

4 April 2016

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Te Ture Whenua Māori Bill

Purpose

1. We have considered whether the Te Ture Whenua Māori 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. This advice has been prepared in relation to the latest available version of the Bill (PCO 17830/20.0). We will provide you with further advice should the final version of the Bill include amendments affecting our conclusion 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 section 19 (freedom from discrimination) and section 14 (freedom of expression). Our analysis is set out below.

Summary

3. The Bill restates and reforms the law relating to Māori land, replacing Te Ture Whenua Māori Act 1993.¹ It maintains the dual kaupapa of retention and utilisation, but seeks to provide clearer and more empowering guidance with regard to Māori land use.
4. As it provides a separate regime for Māori landholding, the Bill constitutes a limit on the freedom from discrimination on the basis of race affirmed by section 19 of the Bill of Rights Act. We nonetheless consider that, given the particular historical context of Māori land and its intrinsic cultural dimension, the limit is demonstrably justified under section 5 of the Bill of Rights Act.
5. Particular provisions of the Bill further limit the freedom from discrimination, on the basis of family status, age, and disability. Other provisions limit the freedom of expression affirmed by section 14 of the Bill of Rights Act. The limiting measures are designed to ensure the purposes of the Bill can be met in a meaningful way and we also consider those limits to be consistent with the Bill of Rights Act.

¹ Te Ture Whenua Māori Act 1993 was passed after the Bill of Rights Act but did not receive a vet for consistency as it had been introduced prior to the Bill of Rights Act's enactment.

The Bill

6. The Bill regulates Māori land transactions, activities and governance. Its principles recognise the centrality of the Treaty of Waitangi, tikanga Māori, and whakapapa with regard to Māori land law and rights. It provides for:
- a. the status and classifications of Māori customary and freehold land;
 - b. Māori land tenure to be held on the basis of tikanga Māori and to endure as a taonga tuku iho by virtue of whakapapa (in particular, the Bill places rules and restrictions on Māori land disposition);
 - c. ownership structures, beneficial interests and succession entitlements;
 - d. decision-making bodies and processes in respect of Māori land, based on a policy of increasing self-governance and including representative, collective and threshold decision-making frameworks;
 - e. a Māori land register of both legal and beneficial interests in Māori freehold land;
 - f. dispute resolution processes, which in some cases will be mandatory prior to a dispute coming before the Māori Land Court; and
 - g. the continuation of the Māori Land Court and Māori Appellate Court.

Consistency of the Bill with the Bill of Rights Act

Section 19 – Freedom from discrimination

7. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination on the prohibited grounds set out in the Human Rights Act 1993 ('the Human Rights Act').
8. The key questions determining whether legislation limits the freedom from discrimination are:²
- a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under the Human Rights Act?
 - b. if so, does the distinction involve disadvantage to one or more classes of individuals?
9. 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.³

Discrimination on the grounds of race

10. Section 21(1)(f) of the Human Rights Act lists race as a prohibited ground of discrimination.

² 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.

³ See, for example, *Child Poverty Action Group v Attorney-General* above n 2 at [179]; and *McAlister v Air New Zealand* above n 2 at [40] per Elias CJ, Blanchard and Wilson JJ.

