

8 February 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Canterbury Regional Council (Ngāi Tahu Representation) Bill

Purpose

1. We have considered whether the Canterbury Regional Council (Ngāi Tahu Representation) 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 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 19 (freedom from discrimination). Our analysis is set out below.

The Bill

3. The Bill is a local government Bill that replaces part of the function of the Environment Canterbury (Transitional Governance Arrangements) Act 2016, which is due to be repealed in 2019.
4. The main objective of the Bill is to ensure the continuation of Ngāi Tahu representation on the Canterbury Regional Council (trading as Environment Canterbury) through empowering Te Rūnanga o Ngāi Tahu to appoint two non-elected members to Environment Canterbury, to serve equally alongside the 14 elected members following the 2019 local elections.

Consistency of the Bill with the Bill of Rights Act

Section 19 – Freedom from Discrimination

5. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
6. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:¹
 - a) 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,

¹ See, for example, *Atkinson v Minister of Health and others* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

- b) does the distinction involve disadvantage to one or more classes of individuals?
7. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.²
 8. Ethnicity is a prohibited ground of discrimination under s 21 of the Human Rights Act.³ The Bill proposes to confer rights on Māori that are not conferred on other people, by providing Ngāi Tahu with non-elected representatives on the Council, in addition to their vote for elected members. On face value, this appears to breach s 19 of the Bill of Rights Act.
 9. Notwithstanding this, we consider that the Bill does not limit the right to freedom from discrimination affirmed by s 19 of the Bill of Rights Act. Under s 19, discrimination arises only if there is a difference in treatment on the basis of one of the prohibited grounds of discrimination between those in “comparable circumstances, [that] when viewed in context...imposes a material disadvantage on the person or group differentiated against”⁴.
 10. In the context of the provisions within this Bill, no other persons or groups can be considered to be in comparable circumstances to Ngāi Tahu and no persons or groups will be materially disadvantaged by the passing of the Bill.
 11. The Treaty of Waitangi settlement agreed between Ngāi Tahu and the Crown in 1998 acknowledged the rangatiratanga and mana of Ngāi Tahu over their lands (“the Settlement”), and affirmed their “special association” with the natural environment in a number of areas.⁵ On the basis of this, the Settlement awarded Ngāi Tahu positions of input into environmental management bodies throughout the South Island/Te Wai Pounamu. This included establishing a Ngāi Tahu statutory adviser position to the Department of Conservation and awarding dedicated seats to appointees of Te Rūnanga o Ngāi Tahu on the New Zealand Conservation Authority and on Conservation Boards within the Ngāi Tahu Claim Area.
 12. Empowering Te Rūnanga o Ngāi Tahu to appoint two non-elected members to Environment Canterbury adheres to the same principle as the decisions to give Ngāi Tahu input into other environmental governance bodies in the Settlement. Ngāi Tahu have a unique claim to input into the Environment Canterbury context on the basis of their special association with the Canterbury natural environment. No comparator group is currently recognised by the government as having this special association in this region.

² See, for example, *Child Poverty Action Group v Attorney-General* above n 1 at [179]; and *McAlister v Air New Zealand* above n 1 at [40] per Elias CJ, Blanchard and Wilson JJ.

³ Human Rights Act 1993, s 21

⁴ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [109].

⁵ Ngai Tahu. Deed of Settlement. 1998. Section 2

13. On this basis we consider that the Bill does not engage s 19, because it does not treat two comparable groups of people differently on one or more of the prohibited grounds of discrimination.

Conclusion

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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