Local Government (Auckland Law Reform) Bill

9 December 2009

ATTORNEY-GENERAL

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
LOCAL GOVERNMENT (AUCKLAND LAW REFORM) BILL

1. We have considered whether the Local Government (Auckland Law Reform) Bill (PCO 14028/17.0) (‘the Bill’) is consistent with the New Zealand Bill of Rights Act 1990 (‘Bill of Rights Act’). We understand that this Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on Thursday, 10 December 2009.

2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with the right to freedom from discrimination (s 19 of the Bill of Rights Act). Our analysis is set out below.

Purpose of the Bill

3. The Bill is the third and final Bill required to implement the Government’s decisions on local governance arrangements for the Auckland region: the other two pieces of legislation being the Local Government (Tāmaki Makaurau Reorganisation) Act 2009 and the Local Government (Auckland Council) Act 2009.

4. The Bill makes the necessary interim and transitional provisions for the operation of the Auckland Council from 1 November 2010. It does so by providing further provisions to enable the establishment of the various new local governance arrangements in Auckland; facilitate the smooth transition of staff and assets to the new structures; prepare for local elections in Auckland; and provide clarity regarding planning and reporting arrangements for the period up until 1 November 2010. The Bill also provides the substantive detail for the Auckland Council to be able to operate effectively from its establishment on 1 November 2010, including:

- Further detail of the relationship between the Council’s governing body and its local boards
- Arrangements for the management of transport and water supply and wastewater services
- Provision for the development of a spatial plan for Auckland
- Arrangements for a Board to promote issues of significance for mana whenua and Māori of Tāmaki Makaurau and
- Arrangements relating to the governance of council-controlled organisations, development contributions, and representation reviews.

The Bill also provides for transitional planning, funding and rating arrangements for the Auckland Council until at least July 2012.
Section 19: Right to be free from discrimination

Section 19(1) of the Bill of Rights Act provides the right to freedom from discrimination on the grounds set out in s 21 of the Human Rights Act 1993. These grounds include age, which means any age commencing with the age of 16 years, disability, race, and ethnic or national origin.

In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under s 19 exists are:

- does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
- does the distinction involve disadvantage to one or more classes of individuals?

If these questions are answered in the affirmative, we consider that the legislation gives rise to a prima facie issue of "discrimination" under s 19(1) of the Bill of Rights Act. Where this is the case, the legislation falls to be justified under s 5 of that Act.

Establishment and composition of the Board promoting issues of significance for mana whenua and Māori of Tāmaki Makaurau

Clause 45 of the Bill inserts five new Parts to the Local Government (Auckland Council) Act 2009. New Part 7 proposes the establishment of a board to promote issues of significance for mana whenua and Māori of Tāmaki Makaurau.

The Board is to assist the Auckland Council in making decisions, performing functions and exercising powers and the Council must take the Board’s advice into account (new clause 73). The Board must appoint a maximum of 2 persons to sit on each of the Auckland Council’s committees that deal with the management and stewardship of natural and physical resources (new clause 70(1)). The Auckland Council must meet the Board’s reasonable costs in carrying out its functions (new sched 3, clause 20(1)).

While the Council is not required to follow the Board’s advice, this arrangement gives the mana whenua and Māori of Tāmaki Makaurau a sponsored platform from which to promote issues that are significant to them.

Other ethnic and racial groups are able to make representations to the Council in accordance with standard consultation processes. In this connection, we note that the Bill also requires the Mayor of the Auckland Council to establish a Pacific Peoples Advisory Panel and an Ethnic Peoples Advisory Panel to identify and communicate to the Council the interests and preferences of the Pacific peoples and Ethnic communities of Auckland respectively (cl 111).

However, there is no requirement for the views of these groups to be taken into account and the Bill provides that the Advisory Panels will be disestablished in 2013 (cl 111(4)). Together with the ratepayer funding provided to the Board and automatic membership
rights on Council committees dealing with natural and physical resources, it is arguable that this arrangement gives the mana whenua and Māori of Tāmaki Makaurau an advantage on the basis of race. The concomitant disadvantage for non-Māori might be said to give rise to a prima facie issue of discrimination.

In addition, the composition of the Board is limited to 2 taura here representatives and 7 mana whenua representatives (sched 3, cl 1). As this provision effectively excludes persons who are not of Māori descent from being on the Board, the Bill draws a distinction on the basis of race.

We consider any potential issue of inconsistency with s 19 of the Bill of Rights Act arising from the establishment of the Board to be demonstrably justified under s 5 of that Act.