11. The Bill provides a separate regime for Māori landholding. The very premise of the Bill therefore draws a distinction based on race.⁴ The regime places restrictions and obligations on those with interests in Māori land, including limitations on selling and gifting and mechanisms for interests in land to be dealt with against minority interest-holders' wishes. While the regime is intended to recognise and protect the rights of owners and beneficiaries of Māori land, the more stringent rules about how Māori land may be dealt with by individuals bound by the Bill could be considered a material disadvantage. For the purposes of this advice, we have assumed the Bill therefore limits the freedom from discrimination on the grounds of race.
12. However, a provision limiting a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonable and justified in terms of section 5 of that Act. The section 5 inquiry may be summarised as follows:⁵
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?
13. We consider that the legislative provision of a separate regime for dealing with Māori land, to the extent that it is considered to limit the right to freedom from discrimination, is a justified limitation.
14. The objective of the regime is to recognise and preserve the intrinsic cultural dimension to Māori land. Unlike other forms of private land, Māori land tenure is derived from customary rights that have their basis in tikanga Māori. Notions of "ownership" of Māori land tend to be regarded by Māori in terms of stewardship and connection, rather than proprietorship, and in terms of permanence rather than transience. The Bill's general policy statement notes the total amount of Māori freehold land is now reduced to 1.456 million hectares (approximately 5.5 percent of all land in New Zealand). The separate regime for Māori freehold land continues previous efforts to address the historical context of large land loss and the importance of Whenua to Māori, and reflects a policy shift to more clearly support land utilisation as determined by the owners themselves. It is also intended to be consistent with the guarantees given in the Treaty of Waitangi. These objectives are sufficiently important to justify some limitation on the right to be free from discrimination.
15. The limitations are rationally connected to the objectives of the regime, as the framework ensures Māori land retention remains a core focus of the regime and continues to regulate transactions where retention may be placed at risk. The regime

⁴ Clause 5 of the Bill defines 'Māori' as 'an individual of the Māori race of New Zealand, and includes a descendant of such an individual'.

⁵ *Hansen v R* [2007] NZSC 7 [123].

provides a framework to protect and promote the decisions of owners of Māori land to determine, design, establish and operate effective governance arrangements for their land.

16. In light of the factors outlined above we consider the regime's limits are no more than reasonably necessary to achieve the objectives, and are proportionate to those objectives' importance. This conclusion also takes into account the fact the separate regime may not be considered a limitation on the right at all. The regime exists in recognition of the substantively different nature of Maori land holding, and accordingly non-Maori may not be an appropriate comparator group. If that is the case it would be difficult to argue that any different treatment is based on race. Further, where, as here, there is arguably no useful comparator group, it is difficult to demonstrate that the regime is discriminatory, as it is not possible to establish any material disadvantage.
17. We discuss these factors in more detail in relation to particular provisions of the Bill we consider warrant closer analysis. Of those provisions, the Bill's treatment of persons for the purposes of descent and succession is the most significant.

Discrimination on the grounds of family status

18. Under the Human Rights Act, family status (section 21(1)(l)) is a prohibited ground of discrimination. "Family status" means, among other things, "being the relative of a particular person" (section 21(1)(l)(iv)). "Relative" is defined under section 2(1)(a) of the Human Rights Act, in relation to any person, as any other person who "is related to the person by blood, marriage, civil union, de facto relationship, affinity or adoption".⁶
19. The Bill reflects the principle that tikanga Māori is central to matters involving Māori land. The Bill expressly defers to tikanga Māori for the manner in which relationships of descent are determined. Clause 8 provides:

8 Descent relationships determined by tikanga Māori

- (1) This section applies to a provision of Parts 1 to 9 that refers to a term that involves relationships of descent between people, such as a reference to—
 - (a) a child, grandchild, brother, sister, parent, grandparent, whānau, or descendant;
or
 - (b) an association with land in accordance with tikanga Māori.
- (2) The tikanga of the relevant iwi or hapū determines whether—
 - (a) a whāngai relationship at any link in the chain of descent is to be treated as a relationship of descent for the purposes of the provision:
 - (b) a relationship by birth, or a relationship by adoption order, that is deemed by the Adoption Act 1955 to be a relationship of a different kind is to be treated as a relationship of descent for the purposes of the provision, despite anything in that Act.

⁶ The complete definition of relative provides, in relation to any person, means any other person who – (a) is related to the person by blood, marriage, civil union, de facto relationship, affinity, or adoption; or (b) is wholly or mainly dependent on the person; or (c) is a member of the person's household.

