopted in New Zealand by *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

<sup>9</sup> *R v Chaulk* [1990] 3 SCR 1303 at 1335–1336; cited in *Hansen*, above n **Error! Bookmark not defined.**, at [64].

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
  - (a) be ‘rationally connected’ to the objective and not be arbitrary, unfair or based on irrational considerations;
  - (b) impair the right or freedom in question as ‘little as possible’; and
  - (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.
14. A rational and proportionate limitation meeting this test will be “demonstrably justified in free and democratic society” under s 5.

*Sufficiently important objective & rational connection*

15. A key principle of succession under the Act is maintaining appropriate kinship relationships amongst owners of Māori freehold land. This aligns with the principle that part of the importance of Māori freehold land lies in the relationship its owners have to the land, particularly according to tikanga and whakapapa. This objective is linked to the overarching importance of enhancing the intergenerational well-being of owners of Māori land. The new sections share that same objective.
16. The objective arises in the context of Māori freehold land as a taonga tuku iho, Te Tiriti o Waitangi, and New Zealand’s international commitments, which heightens their importance. In particular, the objective reflects the importance of providing due recognition to tikanga Māori in terms of both land tenure systems and determining who is a member of the relevant Māori group for the purposes of succession.<sup>10</sup>
17. The new sections are rationally connected to the objective. They clarify that tikanga is the relevant framework that the Māori Land Court should employ in determining whether an appropriate kinship relationship exists for the purposes of succession.

*Proportionality*

18. Whāngai (meaning to feed) is an arrangement whereby a child is cared for by those who are not the child’s birth parents, often a whanau member. It reflects the principle that the care of children is a community, rather than individual, responsibility. It reflects the central importance of whakapapa and whanaungatanga to maintaining and strengthening ties between and within Māori communities.<sup>11</sup>
19. Whāngai arrangements cover a wide range of circumstances. They might be short or long term; temporary or permanent. They might be within or between whānau, hapū and iwi. In any event, the arrangement is governed by tikanga.<sup>12</sup>

<sup>10</sup> See for example United Nations Declaration on the Rights of Indigenous Peoples, arts 27 and 33.

<sup>11</sup> Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at [178]–[181].

<sup>12</sup> At [180] and [192].

20. Tikanga is not fixed, and varies between Māori groups.<sup>13</sup> The tikanga of the relevant Māori groups involved will determine whether the nature of the arrangement extends to creating a relationship of descent. That is, how extensive a whāngai child's connections are to a whāngai whānau (and vice-versa), and the extent to which connections are maintained with the whāngai child's birth whānau, is predicated on what the relevant tikanga allows or requires of the arrangement, as it is agreed and as it grows.
21. An adopted child's legal relationship of descent is determined by the application of s 16 of the Adoption Act 1955. For whāngai children, tikanga is the basis on which their relationship of descent can be founded. Tikanga is increasingly recognised as a part of the common law.<sup>14</sup>
22. Whāngai arrangements do not automatically sever relationships with the child's birth whānau.<sup>15</sup> Nor do they automatically establish a relationship of descent with the child's whāngai whānau. The tikanga of some Māori groups is such that all whāngai are considered to have a relationship of descent to the whāngai whānau. For others, tikanga is more varied and will rest on a range of factual matters. It is also important to note whāngai is often intra-whānau, which strengthens rather than weakens whānau connections.<sup>16</sup>
23. A whāngai child will establish a relationship of descent with their whāngai whānau (and a severance of a descent relationship with their birth whānau) *in fact* only if the relevant tikanga provides the foundation for it. It is appropriate that a factual assessment via the relevant tikanga should therefore be the basis on which the Māori Land Court determines a relationship of descent *at law*.
24. We consider the differential treatment contained in new sections 114A, 115 and 116 proportional to the objective and therefore a justified limitation to s 19. The limitation is relatively modest. The new sections do not redefine whāngai, or prevent a whāngai child from establishing a relationship of descent if one exists. In addition, the new sections provide the Māori Land Court with tools to address injustice should a relationship of descent not be established, including the ability to order occupation rights and rights to income from the land.
25. The new sections bring the relevant legal test into alignment with the definition of whāngai in the Act, and into alignment with the factual matrix and value system in which descent relationships are capable of being formed. Clarifying that tikanga is the relevant framework to determine whether a relationship of descent is a minor change to the current legislative provisions, but it is one that gives effect to an important objective in light of the central importance of tikanga Māori to the treatment of succession to Māori freehold land.

### ***Whāngai – conclusion***

26. New sections 114A, 115 and 116 are a limitation to s 19 on the basis of family status, but are nonetheless capable of being demonstrably justified under s 5. Accordingly,

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<sup>13</sup> At [192] in relation to succession.

<sup>14</sup> See for example *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95] and [164].

<sup>15</sup> Law Commission, above n 11, at [196].

<sup>16</sup> At [179]. See also *Nikau v Nikau* [2018] NZHC 1862 at [20]–[21].

new sections 114A, 115 and 116 appear to be not inconsistent with the right to freedom from discrimination.

