Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Bill

Submission of Te Pūkenga Here Tikanga Mahi - The New Zealand Public Service Association (PSA)

Manaaki whenua, manaaki tangata, haere whakamua
Care for the land, care for the people, and move forward

Who we are

1. Over 75,000 people are members of **Te Pūkenga Here Tikanga Mahi, the Public Service Association (PSA**). Just under 12,000 PSA members are Māori, working in the Public Service, the wider State services, District Health Boards, Local Government and contracted Community Public Services in all parts of Aotearoa. Te Rūnanga o Ngā Toa Āwhina is the Māori arm of the PSA. Founded in 1913, the PSA is the largest trade union in New Zealand and is an affiliate of Te Kauae Kaimahi, The New Zealand Council of Trade Unions.

2. We thank the Māori Affairs Select Committee for the opportunity of public consultation. There are over 130 PSA members who work at all Māori Land Court offices across Aotearoa, and we further represent over 2300 members who work within the wider Ministry of Justice. We would like to speak in support of this submission to the Māori Affairs Select Committee. Due to the relevance of the kaupapa to the people we represent, we request a timeslot of 30 minutes.

3. In preparation for this submission, we sought the views of our Māori Land Court membership via a survey.[1] This topic has also been discussed widely by our Māori delegates within the Ministry of Justice Rūnanga as well as by our Public Service Sector delegates in Te Rūnanga o Ngā Toa Āwhina. It was the topic of a workshop attended by our Māori delegates at our Public Service Sector hui at Ōrongomai Marae in August 2019. These avenues have helped shape our submission.

4. The PSA, Te Rūnanga o Ngā Toa Āwhina and Māori Land Court delegates have been involved in this kaupapa of Whenua Māori Reform for quite some time. The PSA was not in support of the former Te Ture Whenua Māori Bill. In August 2015, the PSA made a lengthy written submission to the Māori Affairs Select Committee. In July 2016, the PSA again wrote a submission. In September 2016, PSA delegates from Māori Land Court spoke in front of the Select Committee at Parliament. It is in this context that the PSA now makes this submission on the Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Bill (the Amendment Bill).

[1] Survey quotes are used extensively in this submission, shown in italics.

Introduction

5. The Public Service Association – Te Pūkenga Here Tikanga Mahi (PSA) broadly supports Whenua Māori reform. Our members within the Māori Land Court can see the value in making targeted changes to Te Ture Whenua Māori Act 1993 ("the Act") to better support the efficient operation of the Court and enable our Māori Land owners to connect with their whenua. However, feedback from our members would indicate that many of the issues that the legislative changes are intended to resolve are due to the chronic underfunding of the Māori Land Court, rather than bad legislation or poor processes.

6. The PSA advocates for adequately funded government agencies to provide better public services for Māori. We note that the majority of workers in the Māori Land Court are Māori. The Ministry of Justice has one of the lowest average salaries in the entire Public Service sector.[2] Women make up 68% of the Ministry workforce.[3] We are proud that Te Rūnanga o Ngā Toa Āwhina has recently joined the Waitangi Tribunal kaupapa inquiry into employment issues affecting Māori women (the Mana Wahine Inquiry).[4]

7. This submission first considers the current state of capacity and capability at the Māori Land Court. It then examines some of the major changes proposed to the Act and provides some commentary based on feedback from our members working at the Māori Land Court, particular around the workability of some of the proposed changes.

Current state of the Māori Land Court

8. We have strong concerns about capacity and workload at the Māori Land Court. According to Ministry of Justice information, the Māori Land Court receives on average 2241 succession applications and 1590 trust applications per annum. The amount of applications on hand was at its lowest in early 2017, as there had been a concentrated effort to reduce numbers of files. However, after the Ministry restructure of 2017, where the Māori Land Court workforce was significantly reduced, with over 300 years of collective institutional knowledge being lost,[5] the numbers of applications on hand has been steadily rising and we understand it is at its highest level in decades.