- (3) An order made by the court on any of the following matters is proof of the matter for the purposes of Parts 1 to 9:
- (a) whether a whāngai relationship exists:
 - (b) whether a whāngai relationship is to be treated as a relationship of descent:
 - (c) whether a relationship by birth, or by adoption order, is to be treated as a relationship of descent.
20. The Bill does not contain an equivalent provision to clause 8(2) in respect of biological relationships.⁷ It therefore distinguishes lineal descendants (persons of direct genealogical descent) from non-lineal descendants (whāngai or adopted persons). This constitutes a distinction based on family status.
21. Descent relationships are crucial to determinations about whether a person is a “preferred recipient” or an “eligible beneficiary” in relation to Māori freehold land. Unlike descent relationships by birth, descent relationships based on adoption, whether by custom (whāngai) or by adoption order, do not *automatically* confer the same benefits.⁸
22. However, we also note the Bill’s provision for adopted children to hold or succeed to beneficial interests even where that entitlement does not exist in general law, as clause 8(2)(b) overrides the Adoption Act 1955.⁹ This means an adopted child may hold or succeed to beneficial interests as a descendant of either or both their adoptive and birth parents, if the tikanga in the circumstances so determines.
23. The material disadvantage under the Bill for whāngai and adopted persons can be seen in the following examples:
- a. Under clause 105 of the Bill, a parcel of Māori freehold land may only be gifted to a “preferred recipient” or entity. A “preferred recipient” is defined in clause 96 as including “children, grandchildren and other descendants of the owner”. Biological children are therefore automatically included within the definition of a preferred recipient and eligible to receive a gift of land. A non-biological child (such as whāngai or adopted persons) will only be able to receive a gift if there is evidence that they are a descendant in accordance with tikanga as specified in clause 8(2)(a) or (b); and
 - b. Clause 246 of the Bill sets out the way “eligible beneficiaries” are determined on intestacy and the manner in which individual freehold interests or parcels of Māori freehold land devolve on intestacy. Again, lineal descendants are automatically considered to be “eligible beneficiaries” whilst whāngai or adopted children are subject to the provisions specified in clause 8(2)(a) or (b).
24. Because material advantages stem from being a descendant, and correspondingly there is material disadvantage to those not automatically determined to be descendants, the Bill limits section 19 of the Bill of Rights Act. The issue is one of intra-

⁷ That is, those biological relationships not affected by adoption.

⁸ Clauses 16, 25, 48, 59, 96, 100, 101, 141, and 292 detail these benefits.

⁹ Under section 16(2) of the Adoption Act 1955, a person who is adopted severs legal ties with their birth parents and is in law considered as a natural child of the adoptive parents.

ground discrimination, as the distinction and resultant material disadvantage are between lineal and non-lineal descendants of the same protected class under the Human Rights Act.¹⁰

Is the objective sufficiently important?

25. Clause 8 reflects a policy intention that the community of ownership of Māori land should comprise individuals who have an association with the land that accords with tikanga Māori and whakapapa links. The intention reflects the Bill's objectives of retaining Māori land in Māori ownership; placing tikanga Māori at the centre of matters involving Māori land; and preserving Māori land as a taonga tuku iho by virtue of whakapapa.
26. The objectives take on further significance in light of the rights and obligations under the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Articles 3 to 5 of UNDRIP affirm the rights of indigenous peoples to self-determination in relation to the pursuit of economic, social and cultural development and internal affairs, and the right to maintain and strengthen their distinct institutions.

Is there a rational connection between the limit and the objective?

27. Determining whether a whāngai or adopted person is a descendant by reference to the tikanga of a particular iwi or hapū allows that iwi or hapū to retain its land in a way that preserves the group's connection to the land, and therefore the cultural importance of retaining it in the first place.

Does the limit impair the right no more than reasonably necessary to achieve the objective?