### **Spousal or partner interests**

27. Clauses 22 and 24 of the Bill insert new sections 108A and 109AA into the Act. New sections 108A and 109AA provide for the interests of a deceased owner's spouse or partner in the case of a will or intestacy respectively.
28. Under the Act, an owner of Māori freehold land may leave a life interest to their spouse or partner by will.<sup>17</sup> In the case of intestacy, a surviving spouse or partner may apply to the Māori Land Court to receive a life interest.<sup>18</sup> The life interest can comprise any or all of: income and grants from the Māori freehold land interests; occupation of a family home situated on the land; and participation (by voting) in decision-making about the land. These interests pass to the deceased owner's successors once the spouse or partner has died, entered a new relationship, or surrendered the rights.
29. New sections 108A and 109AA retain the ability for a spouse or partner to receive a life interest in income, grants and occupation, but removes the entitlement to participate in decision-making. Participation in decision-making is instead transferred to those who succeed to the beneficial interest in the land.
30. New sections 108A and 109AA engage the right to be free from discrimination under s 19 of the Bill of Rights Act on the basis of family status.<sup>19</sup> To the extent that the right to be free from discrimination is engaged, any limitation to the right must be demonstrably justified.
31. The objective of new sections 108A and 109AA is sufficiently important. The new sections seek to preserve beneficial owners' on-going relationship to the land and to support such owners in their aspirations for the land by encouraging earlier engagement. The ability of beneficial owners, rather than spouses or partners, to make decisions about the land's future is rationally connected to that objective.
32. The limitation is minimal. The ability of anyone (not just spouses and partners) to obtain interests in Māori freehold land is, and always has been, heavily controlled. There is no legal right in the property of another arising from the expectation of an inheritance. In that context, the new sections nevertheless retain significant rights (to live on the land or receive income from it) in favour of spouses or partners, while transferring to others the ability to participate in decisions affecting the future of the land.
33. In our view, the limitation is in proportion with the objective. Given the difficulties of ensuring inter-generational engagement, the importance of preserving relationships to the land, and the desire to support opportunities for owners to use their land to meet their aspirations, any limitations on s 19 produced by new sections 108A and 109AA are capable of being demonstrably justified.

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<sup>17</sup> Section 108(4).

<sup>18</sup> Section 109(2).

<sup>19</sup> See s 21(1)(l)(iii) of the Human Rights Act 1993.

34. Accordingly, new sections 108A and 109AA appear to be not inconsistent with the right to freedom from discrimination.

### **Limitations to rights of appeal**

35. The Bill contains two material limitations to rights of persons to challenge decisions that affect them.
36. New section 32A allows for a judge of the Māori Land Court to appoint additional members who have knowledge and experience of tikanga Māori or whakapapa. The appointment may be at the request of the parties or of the judge's own motion. New subsection 4 provides:
- (4) The proceedings and processes of the court cannot be challenged on appeal, or in any other proceedings, on the grounds that an additional member appointed under this section had a tribal affiliation or other relationship with any of the parties unless it is shown that the additional member acted in bad faith.
37. New sections 113A and 235A allows a registrar of the Māori Land Court, at the applicant's request, to determine and make an order in respect of certain specified applications relating to simple and uncontested succession or simple and uncontested trust matters. This is intended to encourage succession where the present process has not been used.
38. The registrar's determinations and orders are treated as if an order of the Court.<sup>20</sup> Any person affected by such a determination or order may apply for review by a judge of the Māori Land Court. The review is on the papers, unless the judge considers a hearing necessary. New sections 113A(7) and 235A(8) provide that, before applying for a rehearing of the judge's decision on review under s 43, a person must first obtain leave. Section 43 does not ordinarily require leave.
39. While new sections 32A, 113A and 235A contain limits to the ability of parties to challenge decisions of the Court, they do not infringe on the right to justice in s 27 of the Bill of Rights Act. Existing rights of judicial review are not affected.
40. Turning to the ability to challenge the substantive decision:
- 40.1 With respect to new section 32A, challenges may still be made to the substantive decision in which the additional appointees are involved.
- 40.2 With respect to new sections 113A and 235A, persons affected are able to access a series of reviews. We note that, subject to the provisions in the Act, the general law of administration of estates applies.<sup>21</sup> The general law places obligations on administrators or executors to inform those with a claim to the estate. The general law also places fiduciary obligations on trustees to act in the interests of beneficiaries. The general law will therefore enable relevant interested persons to contest the matter in the first instance.

<sup>20</sup> With the exception of orders pursuant to ss 41 (orders pronounced in open court) and 43 (rehearings) and procedural matters otherwise provided for in the Act: new section 113A(5).

<sup>21</sup> Te Ture Whenua Maori Act 1993, s 101.

41. New sections 32A, 113A and 235A do not engage s 27 of the Bill of Rights Act. Accordingly, new sections 32A, 113A and 235A appear to be not inconsistent with the right to justice.

## CONCLUSION

42. This advice concludes that:
- 42.1 New sections 114A, 115 and 116, which provide for relationships of descent according to tikanga for whāngai children and the rights to succession of those children, engage s 19 of the Bill of Rights Act. The limitation is justified under s 5.
- 42.2 New sections 108A and 109AA, which limit the life interests of a surviving spouse or partner by excluding participation in decision-making, engage s 19 of the Bill of Rights Act. The limitation is justified under s 5.
- 42.3 New sections 32A, 113A and 235A do not engage s 27 of the Bill of Rights Act.
43. This advice has been reviewed in accordance with Crown Law protocol by Helen Carrad, Crown Counsel.

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Debra Harris/Monique van Alphen Fyfe  
Crown Counsel/Assistant Crown Counsel

**Encl.**

**Noted / Approved /Not Approved**

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Hon David Parker  
**Attorney-General**  
/ /2019