



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Rotorua District Council (Representation
Arrangements) Bill

Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990 and
Standing Order 269 of the Standing Orders of the House of
Representatives

1. I have considered whether the Rotorua District Council (Representation Arrangements) 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. I have concluded the Bill limits s 19 (freedom from discrimination) and, on the information available to me, cannot be justified under s 5 of the Bill of Rights Act.
3. As required by s 7 of the Bill of Rights Act and Standing Order 269, I draw this to the attention of the House of Representatives.

The Bill

4. The Bill specifies representation arrangements for Rotorua District Council (the Council) that would otherwise be prevented by the Local Electoral Act 2001. The Bill provides that these representation arrangements apply to the next 2 triennial general elections of the Council; and can also apply to subsequent triennial general elections, by Order in Council.
5. The purpose of the Bill is to provide for the Council's ideal representation arrangement for the Rotorua District (the District), which the Council considers provides for fair and effective representation.
6. The representation arrangements stipulated in the Bill are:
 - 6.1 one general ward with three seats;
 - 6.2 one Māori ward with three seats;
 - 6.3 four seats elected at large;
 - 6.4 one mayor elected at large;
 - 6.5 a Rotorua Lakes Community Board; and
 - 6.6 a Rotorua Rural Community Board.

Consistency of the Bill with the Bill of Rights Act

7. I note that this analysis is based only on the text of the Bill and publicly available information released by the Council and the Local Government Commission. The conclusion I have reached, that the Bill cannot be justified under s 5 of the Bill of Rights Act, is largely due to the absence of information and analysis available to provide justification for the limit on the right to freedom from discrimination.¹

¹ The information relied on for the purposes of this advice is found at the following websites:

- Rotorua Lakes Council, 19 November 2021, Representation Review decision:
<https://www.rotorualakescouncil.nz/our-council/news/news?item=id:2g4kgfbb81cxbydllda9>

Section 19 – right to be free from discrimination

8. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993.
9. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:
 - 9.1 does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act; and if so,
 - 9.2 does the distinction involve disadvantage to one or more classes of individuals?

Does the legislation draw a distinction on one of the prohibited grounds of discrimination?

10. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Ethnicity is a prohibited ground of discrimination under s 21 of the Human Rights Act. Whether disadvantage arises is a factual determination.²
11. The Bill distinguishes between the seats that an individual on the Māori roll may vote for, compared with the seats that an individual on the General roll may vote for. People of Māori descent who are enrolled to vote on the Māori roll would vote for Māori seats. Everyone on the General roll would continue to vote for general seats.
12. Individuals of Māori descent can choose whether to enrol on the Māori roll or the General roll. Only individuals of Māori descent can register for the Māori roll,³ while the General roll includes non-Māori and those of Māori descent who choose not to be enrolled on the Māori roll.
13. The Bill therefore could be seen to draw distinctions on the basis of race or ethnic origins, between people of Māori and non-Māori descent. This is because people of Māori descent can choose to be enrolled on either the Māori roll or General roll, whereas people of non-Māori descent can only be enrolled on the General roll.
14. I note, however, that any advantages conferred on those on the Māori roll by the Bill are not available to people of Māori descent enrolled on the General roll. In addition, once enrolled, voters can only change rolls during the Māori Electoral

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- Rotorua Lakes Council, Agenda for Strategy, Policy and Finance Committee, 16 November 2021: <https://www.rotorualakescouncil.nz/our-council/meetings/agendas-and-minutes?item=id:2g1ttw7j517q9s6inve3>
 - Local Government Commission, Determination of representation arrangements, 8 April 2022: <https://www.lgc.govt.nz/commission-news-and-contact-information/media-releases-and-notices/decision-on-the-representation-arrangements-for-the-election-of-the-rotorua-district-council-to-be-held-on-8-october-2022/>

² See, for example *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153 at [40] per Elias CJ, Blanchard and Wilson JJ.

