LEGAL ADVICE

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12 October 2021

Hon David Parker, 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), a member's Bill in the name of Joseph Mooney MP, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).

The Bill

2. The Bill seeks to repeal and replace the current law relating to Māori land, Te Ture Whenua Māori Act 1993. The Bill aims to enable the owners of Māori land to improve the performance and productivity of the land whilst ensuring better guardianship of the land. The Bill aims to ensure that the mana and tino rangatiratanga that Māori exercise over their lands is recognised and provided for in law. It aims to protect the rights of the owners of Māori land to retain, control, occupy and develop the land themselves as a taonga tuku iho for the benefit of present and future generations. The Bill recognises the centrality of the Treaty of Waitangi, tikanga Māori, and whakapapa with regard to Māori land law and rights.

3. The Bill is largely identical to a government Bill of the same name that was introduced in April 2016 by the then National government (126-2). The 2016 Bill was withdrawn in December 2017 after Committee of the Whole House but before Third Reading. The current Member's Bill uses the text of the 2016 Bill as amended by Select Committee, and for that reason is not identical to the version that was introduced in 2016.

4. We provided advice to the Attorney-General on the consistency of the 2016 Bill with the Bill of Rights Act.[1] We concluded that the 2016 Bill was consistent with the rights and freedoms affirmed in the Bill of Rights Act. For the purposes of this advice, we have not repeated that analysis, but have considered below whether any of the subsequent amendments reflected in the current Bill have altered the analysis or conclusions.

Consistency of the Bill with the Bill of Rights Act

Section 19 – freedom from discrimination

Discrimination on the basis of family status

5. In our previous advice we discussed the effect of what is cl 9 in the current Bill (cl 8 in the 2016 Bill) with respect to discrimination on the basis of family status. Clause 9(2) of the Bill provides that, in respect of children who are whāngai or subject to an adoption order, the applicable tikanga will determine whether there is a relationship of descent for

[1] Vetting advice dated 4 April 2016. The advice is publicly available on the Ministry of Justice's website.

the purposes of the Bill. There is no equivalent provision is respect of biological relationships. The Bill therefore creates a distinction between lineal descendants (persons of direct genealogical descent) and non-lineal descendants (whāngai or adopted persons). The distinction gave rise to a material disadvantage to whāngai and adopted persons because they were not automatically entitled to the same benefits that lineal descendants were.

6. However, we considered that the distinction between lineal and non-lineal descendants was a justified limitation on the right to be free from discrimination on the basis of family status. This was because the determination of descent relationships by reference to tikanga was rationally connected to the objective of enabling groups of Māori land owners to retain the land in a way that preserves the group's connection to the land, it impaired rights no more than was reasonably necessary to achieve that objective, and was proportionate to the objective.

7. Clause 8(2) of the 2016 Bill provided that it would be the "tikanga of the **relevant iwi or hapū**" that would determine the existence of a descent relationship. Clause 9(2) of the current Bill provides that it is the "tikanga of the **respective whānau or hapū**" that will determine whether a descent relationship exists. The Select Committee considered that the tikanga of the hapū or whānau involved would be more relevant than the tikanga of the iwi.

8. We do not consider that the change from "iwi or hapū" to "whānau or hapū" has any effect on the conclusion of the Bill of Rights analysis on this point.

Discrimination on the basis of age

9. In our previous advice we discussed cl 52 of the 2016 Bill (cl 60 in the current Bill) with respect to discrimination on the basis of age. Clause 52 of the 2016 Bill provided that owners of Māori freehold land under the age of 18 could not vote on decisions relating to the land unless they had a kaiwhakamarumaru.[2] We considered that this was prima facie discrimination on the basis of age (with respect to 16 and 17 year old owners), but concluded that the limitation was justified.

10. The current version of the Bill expands the situations in which a 16 or 17 year old owner can vote on decisions relating to the land. Under cl 60(1)(b), a 16 or 17 year old owner may vote if they have a kaiwhakamarumaru or if they are subject to a property order under the Protection of Personal and Property Rights Act 1988.

11. We do not consider that this change alters the conclusion of the Bill of Rights analysis.

Other amendments made by the Select Committee

12. The Select Committee made a number of other amendments to the 2016 Bill (many of which are minor and technical) which are reflected in the text of the current Bill. We do not consider that any of these amendments give rise to any inconsistencies with the Bill of Rights Act.

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

Conclusion

13. 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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