28. Clause 8 does not impose any restriction on whāngai or adopted persons being descendants for the purposes of Māori land. It instead provides for a factual determination in accordance with the tikanga of the particular iwi or hapū. This is consistent with the Bill's objective of ensuring retention of land and ownership by individuals associated with the land in accordance with tikanga Māori and whakapapa links.
29. The Bill contains several safeguards that ensure that the right is impaired no more than reasonably necessary:
 - a. the Māori Land Court is authorised to make special provision relating to income in respect of a person who is not entitled to succeed to the land or interest solely because the tikanga of a relevant iwi or hapū determines that a whāngai or adopted child is not a descendant (clause 266(2));

¹⁰ We are not aware of any New Zealand authority having considered intra-ground discrimination at the time of writing, but it has been recognised in *Granovsky v Canada (Minister of Employment and Immigration)* [2000] 1 SCR 703; see further: A Butler and P Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 17.16.1.

- b. the disputes resolution process (instigated before court proceedings) can be used to determine whether:
 - i. a person is a whāngai (clause 342(2)(b));
 - ii. a whāngai relationship or relationship by adoption order is to be treated as a relationship of descent (clause 342(2)(c)); and
 - iii. whether a person is a preferred recipient (clause 342(2)(f)).
30. The Māori Land Court has jurisdiction to determine those same matters.¹¹ As noted by the Chief Justice, Rt Hon Dame Sian Elias, in *Takamore v Clarke* [2012] NZSC 116, what constitutes tikanga Māori in any particular case is a question of fact for expert evidence and a court asked to identify the content of tikanga Māori by evidence is not engaged in a process of interpretation or law-creation.

Is the limit in due proportion to the importance of the objective?

31. Drawing on the factors outlined above, we consider the limitation is proportionate to the significance of the purposes of clause 8 in the particular context of New Zealand's history and the continuing obligations of the Treaty of Waitangi.

Discrimination on the grounds of age

Judicial appointment eligibility

32. Age is another prohibited ground of discrimination under section 21 of the Human Rights Act. For the purposes of this advice, the Bill of Rights Act protection from age discrimination applies to persons 16 years and over.¹²
33. Clause 427(6) of the Bill provides that no person may be appointed a judge of the Māori Land Court after attaining the age of 70 years. This exclusion from eligibility is *prima facie* discrimination on the basis of age.
34. Previous advice has found that an analogous limit on section 19 – the imposition of a mandatory judicial retirement age – is justified.¹³ We conclude that there is nothing particular to this Bill which lead us to depart from this reasoning in respect of clause 427(6).

Owners' voting rights, and eligibility for appointment as kaitiaki, whānau trust trustee and kaiwhakamarumarū

35. Clause 52 provides that owners of Māori freehold land under the age of 18, and without a kaiwhakamarumarū¹⁴ appointed to manage their beneficial interest, cannot vote on

¹¹ Clause 300(1)(j), (n) and (o).

¹² Section 21(1)(i) of the Human Rights Act 1993 defines 'age' differently depending on the part of the Act relied upon.

¹³ Crown Law Office, Judicature Modernisation Bill (PCO 17309/14.0): Consistency with the New Zealand Bill of Rights Act 1990, paras 30 – 36; www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/judicature-modernisation-bill (last accessed 14 March 2016).

¹⁴ A kaiwhakamarumarū is someone who provides protection or guardianship to another to prevent harm to that person, and is defined in clause 5 as a person appointed by the court to manage the property of an owner needing protection.

decisions relating to the land. Clauses 195(3)(a), 62(2)(a) and 75(2)(a) require the same age of individuals to be eligible for appointment as a kaitiaki, whānau trust trustee or kaiwhakamarumarū under the Bill.

