

Historic Places Amendment Bill

26 July 2004

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH NEW ZEALAND BILL OF RIGHTS ACT 1990: HISTORIC PLACES AMENDMENT BILL

1. We have considered the Historic Places Bill (PCO version 5586/23) for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that this Bill may be introduced into the House on 27 July 2004.
2. This Bill proposes a number of changes to the Historic Places Act 1993 ("the HP Act"). These amendments:
 - amend the governance arrangements of the Historic Places Trust ("the Trust");
 - designate the Trust as a Crown entity;
 - require the Trust to notify and invite submissions on all proposals to include historic places/areas and wahi tapu/areas in its register of historical and cultural heritage; and
 - clarify and amend those sections of the Act that are unclear or require adjustment, to enhance the Trust's ability to fulfil its functions and responsibilities.
3. Although we have come to the conclusion that this Bill appears to be consistent with the Bill of Rights Act, the Bill raises an issue of consistency with the right to be free from discrimination on the prohibited ground of race (section 19(1)).

Issue of consistency with the Bill of Rights Act

Section 19: the right to be free from discrimination

4. Clause 25 of the Bill repeals and substitutes section 84(2) of the HP Act. The new provision changes the composition of the Maori Heritage Council ("the Council") as a consequence of changes to the structure of the Historic Places Trust Board ("the Board").
5. The Council will continue to consist of eight members, four of whom must be members of the Board. Three of the members of the Board who are also members of the Council must have been appointed to the Board on the basis of their knowledge of te ao Māori and tikanga Māori. One other member of the Board is also appointed to the Council. The four remaining members of the Council are appointed by the Minister, all of whom must be Māori and have the skills, knowledge of cultural background appropriate to the functions and powers of the Council (new section 84(2)(c)).

6. The HP Act currently requires that seven members of the Council shall be Māori. Three of the seven Maori members of the Council are appointed from the Board, while the remaining four are appointed by the Minister.
7. Clause 25 of the Bill appears to be *prima facie* inconsistent with section 19(1) of the Bill of Rights Act because four persons are appointed to the Council on the basis of, amongst other things, their race. In other words, a person who, in all other respects may fill the criteria for appointment to one of the statutory positions may not be eligible for appointment because they are not Māori.
8. The Ministry is of the view that, as appointments should generally be made on the basis of a person's skill, experience and knowledge, a race-based criterion is unlikely to be justifiable in most situations. We note that appointments to the Board under the proposed new section 42 reflect this position. However, after discussions with the Ministry of Culture and Heritage we have come to the view that, on balance, the limits placed on section 19(1) by clause 25 of the Bill appears to be justifiable in terms of section 5 of the Bill of Rights Act. In reaching this conclusion we have taken into consideration the special nature of the Council and the particular functions that the Council is required to carry out.
9. Our reasons for coming to this view are set out below.

Section 5 justification

10. The operating principles behind the Bill are to strengthen the governance arrangements of the New Zealand Historic Places Trust, enhance its accountability to the government through designation as a Crown Entity, and to clarify sections of the HP Act to further enhance the Trust's ability to fulfil its heritage responsibilities. The objective of the proposal is to continue to require the Council to include at least four members who are Māori could be seen as ensuring that the Council is able to fulfil its functions and responsibilities for providing advice to the Trust under section 85 of the HP Act.
11. The HP Act is one of the key pieces of legislation through which the Crown provides protection for New Zealand heritage. The Act's purpose, set out in section 4, is 'to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand'. Section 4 further provides that in meeting this purpose 'all persons exercising functions and powers' shall recognise 'the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga'. This obligation is also consistent with the principles of the Treaty of Waitangi, and findings of the courts and Waitangi Tribunal concerning the Crown's duty to actively protect Māori taonga.
12. Given the historical fact of long Māori settlement in New Zealand, and the traditional relationship of Māori with the land, Māori heritage is a significant aspect of New Zealand's heritage. There have been calls for improved management and preservation of Māori heritage in New Zealand. Successive reviews of heritage management in New Zealand (Parliamentary Commissioner for the Environment, 1996, and a Ministerial Review, 1998/9)

have found that 'historic heritage (and particularly Māori heritage) is continuing to be destroyed at an alarming rate'.

13. We therefore consider that there are important and significant objectives behind these proposed amendments, for the purposes of section 5.

