



## Media Briefing on The Crown in Court (NZLC R 135, 2015): Part 1 – Review of the Civil Proceedings Act 1950

1. The core principle of the Commission’s review is that the Crown ought to be able to sue and be sued in civil proceedings in much the same way as an ordinary person can, both in terms of substantive law and in terms of the procedure that applies. While there are some circumstances in which the Crown will need to be treated differently because of its unique roles and functions, these should be strictly limited to circumstances where the difference in treatment is justified in a free and democratic society.
2. Part 1 recommends introducing a modern Crown Civil Proceedings Bill to replace the Crown Proceedings Act 1950.

### Why a new Act?

3. The Crown Proceedings Act is a statute of considerable constitutional significance so it is important to keep it up to date. However, the Act does not reflect the concerns of contemporary New Zealand or the way in which New Zealand is now governed. The public service has been through large-scale changes that have not been reflected in the Act. In particular, the State Sector Act 1988 and the Public Finance Act 1989 created a new legal architecture for the New Zealand public service, and the Crown Entities Act 2004 consolidated the law relating to the many government entities that have their own corporate personality. The Crown Proceedings Act was intended to have been updated at that time, but this has not occurred. In short, while the substantive law of New Zealand involving Crown litigation is basically the same as that which applies to private parties, the procedural infrastructure provided by the Crown Proceedings Act has not caught up.
4. The Act is also somewhat confusing and convoluted. For example, in most cases, a plaintiff attempting to sue the Crown in tort must first establish that an employee of the Crown has committed a tort. This requirement creates significant difficulties when it is alleged that the Crown or a government department as a whole has breached its obligations. The Act in some areas has also not kept up to date with changes in court procedure.
5. The Report includes a draft Crown Civil Proceedings Bill and we recommend that this be considered for enactment to replace the current Crown Proceedings Act.

### Key provisions in the Bill

6. To a large degree the Bill leaves substantive law unchanged, similar to other revision bills currently being consulted on as part of the Government’s revision

programme. There are four key modifications in the draft Bill that will better align the position of the Crown with ordinary people in civil proceedings:

- a. The Act will expressly apply to actions for damages under the New Zealand Bill of Rights Act 1990, providing certainty that those claims should be treated as civil proceedings for procedural purposes, for example in discovery.
  - b. The Crown will be able to be sued directly in tort (clauses 7 and 8), rather than (as the law currently stands) only being vicariously liable for the acts and omissions of its employees. This change does not of itself create liability for the Crown. The Bill does not create new obligations; rather, it provides a mechanism through which existing obligations can be enforced against the Crown. The scope of Crown liability will continue to be determined by the courts through the normal processes of the common law, and Parliament through statutes. The change will, however, enable litigants and the courts to focus on substantive issues of tort liability. It will also reduce the likelihood that an individual is prevented from seeking legal redress from the Crown simply because they are unable to identify a particular Crown employee responsible for the conduct that caused them harm or because their claim is that the Crown itself has caused them harm. The change means that the courts, like the Supreme Court in the Couch case will not have to work around an out of date statute.
  - c. A court will be able to grant any remedy against the Crown (clause 10) that they could make in civil proceedings against an ordinary person, unless the court is satisfied that the public interest requires a declaration to be made instead. This change will give the courts greater flexibility to tailor orders and remedies to the particular circumstances of the claim. Under the current Act the courts can only make non-binding declaratory orders against the Crown.
  - d. The Crown will no longer be able to issue a public interest immunity certificate to withhold information that it would otherwise be required to disclose in civil proceedings (clause 27). Instead, in cases other than those involving national security matters, the Crown would apply to the court for an order to exclude the information under the Evidence Act. The court would in such cases balance the public interest in withholding the information against the public interest in releasing it. In cases involving matters of national security, the court would hold a closed preliminary hearing and consider whether the risks to national security of disclosing that information or using it in open court mean that the new closed court procedures (recommended in Part 2 of the Report) must be used to protect that information.
7. The Report and Bill also address the extent to which Crown employees and Ministers of the Crown should be protected from personal liability when acting in good faith and performing their role. The Commission considers that Crown employees should continue to have protection, and that the statute should

expressly recognise that Ministers will be entitled to be indemnified, but the Crown should continue to bear liability in these situations where the law imposes liability.

8. Most Crown employees currently benefit from the statutory immunity in section 86 of the State Sector Act 1988. The Bill (clause 13) contains a similarly worded immunity that would apply to all Crown employees (including members of the New Zealand Defence Force, the New Zealand Police, and the New Zealand Security Intelligence Service) and not just those employed under the State Sector Act.
9. Ministers are currently protected by an indemnity for legal costs and damages incurred in the course of legal proceedings. That position should continue, however, we recommend that a statutory scheme for indemnification replace the current administrative one in the Cabinet Manual. To give effect to this the Bill (clause 14) contains a statutory indemnity for Ministers where they have acted in good-faith pursuance of their duties.