9. Our members tell us that they are still feeling the effects of the 2017 restructure more than two years later:

> *"The restructure in 2017 was detrimental to MLC as, in my opinion, it was about numbers and financial position and not the organisation. We were forced to become a structure that was not conducive to our needs and the needs of our people (client). As a consequence a large resource was lost, often not the right resource. It was a square peg in a round hole exercise in my opinion."*
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> *"The restructure resulted in more stress to the staff. MLC was left without any leadership or direction and isolated each district. MoJ have acknowledged that they did not get the restructure in 2017 right in terms of MLC and now we hear they will be employing more staff especially with the proposed legislation to come into effect next year. There has been a huge turnover of staff in our office on the scale we have never seen before."*

[2] Public Workforce Data 2018, page 11.
[3] Ibid, page 35.
[4] Wai 2864 was registered in January 2019.
[5] See Māori Land Court sitting at 163 Waiariki Minute Book 50-66, dated 1 May 2017

"The restructure has had a negative effect on our workloads created by the uncertainty of the proposed changes to the Bill in 2016. Many of our landowners started filing multiple applications for succession as a 'panic' reaction. The influx of work at that time is still being felt today and unfortunately the human resources capable of undertaking much of this work is grossly lacking."

"It has ripped us to shreds!!! The morale of the office has been at a low point since 2017. We lost our mana cos our central figure/head disappeared and so we have been like lost sheep in the wilderness. We also lost a lot of experienced staff who were not keen to work in this current environment. We have managers that struggle to manage in system that's like a 'one size fits all' system."

"OSD restructure removed 35 staff and 500+ years of experience that cannot be learned from a book or training but from time on the floor. MLC is now receiving 24 additional positions without the experience not because MOJ SLT acknowledged the crippling affect of the OSD on MLC but due to the new resource sitting in the Whenua Māori Programme. MLC was meeting KPI's prior to OSD restructure. MOJ SLT should fund an additional 11 staff in the MLC to original numbers."

"Resulted in loss of highly skilled staff with technical knowledge of the MLC, a loss of productivity, increased backlog of applications. Case managers carry high workloads causing high stress, low staff morale and poor customer service. Pre 2017 MLC was a high performing unit with a common focus - post 2017 we are not a cohesive working unit. MOJ implemented the restructure without a clear analysis of why it was required and only gave lip-service to the submissions of MLC staff."

10. In the 2019 budget for Whenua Māori funding, $7.8 million over four years was allocated for new Māori Land Court technology.[6] This will be welcomed by staff and is long overdue. The Māori Land Information System (MLIS) was introduced in 1999 and in the experience of our members, it is slow, clunky, difficult to use, and breaks frequently. Our members tell us it should have been replaced a decade ago, but instead is a symbol of underfunding of public services for Māori. While a new computer system will no doubt have teething issues, it is likely to have a significant and positive effect, particularly in terms of time savings. This will be very beneficial to Māori Land owners, with quicker application processing times.

11. We recommend that the committee closely consider the timing of the introduction of the changes proposed in the Bill. It is disappointing that new legislation is coming in at a time when Māori Land Court workloads are at all-time high, and staff morale is very low. October 2020 is practically around the corner, and there will be significant mahi to do for everyone to get ready. We understand that a number of new temporary positions have been announced and are about to be advertised. While Māori Land Court is in need of new staff, our members tell us that they worry about the time they will have to spend training new staff, who are only on 6-month contracts. For the reforms to be successful, Māori Land Court staff need to be ready by October 2020.

[6] Delivering for Māori and the whenua, 24 May 2019. https://www.beehive.govt.nz/release/delivering-m%C4%81ori-and-whenua

Registrars' Powers

12. A major technical change to the Act proposed by the Bill is around simple matters being dealt with by court registrars, rather than the judiciary.

13. The Bill proposes that, at the applicant's request, a court registrar may deal with an application for 'simple and uncontested' succession. A simple and uncontested succession is defined in the Amendment Bill as "succession that the Registrar is satisfied is simple, such as the following examples, and uncontested". The examples provided are:

    - Succession by will, where all successors belong to a preferred class of alienee; and
    - Succession to further interests where an earlier succession order has already been made.

14. In the same way as is done in the succession sections, the Bill changes the Act to allow court registrars to receive and determine "a simple and uncontested Trust matter" which is defined as "a trust matter that the Registrar is satisfied is simple and uncontested, such as the following", with three examples then listed. These examples are:

    - Constitution of a whānau trust order under s 214 to hold only the applicant's beneficial shares and interests
    - The conclusion of a kai tiaki trust constituted for a minor, when the minor reaches the age of 20; and
    - The appointment of a trustee to a whānau trust, where no objections are received to this appointment within 28 days after notice is given of the proposed appointment.

15. While the examples provided in the Bill are relatively simple and uncontroversial, however it could be argued that it could be of concern if an application to further interests was reliant on an earlier succession order that was made on the basis of a family arrangement. Or that the 28 days notice referred to above is unclear as to who is giving notice to whom.