Rational and proportionate measures

14. The Trust has a range of functions and powers, which are set out in sections 39 and 54 of the HP Act. As set out above, these include responsibilities for identifying, investigating, assessing, registering, protecting and conserving wāhi tapu areas and other places of significance to Māori. For example, section 39(d) of the HP Act sets out the functions of the Trust, which includes provision of information, advice, and assistance in relation to the identification, recording, investigation, assessment, registration, protection, and conservation of wāhi tapu areas, historic places, and historic areas. Section 54(b) of the HP Act sets out the powers of the Trust, which includes identifying, recording, assessing, protecting, and conserving wāhi tapu, wāhi tapu areas, historic places, and historic areas.
15. Among other matters, the Council acts as an advisory body to the Trust, to assist the Trust to fulfil its responsibilities in terms of Māori heritage. The functions of the Council, as set out in section 85 of the HP Act, are limited to those aspects of the Act that are of particular significance and relevance to Māori. These functions include ensuring that, in the protection of wāhi tapu, wāhi tapu areas, and historic places and historic areas of Māori interest, the Trust meets the needs of Māori in a culturally sensitive manner. The functions of the Council also include developing programmes for the identification and conservation of wāhi tapu, wāhi tapu areas, and historic places and historic areas of Māori interest, and assisting the Trust to develop and reflect a bicultural view in the exercise of its powers and functions.
16. As set out above, the Trust exists to attain the objectives of the HP Act, as set out in section 4. Particular focus of the work of the Trust is on the protection of Māori heritage. New section 42 recognises the importance and significance of these interests, through the appointment of persons to the Board who have knowledge of te ao Maori and tikanga Māori. The fact that particular members of the Board only require knowledge of te ao Māori and tikānga Maori (as opposed to being Māori) reflects the different functions of the Council and the Board. Members of the Board require a range of skills, knowledge and experience relating to all of the functions and powers of the Trust, including those concerning Maori heritage. Appointments to the Board may, therefore, be unnecessarily restricted by requiring a number of Board members to be Māori, though it is essential that there are Board members with skills and knowledge relating to Maori heritage.
17. For the Council to operate effectively as a part of the Trust, it needs to have some members in common with the Board. Given the Council's functions, these are most appropriately those members with knowledge of te ao Maori and tikanga Maori.

18. The composition of the Council is also not limited to Māori, with those members of the Board who have knowledge of teo Māori and tikanga Māori also being members of the Council. However, the requirement for four members of the Council to be Māori ensures that the interests of Māori, as identified by the Council, are represented at Board level. Furthermore, the specific responsibilities of the Council in relation to Māori culture and heritage is likely to be enhanced by the involvement of Māori because only persons of Māori ethnicity possess the following attributes:

- Whakapapa and whakawhanaungatanga connections (based on descent or ancestry). Whakapapa and whakawhanaungatanga are the fundamental relationships between Māori and cultural heritage; and the basis upon which Māori can claim standing on marae and communicate effectively with tangata whenua at the local level;
- Kaitiakitanga (guardianship status) of Māori heritage. In Māori culture, the kaitiaki relationship with heritage is reserved for appropriate persons of Māori ethnicity and tribal affiliation, and may involve the safeguarding of knowledge of the existence and significance of sites.

19. The Ministry for Culture and Heritage has advised that appointments made to the Council solely on the basis of a person's qualification and experience without reference to Māori ethnicity would affect the credibility and mana of the Trust in relation to its statutory responsibilities to protect Māori culture and heritage. The ability of the Trust and the Board to understand the concerns of and speak with Māori constituents about the protection of Māori culture and heritage is particularly important in this regard.

20. It is relevant to note that Māori appointees to the Council also need to possess the skills, knowledge, or cultural background necessary to contribute to the functions of the Council. In other words, Māori are not being appointed to the Council solely because of their race. The proportion of Māori required to be on the Council, in our view, is not irrational or disproportionate, given the role of the Council, its functions, and the responsibility of the Council to provide advice on its area of expertise, Māori heritage. In addition, the Council has an advisory role, and the Trust is able, under its functions and powers, to seek the advice and views of other groups. As noted above, it is essential that strong linkages are maintained between the Trust Board and Council to ensure that the Council continues to operate effectively as an integral part of the Trust structure. The provision of a statutory board to advise on Māori heritage is also consistent with the purpose of the objective.

21. Finally, sites of historical and cultural significance to Māori are considered by Māori to be central to sustaining a living Māori culture, the basic premise of the Treaty of Waitangi and the Treaty principle of active protection. This proposal ensures that the Trust has the requisite capabilities to provide protection of taonga consistent with its functions and powers.

22. In our view, the provisions of the Bill that require the Council to include four Māori members are rationally and proportionately connected to the aim of enhancing the ability of the Trust to fulfil its functions under the HP Act. Accordingly, we consider that the limitation is justified in terms of section 5 of the Bill of Rights Act.

CONCLUSION

23. We have concluded that although provisions in the Bill raise *prima facie* issues of inconsistency with section 19 of the Bill of Rights Act, we consider that the limitation placed on the right by requiring a proportion of the membership of the Māori Heritage Council to be Māori is a reasonable one for the purposes of the Bill of Rights Act. We consider that the Bill appears to be consistent with the Bill of Rights Act.

24. The Ministry of Justice considers that although statutory appointments to Boards, Councils and similar bodies should generally be based on knowledge, skills, and experience, each provision will be considered in the context of the objectives and functions of the proposed body.

25. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to the Minister for Culture and Heritage, if you agree.

Roger Palariet Acting Chief Legal Counsel Office of Legal Counsel	Boris van Beusekom Senior Legal Adviser Bill of Rights/Human Rights Team
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cc: Minister of Justice
Minister for Culture and Heritage

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