

15 February 2024

Hon Judith Collins KC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Pae Ora (Disestablishment of Māori Health Authority) Amendment Bill

Purpose

1. We have considered whether the Pae Ora (Disestablishment of Māori Health Authority) Amendment 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 not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 25943/2.1). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. 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 (freedom from discrimination). Our analysis is set out below.

The Bill

4. The Bill seeks to amend the Pae Ora (Healthy Futures) Act 2022 (the principal Act) by disestablishing the Māori Health Authority (the Authority). It also proposes changes to the objectives and functions of Health New Zealand (Health NZ) and introduces additional duties on the Health NZ board. It makes changes to the Hauora Māori Advisory Committee, to timeframes for implementing localities, to remove joint-decision making provisions, and a number of consequential amendments as a result of the disestablishment.
5. The Bill creates requirements on Health NZ based on those that currently sit with the Authority, including to:
 - support and engage with iwi-Māori partnership boards (new s 15)
 - engage with and report to Māori (new s 16A). This includes having systems in place for engaging with Māori in relation to their aspirations and needs for hauora Māori and using that to inform the performance of its functions.

Consistency of the Bill with the Bill of Rights Act

Section 19 – Freedom from discrimination

6. 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. Two factors must be met for discrimination to be identified under s 19(1) of the Bill of Rights Act: ¹

¹ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 CA at [55]; *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

- a. there is a differential treatment or effect as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination; and
 - b. that treatment has a discriminatory impact (i.e., it imposes a material disadvantage on the person or group differentiated against).
7. Differential treatment 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
 8. Discrimination may also arise where there is a failure to treat two groups, which are different by reason of a prohibited ground of discrimination, differently.³

Creating or removing a distinction between comparable groups

9. In 2021, we advised the then Attorney-General on the Pae Ora (Healthy Futures) Bill, which became the principal Act.⁴ The principal Act established the Authority, which was set up in response to a recommendation by the Waitangi Tribunal.⁵ It also addressed other issues raised by the Tribunal, including by recognising iwi-Māori partnership boards, and established the Hauora Māori Advisory Committee to advise the Minister of Health, among other provisions.
10. In our advice on the Pae Ora (Healthy Futures) Bill, we considered provisions which explicitly promoted Māori health and sought to uphold the principles of Te Tiriti of Waitangi. We considered these provisions could be seen to draw distinctions on the basis of race or ethnic origins.
11. However, we considered that the provisions did not engage s 19(1). This was because we did not consider any other group was in a comparable position to Māori as the Crown's Treaty partner and considering the Crown's duties under te Tiriti o Waitangi. We also considered that no other group was materially disadvantaged by the equity-enhancing measures.
12. Disparities between the health status of Māori and other ethnic groups have been widely noted. Analysis underpinning proposals in the Pae Ora (Healthy Futures) Bill stated that life expectancy is lower for Māori than for non-Māori and non-Pacific people, and that Māori have worse rates of access to services and poorer quality care.⁶
13. To the extent that the Bill includes provisions that specifically require engagement with Māori or support of Māori entities (new ss 15 and 16A), similarly we consider that these provisions do not engage s 19 of the Bill of Rights Act.
14. By disestablishing the Māori Health Authority and related provisions, the Bill may be seen to remove a distinction on the basis of race or ethnicity. We have previously taken the view

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 Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 17.10.42.

⁴ Advice to Hon David Parker, *Consistency with the New Zealand Bill of Rights Act 1990: Pae Ora (Healthy Futures) Bill*, 12 October 2021.

⁵ Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019). In 2019, the Tribunal found that the Crown had breached te Tiriti o Waitangi by failing to design and administer the primary health care system to actively address persistent Māori health inequities and by failing to give effect to tino rangatiratanga.

⁶ Department of the Prime Minister and Cabinet, *Supplementary Analysis Report: Health System Structural Change to support Reform Programme*, 2 June 2021. The analysis also noted health inequity for other groups.

that the removal of a benefit may not give rise to discrimination, because it removes, rather than creates, a relevant distinction.⁷ If the Bill is viewed in this way, we do not think that it engages s 19 of the Bill of Rights Act on this basis.

Differential treatment of different groups

15. We have also considered whether the Bill could be seen as discriminatory on the basis of a failure to treat different groups differently, as it removes a measure intended to promote equitable outcomes for Māori.
16. The Authority's functions include policy and strategy, commissioning services, and performance monitoring. Under the Act, it plans and commissions Māori health services with Health NZ. Its structure is designed to ensure it has operational autonomy to give effect to Māori aspirations and needs, while remaining aligned with other health entities and structures. The disestablishment of the Authority and the reallocation of its functions to Health NZ may risk reduced focus on Māori health, as Health NZ will have competing priorities. For example, the Authority is charged with designing and delivering services to achieve the best possible health outcomes for Māori (principal Act, s 18), whereas Health NZ will have the wider remit of achieving the best possible health outcomes for all New Zealanders (principal Act, s 13 as amended).
17. We do not consider that disestablishing the Authority materially disadvantages Māori to the extent that the Bill gives rise to discrimination under s 19(1), for the following reasons.
18. The Bill does not propose to change the purpose of the principal Act, which is "to provide for the public funding and provision of services" to "achieve equity in health outcomes among New Zealand's population groups, including by striving to eliminate health disparities, in particular for Māori" (s 3(b) of the principal Act), among other things.
19. Similarly, the Bill does not change the health sector principles, which guide the exercise of functions and powers by the Minister and Ministry of Health and each health entity (principal Act, s 7). The principles provide that the health sector should be equitable, including ensuring Māori and other groups receive equitable levels of service and achieve equitable health outcomes. Principles relating to engagement with Māori and to Māori health services and measures are also included in s 7 of the principal Act. Section 7(1)(c) provides that the health sector should provide opportunities for Māori to exercise decision-making authority on matters of importance to Māori.
20. While the Bill disestablishes the Māori Health Authority, there may be other ways to achieve the principal Act's purposes and outcomes related to Māori health. In our view, there is limited information that would indicate that the Bill will undermine present or potential future Māori health outcomes and result in material disadvantage for Māori. We therefore consider that the s 19 right to freedom from discrimination is not engaged.
21. We have therefore concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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⁷ Advice to Hon David Parker, *Consistency with the New Zealand Bill of Rights Act 1990: Oranga Tamariki (Repeal of Section 7AA) Amendment Bill*, 13 October 2022.