

3 October 2016

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: New Plymouth District Council (Waitara Lands) Bill

Purpose

1. We have considered whether the New Plymouth District Council (Waitara Lands) 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(1) (freedom from discrimination). Our analysis is set out below.

The Bill

3. The Bill deals with 104 hectares of historically disputed, council owned land in Waitara. The Bill removes restrictions on the use of funds from this land, transfers ownership of some land to Te Kohitanga o Te Atiawa Trust ('the Trust'), gives current lessees the right to the land they are leasing from the council and gives the Trust the right of first refusal over some sections of council land. A fund is set up for income from sale and lease of council owned land, and a board ('the Board') is established to distribute a portion of this fund to benefit the Waitara community.

Consistency of the Bill with the Bill of Rights Act

Section 19(1) - Freedom from discrimination

4. 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').
5. The key questions determining whether legislation limits the freedom from discrimination are:¹
 - 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?

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.

6. 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
7. Section 21(1)(h) of the Human Rights Act 1993 provides that disability is a prohibited ground of discrimination. Disability is defined as including physical, intellectual or psychological disability or impairment and physical or psychiatric illness, among other characteristics.
8. Clause 4(1)(d) of Schedule 2 in the Bill states that a vacancy occurs on the Board if a member has an order made under ss 10, 11, 12 or 31 of the Protection of Personal and Property Rights Act 1988 ('the PPPR Act') which reflects adversely on their competence to manage their own affairs in relation to their property or their capacity to make or communicate a decision relating to their personal care or welfare. This limits the right to be free from discrimination on the basis of disability under s 19(1) of the Bill of Rights Act, as the ability to serve on the Board may be restricted for those with intellectual or psychological disabilities or impairments.
9. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:³
 - 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?
10. We consider that the limitation is justified under s 5 of the Bill of Rights Act because:
 - a. the objective of ensuring only those competent to do so fill the relevant role and obligations is sufficiently important
 - b. excluding people without the competence to manage their own affairs or the capacity to communicate decisions about their own care and welfare from the Board is rationally connected to that objective. The use of orders under ss 10, 11, 12 and 31 of the PPPR Act is a reasonable proxy for determining this competence or capacity
 - c. by including only orders under ss 10, 11, 12 and 31 of the PPPR Act, rather than all orders under the PPPR Act, which would extend to temporary and interim orders, the limit is no more than reasonably necessary, and
 - d. the limit is proportionate to the importance of the objective.

² 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.

³ *Hansen v R* [2007] NZSC 7 [123].

11. For these reasons, we conclude that any limits to the freedom from discrimination imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Conclusion

12. 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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