The active protection of the indigenous people of New Zealand and those that have been historically disadvantaged is a significant and important objective. The Board furthers this objective by giving special recognition to the mana whenua and Māori of Tāmaki Makaurau as tangata whenua. It only goes so far as is necessary to ensure their informed participation and input, and does not confer a right of veto. The Bill does not attempt to assign a particular weight to the Board’s advice and the Council is not required to follow it.

We note that the current legislative framework for the governance of local authorities provides a mechanism to encourage local authorities to meaningfully engage with Māori and mana whenua to ensure that their interests are known and where possible acted upon. The participation mechanism proscribed under the Bill will better enable the Auckland Council to carry out these legislative responsibilities to accurately capture and reflect the views of mana whenua and Māori of Tāmaki Makaurau. This, in turn, will improve the quality of decision-making by the Auckland Council.

In our view, the arrangements in the Bill strike an appropriate balance between promoting the specific participation of mana whenua and Māori of Tāmaki Makaurau and the right to freedom from discrimination.

**Disqualification of members of the Board**

We have further considered whether the provision relating to the disqualification of the members of the Board raises issues of discrimination of the grounds of age and disability (see sched 3, cl 5 of the Bill).

Disability discrimination

We note that a person is disqualified from being on the Board if he or she is subject to a property order under the Protection of Personal and Property Rights Act 1988 ('PPPRA') (new sched 3, cl 5(2)(d)); or a personal order made under that Act that reflects adversely on the person’s competence to manage his or her own affairs in relation to their property or capacity to make or communicate decisions relating to any particular aspect of his or her personal care or welfare (new sched 3, cl 5(2)(e)).
The Bill applies similar disqualification criteria in respect of the directors of Auckland Transport (new sched 2, cl 3(c) and (d)).

A Court may issue orders under the PPPRA where it determines that an individual lacks capacity, in whole or in part, to manage his or her property interests or lacks capacity to communicate his or her wishes with respect to those interests. The provisions, where they introduce a PPPRA order as a proxy for competence, are plainly aimed at addressing the issue of people that lack the capacity to perform the functions associated with membership of the Board, which includes the management of certain funds.

There is an argument that the use of PPPRA orders for the purposes of disqualification of members of the Board does not make a distinction based on a disability, as they require the Court to consider a person's competence. Balanced against this, there is a counter argument that the use of PPPRA orders effectively treats persons subject to an order differently from those who are not subject to such an order. As these orders are more likely to affect individuals who lack capacity by reason of their disability, the use of these provisions may disproportionately affect persons with a disability.

For completeness, we consider that the use of PPPRA orders in the disqualification provisions in the Bill is justified in terms of s 5 of the Bill of Rights Act.

The objective of introducing the PPPRA test is to immediately remove people from a position of trust, where they cannot communicate choices, understand relevant information, appreciate a situation and the consequences, and rationally manipulate information. We consider that disqualification from the Board based on a Court finding that a person is not competent to manage their affairs, whether fully or in part, is an important and significant objective.

We consider there to be a rational and proportionate connection between the need to remove people from public or fiduciary office for reasons of incompetence and the use of the PPPRA test to do so. This provision represents an appropriate balance between the right to be free from discrimination based on disability and the requirement to be fully able to carry out the duties under those offices.

In reaching this view, we note that the reference to personal orders is nuanced to reflect that the order must adversely reflect on the person’s ability to manage property or communicate decisions. These abilities are integral to being a member of the Board. If a personal order did not reflect adversely on the ability to manage property or communicate decisions then there would be no bar on appointment, as a member of the Board.

Age discrimination

Schedule 3, cl 5(2)(a) provides that a person under 18 years of age is disqualified from being a member of the Board. We consider that this provision creates a disadvantage for persons under 18 years of age and thereby also gives rise to a prima facie issue of discrimination on the grounds of age. However, we do not consider that this provision is unjustified in terms s
5 of the Bill of Rights Act. Because of the activities the Board is required to undertake – including sitting as a member of particular committees of the Auckland Council and negotiating the annual funding of the Board with the Council – the members of the Board are required to possess a satisfactory level of life-experience, judgment and financial awareness to enable them to make considered and balanced decisions. Setting a threshold for membership based on a minimum age will provide the Board with the appropriate level of decision-making maturity and will give confidence that its members have sufficient experience.

Conclusion

This advice has been prepared by the Public Law Group and the Office of Legal Counsel. We have reached the conclusion that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr
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Office of Legal Counsel

Footnote:

1. See, for example, ss 4, 14(1)(d), 77(1)(c), and 81(1)(a)(b) and (c) of the Local Government Act 2002 and ss 6(e), 7(a), 61(2A), 62(1), 66(2A) and 74(2A) of the Resource Management Act 1990.

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