



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Head of State Referenda Bill

Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 261 of the Standing Orders of the
House of Representatives

1. I have considered whether the Head of State Referenda Bill (“the Bill”) is consistent with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”). I have concluded that the Bill appears to be inconsistent with s 19(1) of the Bill of Rights Act, which affirms the freedom from discrimination, and that the inconsistency cannot be justified under s 5 of that Act. As required by s 7 of the Bill of Rights Act and Standing Order 261, I draw this to the attention of the House of Representatives.

Purpose of the Bill

2. The Bill provides for two referenda to decide the method for selecting the head of state of New Zealand. The first referendum would be held in conjunction with a general election and would ask whether to continue with the Sovereign as the head of state or whether to change to a head of state either: a) appointed by a vote of at least 75% of the House of Representatives; or b) elected by a majority of voters. If the majority of votes in the first referendum are in favour of one option, that option is carried, and the second referendum will not be held.
3. If no option receives a majority of votes, the two options receiving the highest number of votes would be subject to a second referendum within 12 months of the first referendum. That referendum would be conducted by postal ballot under the Referenda (Postal Voting) Act 2000 and would be binding. If a majority of voters at the second referendum vote for a change of the head of state, the Governor-General becomes the head of state until a replacement is appointed or elected.
4. The Bill provides for an appointed or elected head of state to serve for a term of five years. If the head of state is to be elected by a majority of voters, the first election must be held no more than six months after the second referendum. Elections of the head of state would be conducted by postal ballot using the single transferable vote electoral system.

Inconsistency with s 19(1) of the New Zealand Bill of Rights Act 1990

5. Any person who is entitled to vote in a general election is entitled to vote in the first referendum;¹ however, cl 32 of the Bill states:

The referendum roll used for the second referendum must be the same as that used for the first referendum, without any updating or modification.

6. Clause 32 would require precisely the same roll of voters to be used for both referenda. Any person who qualifies to be on the electoral roll between the first and second referenda would not be eligible to vote in the second referendum.
7. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds of discrimination set out in the Human Rights Act 1993.

¹ Clause 4 defines elector as a person registered as an elector for an electoral district constituted under the Electoral Act 1993. That Act entitles any New Zealand citizen or permanent resident who is over 18 years of age to vote in general elections (subject to some disqualifying criteria).

8. The key questions in assessing whether a provision gives rise to discrimination under s 19 are:
- does the provision draw a distinction based on one of the prohibited grounds of discrimination; and
 - does the distinction involve disadvantage of the type prohibited by the legislation to one or more classes of individuals?

Does the Bill draw a distinction on the prohibited grounds?

9. The prohibited grounds of discrimination set out in s 21 of the Human Rights Act include age (commencing at 16).
10. Clause 32 would prevent a person who turns 18 after the first referendum but before the second referendum from voting in the second referendum. In comparison, a person who was 18 before the first referendum would be able to participate in the second referendum. The Bill, therefore, appears to draw a distinction on the basis of age.

Does the distinction lead to disadvantage?

11. The referendum asks voters to decide whether New Zealand should remain a monarchy or become a republic and, if so, how the head of state should be selected. This is a question of significant constitutional importance. Excluding some young people from participating in that decision must be considered a disadvantage. This view is supported by article 25 of the International Covenant on Civil and Political Rights, which affirms the importance of participating in public affairs. The distinction drawn by cl 32 of the Bill therefore gives rise to disadvantage for the purposes of s 19(1) of the Bill of Rights Act.

Possible justifications under s 5 of the Bill of Rights Act

12. Section 5 of the Bill of Rights Act states that the rights and freedoms contained in the Bill of Rights Act may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. A limitation on a right or freedom might be justified where:
- the provision serves an important and significant objective; and
 - there is a rational and proportionate connection between the provision and that objective.

Significant and important objective

13. It is not clear what purpose cl 32 is designed to achieve. I am not aware of any instances of the roll being closed for a two-stage referendum. In general, electoral law focuses on accommodating those who become eligible to vote. However, roll closing does occur in presidential systems overseas when there is a “run-off” election between the highest polling candidates. In such systems, it is a common practice to close the roll prior to the first round of voting. The run-off election is therefore decided by the same voters as were eligible for the first round of voting. For example, s 20 of the Finnish Election Act 1998 states that “In the Presidential

election, the same voting register shall be used in the first and the second round of the Presidential election”.

14. I do not consider these overseas examples of “run-off” elections to be analogous to the two referenda proposed in the Bill. In the “run-off” elections, the first and second rounds of voting are closer together. It is possible that the rolls are closed because it is impractical to update them within a short period of time. Under the Bill, the two referenda could take place up to a year apart during which time a significant number of people would qualify to vote.
15. The fact that a person was ineligible to vote in the first referendum does not prevent that person from making an informed decision in the second referendum. I see no reason to exclude them from participating. I have, therefore, concluded that cl 32 does not serve a significant and important objective.

Rational and Proportionate Connection

16. Even if cl 32 did serve a significant and important objective, and in my opinion it does not, I do not consider the provision to be rationally and proportionately connected to the objective. First, as noted above, there is no reason to assume that it would promote better decision-making. Secondly, people who were eligible but chose not to participate in the first referendum are still able to vote in the second referendum. Clause 32 therefore does not ensure that the individuals voting in the second referendum have truly engaged in the decision at the first stage. Thirdly, the disadvantageous effect of cl 32 is substantive and, in my view, outweighs any possible benefit.

Alternative interpretations of cl 32

17. Section 6 of the Bill of Rights Act provides that, wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights Act, that meaning shall be preferred to any other meaning.
18. I have considered whether cl 32 can be given an interpretation that would avoid the discriminatory effect outlined above. If cl 32 could be interpreted to allow basic maintenance of the roll (removing individuals who no longer qualify and including those who do) it would not discriminate on the prohibited grounds. However, the words “without any updating or modification” make it clear that no changes can be made to the roll in the intervening period, including the addition of newly qualified voters. I am unable to give those words any interpretation other than that meaning.

Conclusion

19. For these reasons, I have concluded that the Bill appears to be inconsistent with s 19(1) of the Bill of Rights Act and that the inconsistency cannot be justified under s 5 of that Act.



Hon Christopher Finlayson
Attorney-General