16. The question arises as to what other examples in practice may be decided to be simple and uncontested by a Registrar. An obvious example would be removal of a deceased trustee from any type of Māori Land trust, as long as the appropriate documentation (i.e. trustee meeting minutes and death certificate) are provided. Another example could be changing the name of a trust, or the tipuna of a trust. However, it could be problematic if different Registrars have different interpretations of the phrase "simple and uncontested".

17. We note that any person affected by a Registrar's decision may apply for a review of that decision by a Judge within 28 days of the order being made, or outside this timeframe if the Judge grants leave. We support this notion, as it provides an extra level of protection to the Māori land owner.

18. If the Registrar decides, at any point during the course of the application, that the matter is not actually "simple and uncontested", they are able to refer the application to the Court. If, in such a case, the matter were to be referred to the Court, the application would possibly take longer to process than if it were set down for open court in the first instance. Shorter timeframes for applications is a goal of this technical change.

19. We note from the departmental disclosure statement: "The bill will enable simple and uncontested succession applications to be received, confirmed, and recorded by a Registrar of the Māori Land Court, instead of going through a full court hearing process."[7] In our view this understates the Māori Land Court case manager role. It does not take into account several time-consuming tasks that every succession application will require, for example, extensive research, communication with applicants and interested parties, beneficiary rent searches with the Māori Trustee and relevant incorporations.

20. Some of our members have expressed concern about the application of "simple and uncontested" matters. While they can see benefits of in terms of time and cost, their experiences in court have made them cautious:

    "Myself, often being on Court circuit at hearings, I see what may appear on the face of the application for these type of matters to be straight forward, to then turn into something more complex at Court when other interested parties turn up and throw in other issues related to the matter that make it more complex and requiring an adjournment with directions."

    "Simple and uncontested - needs to be well defined. I agree there is merit with certain applications being delegated to Registrars' Powers. The standard of the application will need to be a lot higher than current especially if no appearance is required."

    "Good idea but nothing is simple and uncontested these days, but agree with the idea in principle."

    "Seldom are there very little succession and trust applications that are simple and uncontested. These are the main applications that are complex and contested."

    "Simple successions are few are far (lol) having worked as a case manager for 9 years and recently becoming an Advisory Officer my perspective of Registrar has changed. If there was a level of consistency with all Deputy Registrars I see this working well but within this office alone the DR have different approaches to different situations."

21. In the 2019 Budget, as a part of the Whenua Māori funding, $10.1 million over four years was set aside for "Succession/online forms/other".[8]

22. In our view a substantial portion of that $10.1 million funding should be towards training of new and current staff. As it stands, the Māori Land Court currently spends very little budget on staff training. The online knowledge base is underutilised, as it is under-resourced. The norm is that new frontline staff are trained by more experienced frontline staff. However, as experienced staff have been leaving the Māori Land Court due to restructures or better opportunities elsewhere, on-the-job training has been lacking. The following responses from our union members are very typical:

    "More work with less experienced staff to do the mahi. Much of the time is being spent training new staff on fixed term contracts which is not helpful in trying to maintain the processing of the regular mahi being put through the Court."

[7] Departmental Disclosure Statement https://www.tpk.govt.nz/en/a-matou-mohiotanga/land/departmental-disclosure-statement-ttwmb

[8] Delivering for Māori and the whenua, 24 May 2019. https://www.beehive.govt.nz/release/delivering-m%C4%81ori-and-whenua

"We will struggle with these changes as staff are being given more mahi to do with less tools and resources to complete the work."

"We need to ensure we have good training sessions put in place to ensure all staff receive the same training together before going live with the new systems and legislation. Staff cannot give effect to something new without good robust training and testing of the new systems."

23. In line with the above, it should be noted that the Māori Land Court has very few Deputy Registrars in non-managerial positions. This is apparently due to both the lack of training available as well as stressful workloads placed on Deputy Registrars, with no pecuniary benefit. As noted in membership survey:

"In 2017 I went off on Maternity Leave and when I returned end of year the dynamics in the office had changed significantly. We lost the Team Leader 'tier' and that whole workload was then put on to our Deputy Registrar to pick up the checking of case managers work and certification process. This had an impact by not wanting to become a Deputy Registrar anymore."

24. Our members have a view that Registrars should be compensated for the extra work and responsibilities that they would carry to enable the new legislation. The vast majority of Māori Land Court staff sit on the same Ministry of Justice payband (J3), with a starting salary rate of $48,853 per annum. This is certainly not commensurate to the responsibilities required under the Bill's amendments. It is PSA's recommendation that the role is re-sized to take note of the extra authorities that will be exercised by Registrars under the Amendment Bill.

