



LEGISLATION DESIGN AND ADVISORY COMMITTEE

22 June 2022

Tāmami Coffey
Chairperson
Māori Affairs Committee
Parliament Buildings
Wellington

Tēnā koe Tāmami,

Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Claims Settlement Bill

Introduction

1. The Legislation Design and Advisory Committee (**LDAC**) is mandated by Cabinet to scrutinise Bills against the *Legislation Guidelines* (2021 edition) (**Guidelines**). The Guidelines have been created to promote legislation that is well designed and accords with fundamental legal and constitutional principles.
2. LDAC's focus is not on policy, but rather on legislative design and the consistency of legislative proposals with the principles contained in the Guidelines.
3. The Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Claims Settlement Bill (the **Bill**) seeks to give effect to the deed of settlement signed between the Crown and Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua, agreeing to a final settlement of the historic Treaty of Waitangi claims of Ngāti Kahungunu.
4. Our submission focusses solely on the implications that this Bill may have on proceedings before the Supreme Court.¹ Good legislative design would say that, if legislation is being considered that may overturn a court decision, or alter the law at issue in existing proceedings; such legislation needs to be justified as being in the public interest and no more than is reasonably necessary to serve that interest.²

LDAC Guidelines

5. Chapter 12.2 of the Guidelines provides principles to consider when designing legislation that relates to matters that are subject to prospective court decisions or current litigation. As a general

¹ *Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Limited and The Waitangi Tribunal and Ors* [SC 93/2021] (judgement reserved).

² Legislation Guidelines (2021 edition), chapter 12.2.

principle, legislation should not deprive individuals of their right to continue proceedings that seek to assert rights and duties under that law.

6. The Guidelines recognise that Parliament is entitled and empowered to make and amend any law that it sees fit, including in cases where it will amend the law that is subject to ongoing litigation. From a design perspective, however, there are important considerations that apply to legislation of this type.
7. Firstly, there is a strong constitutional convention, arising out of the separation of powers and the principle of comity between Parliament and the courts, that legislation should not generally interfere with the judicial process in particular cases before the courts. This ordinarily means that:
 - a. When Parliament is considering legislating in relation to a matter that is currently before the courts, ordinarily it should let the existing legal proceedings be completed before it legislates. This will allow Parliament to understand what the existing law is before it makes a decision about whether a change to the law is required and if so how it should be amended. Parliament should only legislate before existing legal proceedings are completed where there are sufficiently strong reasons to do so in the public interest and these are clearly articulated.
 - b. Even when there are good reasons for legislation to alter the outcome of a particular legal proceeding, it ought not to apply to the particular litigants to deprive them of the benefits of litigation. Doing so would in effect be creating retrospective legislation, reducing the certainty and predictability of the law.
8. The second important consideration is the converse of the first. In some situations, there may be good reasons why a law ought to apply to litigants in a pending case. That would be so if the policy reasons for enacting retrospective legislation in the first place would be undermined by leaving intact the litigants' potential benefit. Cases of this type are likely to be rare. The Guidelines indicate that such legislation needs to be justified as being in the public interest and impairing the rights of litigants no more than is reasonably necessary to serve that interest. On this point, LDAC observes that predicting that the outcome of court proceedings and legislating as if the courts have already ruled in the Crown's favour is not a sufficiently strong reason to justify legislating before litigation is complete.

Legislative effect on court proceedings

9. As we understand the Bill, it will, if enacted, make moot ongoing litigation that is currently before the Supreme Court and extinguish the jurisdiction of the Waitangi Tribunal in relation to the underlying proceeding now before the Supreme Court.³
10. By way of context, we note that there is ongoing dispute regarding the process that the Crown followed leading up to the signing of the deed of settlement. The litigation relates to a preliminary determination from the Waitangi Tribunal that it was inclined under its resumption powers to recommend the return of certain forestry land to groups other than the settlement entity. (Such an

³ Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Bill 2022 (100-1), cls 14-15.

exercise of the Tribunal's resumption powers would be binding and result in the return of land, rather than being simply recommendatory, as is the case with other parts of the Tribunal's jurisdiction.) The Waitangi Tribunal's determination was overturned by the High Court on application for judicial review on the basis that resumption was not legally available in the particular circumstances. The Supreme Court granted leave to appeal, leapfrogging the Court of Appeal. The appeal was heard in February 2022 and the Court's decision is currently reserved.

11. In November last year, the Waitangi Tribunal issued a decision following an urgent hearing regarding the treaty settlement process. Among other findings, the Tribunal raised concerns that the Bill would cut across the litigation before the Supreme Court. A copy of this decision can be found here:

https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_179436738/Tribunal%20Decision.pdf

12. LDAC does not hold a position on the litigation or the Crown's approach to the settlement, however, it wishes to highlight that if passed, this Bill would appear to moot the current appeal to the Supreme Court. It would also appear to remove the Waitangi Tribunal's jurisdiction to make orders for resumption, which it might otherwise decide to do if the Supreme Court allows the appeal and remits the matter back to it.
13. LDAC is not aware of the reasons why the Crown wishes to legislate before the Supreme Court's decision is released. It is therefore not in a position to offer a view on whether there is a sufficiently strong reason that would justify doing so, or justify depriving the litigants of the benefits of litigation.
14. In this respect, LDAC notes that the reasons for introducing the legislation before litigation is complete were not laid out in the Bill's departmental disclosure statement and the issue was not referred to by the Minister during the first reading debate.

Recommendation

15. In the circumstances, LDAC recommends that:
 - a. The committee request an explanation from Ministers as to why the Crown considers it appropriate to legislate before the Supreme Court has had the opportunity to deliver its decision and any further litigation in the Waitangi Tribunal and High Court is complete.
 - b. The committee consider that explanation and determine whether it is appropriate for the Bill to progress before the Supreme Court has had the opportunity to deliver its decision and any further litigation in the Waitangi Tribunal and High Court is complete.
 - c. If the committee, and subsequently the House itself, decide that there are sufficiently compelling reasons for the Bill to be progressed now, these should be clearly articulated and explained to the public.

16. Thank you for considering our submission. We wish to be heard briefly.

Nāku iti noa nā,

A handwritten signature in black ink, appearing to read 'M. Steel', written in a cursive style.

Mark Steel

Chair

Legislation Design and Advisory Committee