³ Electoral Act 1993 (see sections 76-77).

Option, which is usually held only every five years,⁴ which may create difficulties for voters wishing to change rolls in response to this Bill.

Does the distinction involve disadvantage to one or more classes of individuals?

15. I have used the figures and calculations provided in the Council's report for the purposes of this analysis. On the basis of those figures, I consider that the Bill creates a disadvantage for non-Māori because the proposed representation arrangements in cl 10 would lead to disparity in representation between the Māori ward and the general ward.
16. Clause 10(1) of the Bill establishes a representation arrangement for Council members to be elected as follows:
 - 16.1 3 members by the electors of the Te Ipu Wai Taketake ward (Māori seats)
 - 16.2 3 members by the electors of the Te Ipu Wai Auraki ward (General seats)
 - 16.3 4 members by the electors of the District as a whole (at large seats)
 - 16.4 a mayor by the electors of the District as a whole.
17. This 3-3-4 model proposed in the Bill would result in an arrangement whereby the number of elected Māori ward members and general ward members would not be proportionate to the respective Māori Electoral Population (MEP)⁵ and General Electoral Population (GEP).⁶ This is because the Bill proposes that all electors in the District will be represented by the same number of members on the Council, even though that number of members represented on the Council is not proportionate to the Māori and general electoral populations in Rotorua (MEP of 21,700 and GEP of 55,600).
18. This arrangement is not consistent with the Local Electoral Act 2001 (LEA). Schedule 1A of the LEA sets out a formula for calculating the number of Māori ward members for local councils which allows for the number of Māori ward members to be proportionate to the MEP. Clause 12(3)(a) of the Bill provides that cl 10, which contains the new representation arrangements, applies despite such provisions of the LEA.

⁴ Information taken from Electoral Commission website, <https://vote.nz/enrolling/get-ready-to-enrol/general-roll-or-maori-roll/>.

⁵ Statistics New Zealand defines the MEP as the proportion of enrolled Māori descent electors who choose the Māori electoral roll, multiplied by the 2018 Census Māori descent usually resident population count. This means that the MEP includes people who are not enrolled on the electoral roll (such as children). See: (<https://www.stats.govt.nz/assets/Uploads/Methods/The-mathematics-of-electorate-allocation-in-New-Zealand-based-on-the-outcome-of-the-2018-Census-and-Maori-Electoral-Option-2018/The-mathematics-of-electoral-district-allocation-in-new-zealand-based-on-the-outcome-of-the-2018-census-and-maori-electoral-option-2018.pdf>)

⁶ Statistics New Zealand defines the GEP as the census non-Māori descent usually resident population and a proportion of the census Māori descent usually resident population that corresponds to the percentage of Māori descent electors who choose the general electoral roll.

19. In a representative democracy, it is important to maintain approximately the same level of representation for everyone. The proposed arrangements in the Bill would make the number of council members for the Māori ward disproportionately higher than the number of council members for the general ward in comparison to their respective populations. As the disadvantaged group is those on the General roll, changing representation arrangements away from proportional representation therefore creates a disadvantage for non-Māori as they cannot in future elect to change rolls.

Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?

20. Where a provision appears 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 demonstrably justified in a free and democratic society under s 5 of the Bill of Rights Act. The s 5 inquiry may be approached as follows:⁷
- 20.1 does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - 20.2 if so, then:
 - 20.2.1 is the limit rationally connected with the objective?
 - 20.2.2 does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - 20.2.3 is the limit in due proportion to the importance of the objective?

21. As there is no responsible agency for developing the policy behind the Bill, it has not been possible to access information which would provide a robust justification for the proposed representation arrangements under the Bill. My assessment is accordingly based only on the contents of the Bill and information made publicly available by the Council and the Local Government Commission.

Is the objective sufficiently important?