36. These provisions constitute prima facie discrimination on the basis of age in respect of 16 and 17 year-olds. However, we consider the limits on section 19 of the Bill of Rights Act are justified.
37. The purpose of the age restriction on voting is to ensure decisions made with regard to Māori land are made in full understanding of their circumstances and consequences, both in terms of the tikanga of the relevant hapū or iwi and finance and landholding in general. Age restrictions also ensure kaitiaki, trustees and kaiwhakamarumarū, who have significant responsibilities under the Bill, are sufficiently mature to properly understand the nature and consequences of their actions, to act without undue pressure or influence and to hold the trust and confidence of the person or group concerned. Given the importance of considered decisions relating to Māori land in light of the Bill's purpose, we consider this a sufficiently important objective to justify some limitation on the freedom of discrimination.
38. The limitation is rationally connected to the objective as the age of 18 is often used as a proxy for the responsibility and maturity sufficient to make significant financial and legal decisions. That proxy is also rationally connected to ensuring owners and kaitiaki, trustees and kaiwhakamarumarū are able to comply with their cultural and statutory obligations.
39. For the same reasons, we consider the limits are in proportion to, and go no further than reasonably necessary to achieve, the objective. In respect of voting rights this finding is supported by the Bill's provision for kaiwhakamarumarū themselves, who may preserve the minor's interest by exercising voting rights on their behalf.

Discrimination on the grounds of disability

40. A further prohibited ground of discrimination in the Human Rights Act is disability. Section 21(1)(h) defines disability as including physical, intellectual or psychological disability or impairment and physical or psychiatric illness, among other characteristics.
41. The criteria¹⁵ for kaitiaki, whānau trust trustee and kaiwhakamarumarū appointments disqualify individuals subject to a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 2003 or a property order under the Protection of Personal and Property Rights Act 1988 ('PPPR orders').¹⁶

¹⁵ Clauses 184(4)(g) and (h), 62(2), 75(2)(a).

¹⁶ Compulsory treatment orders can be made by a court in respect of a patient with a mental disorder requiring treatment either in a hospital or in the community. PPPR orders can be made by a court 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.

42. The ineligibility of individuals subject to compulsory treatment or PPPR orders from holding these roles limits the right to be free from discrimination on the basis of disability under section 19 of the Bill of Rights Act. However, we consider these limits on the right to freedom from discrimination to be justified. Excluding individuals who are subject to an order serves, and is rationally connected to, the sufficiently important purpose of ensuring only those competent to do so fill the relevant role and obligations. Those exclusions are proportionate and go no further than reasonably necessary to achieve that purpose, as ineligibility applies only in respect of current orders (which are made by a court and can be reviewed or revoked).

Section 14 – Freedom of expression

43. 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. Freedom of expression includes the right not to say anything or certain things.¹⁷
44. The Bill contains several provisions which may be seen to limit the freedom of expression both by requiring certain personal and commercial information to be published or accessible and by allowing certain personal or commercial information to be withheld.¹⁸ For example, it provides for a register of Māori Land interests ('the register'). Public access must be maintained to the public part of the register, which will record both legal and beneficial interests in Māori land as well as governance agreements, dispositions and other matters provided throughout the Bill. Further requirements may be specified in regulations (but will not include contact details for legal or beneficial owners). Personal information to be withheld from the register during a renewable 'withholding period' of up to five years if certain conditions are met.
45. We consider such limits to be minimal at most and, to the extent they exist, justified under the Bill of Rights Act. The register, for example, is designed to enable the public to identify owners of, interests in, and governance and management arrangements for, Māori land. It facilitates decision-making and dealing with respect to Māori land, and compliance with the purpose and requirements of the Bill. Providing grounds for withholding personal information ensures the safety of individuals and their families where appropriate.
46. We consider these purposes to be sufficiently important to justify some limitation on the freedom of expression. The limits are rationally connected and proportionate to the objectives, and no more limiting than reasonably necessary, as the provisions are set out in terms that require the measure taken to achieve the relevant objective. Exceptions, supporting provisions and criteria, and provision of a dispute resolution process and access to the Māori Land Court to address any objections, further bolster the proportionality of the limits.

¹⁷ *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

¹⁸ Clauses 214, 215, and 272–276.

Conclusion

47. 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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