22. The broad purpose of the Bill is to provide for an arrangement which the Council considers achieves fair and effective representation for both Māori and non-Māori electors on the Council, taking into account:
- 22.1 The notion of “parity/equality/equity” (specifically, the Council considers the proposed representation best achieves “parity” as each elector would be able to cast a vote for seven council members between the relevant ward they vote in and the at-large seats);
 - 22.2 The principles of the Treaty of Waitangi / te Tiriti o Waitangi;

⁷ *Hansen v R* [2007] NZSC 7.

- 22.3 The spirit, intent and generosity of Ngāti Whakaue as provided in the Rotorua Township (Fenton) Agreement (which permitted establishment of the Rotorua Township with the approval of Ngāti Whakaue);
- 22.4 The need to guarantee Māori representation at the decision-making table, to ensure mana whenua can inform decisions being made by the Council.
23. There is no doubt that improving opportunities for Māori to contribute to local government decision-making processes, including making better provision for Māori representation in the District's local government, is an important and significant objective.

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

24. The establishment of an equal number of Māori ward and general ward seats could be said to be rationally connected to the objective of making better provision for Māori representation in local government. This proposal would guarantee an equal number of seats at Council to Māori and non-Māori people in order to inform and influence decision-making processes; and provide for the concept of co-governance or shared decision-making between mana whenua and mataawaka, and local government.

Is the impairment on the right greater than reasonably necessary?

25. As there is no responsible agency for developing the policy of the Bill, I do not have access to information (beyond the publicly available information regarding the Council's representation review) which considers possible options or alternatives to achieve the objectives of fair and equal representation, and make better provision for Māori representation, on the Council.
26. I acknowledge that the alternative options that have been considered may not achieve what the Council considers to be the ideal representation arrangements for the District. However, from the information available, it is apparent that there may be alternative representation options that limit the right to freedom from discrimination to a lesser degree, whilst still achieving proportional and fair representation (and also being consistent with the current provisions of the LEA).
27. It is relevant to note here that the Council does not currently have a Māori ward under its existing representation arrangements; accordingly, it appears that any new representation arrangement for the Council which specifically provides for a Māori ward with Māori seats proportionate to the MEP will go some way to achieving the objective of making better provision for Māori representation on the Council.

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

28. Providing for better representation of Māori in local government decision-making processes is a significant and important objective. However, I consider that the limit on freedom from discrimination created by the proposed representation arrangements for the Council in the Bill does not appear to be proportionate to this objective.

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29. The Bill creates a disparity in the number of people represented by each ward Council member. The proposed representation arrangement would make the number of Council members for the Māori ward disproportionately higher than the number of Council members for the general ward, in comparison to their respective populations. This discriminates against electors who are on the General roll (and, as outlined above, those who are non-Māori and cannot change rolls in future).
30. This proposed arrangement detracts from the key constitutional principle of equal representation in a representative democracy. I consider that there must be strong reasons to depart from this fundamental constitutional principle and, accordingly, to justify the limit on the right to freedom from discrimination. Departures from the Local Electoral Act may also have broader constitutional impacts and need to be carefully considered. Arrangements like these, if replicated across other local bodies could result in significant impacts, which may be better considered in full by central government and Parliament.
31. While I recognise the legitimacy and importance of providing for better Māori representation on the Council, I note that there may be other ways to advance Māori representation as discussed above. I do not have full knowledge of the complex history that has led to the Council promoting this local Bill as a solution. My opinion has been based on the Bill itself and publicly available documents, which means there is limited information to assist a justification analysis. While the proposals in the Bill could be justifiable, I do not have enough information to conclude that the model proposed in the Bill is a proportionate response to the problem it seeks to address and the desired objective.

Conclusion

32. For the above reasons, I have concluded the Bill appears to limit the right to be free from discrimination affirmed in s 19 of the Bill of Rights Act and cannot be justified under s 5 of that Act.



Hon David Parker

Attorney-General

21 April 2022