Dispute Resolution

25. Another major change for the Māori Land Court in the Amendment Bill is the new ability for Māori land disputes to be referred to mediation. The Bill provides that:

- Mediation may be undertaken in relation to any matter over which the Court has jurisdiction;
- Parties can seek mediation of an issue without needing to have initiated Court proceedings;
- Parties can seek mediation of an issue where Court proceedings have been initiated by requesting that a Judge refer them to mediation, or a Judge can refer a matter to mediation on their own initiative;
- Mediators can be either a Judge; a person from "a list of persons whom the Chief Executive [of the Ministry of Justice] has approved as mediators"; or a mediator not on the Chief Executive's list, but only if this mediator is approved by the Chief Executive;
- The provisions relating to non-judicial mediators will not come into effect at the same time as the rest of the Bill but will await a later date to be set by the Government. Until that point, only Judges can mediate disputes;
- Where a mediation is successful, the mediator will record the terms of the resolution and report them to the Judge or Registrar who referred the issue to mediation. The Judge or Registrar may make an order incorporating the terms of this resolution;
- Where a mediation is unsuccessful, the Court may either (a) refer the matter to a Court hearing, or (b) direct that further mediation take place to attempt to reach a resolution.

26. Our members have a range of views on this process. Many of our members can see value in the proposed dispute resolution process. We know that the issues of Māori land owners can be complex, and a 'one size fits all' approach will not necessarily provide the best solutions. Remedies could be more creative or flexible than what is normally possible in a court setting. Mediation can be empowering and mana-enhancing for our customers, and we can see the importance of Māori land owners maintaining positive relationships among whānau and hapū.

    "I think it will be helpful as many of our parties are raising matters of a personal nature in Court which lead to family disputes some of which result in permanent divisions within the whānau*. I think the only difficulty will be having the Judges as mediators will mean they may require more judges to deal purely with the mediations as they will not be able to then preside on cases where mediation fails."*

    "Strong advocate for mediation and dispute resolution - appreciate that most of the issues that require mediation/facilitation will not be legal issues. Doubt the judiciary will want to lead these types of mediation and their primary focus will be the legal/commercial issues. Regardless there will still be the judicial discretion for Court directed meetings for dispute resolution purposes - therefore the service will still be available for our clients."

    "This is a service that is needed for clients as staff or judges have been stand in (unpaid) mediators and counsellors for years. This service MUST be free for clients as our clients are impacted by POVERTY which reduces their access to justice. To have a service that they must pay for prevents their human rights to justice."

    "I think this will be particularly helpful for our customers and I am looking forward to learning new skills myself as part of this process."

    "Strongly agree with mediation as avenue to assist and support land owners to identify and provide solutions to their issues. Should be a free service for Māori land owners."

27. Our members can also see that this process will further increase their workloads, as staff will end up doing the organising around the mediation to support the judiciary or mediator. Furthermore, there may be no application for court proceedings, rather just an application for mediation. This would mean that a staff member would have to start from the beginning, to figure out who all the parties are, and what is the issue. There will be a lot of work involved for staff if this process becomes popular.

    "Who will organise this? How much extra work will this involve for case managers. Are the case managers involved and to what extent?"

    "I think this is a good idea, however, there will be more work for the Case Manager who will more than likely be required to organise everything - so as well as case managers they will become event managers as well!! I guess the bonus is that with the Judges doing the mediations for the first 2 years, that will cut out the process of having to try find qualified mediators!!"

    "In theory it serves a great purpose but again this is going to put more pressure on staff when there is no application before the Court. There will need to be strict procedures and rules in place to govern how and when this service is utilised."

28. We support the dispute resolution service being free of charge to Māori Land owners. But while the Regulatory Impact Statement notes that litigation can be time consuming, this process could be too. In the beginning, if there is a large uptake of the service, there may be a wait time for the judiciary to become available. There will still be work time lost for the parties; this process could end up taking longer than a court process.

29. We note that the 2019 budget has, under the Whenua Māori funding, proposed funding of up to $5.5 million over 4 years for this service.[9] However we also not that the regulatory impact analysis from Cabinet had budgeted up to $3.09 million per annum,[10] noting that the bulk of this cost going towards the payment of mediator fees and expenses. The amount in the 2019 budget is considerably lower, and in our view is likely to be inadequate.

Related matters

30. Whāngai – The Bill amends the sections of the Act relating to whāngai. In particular the Bill:

    - States that the Court has the ability to determine whether someone is a whāngai and whether there is a "relationship of descent" between them and either/both of their whāngai and birth parents. Whether a "relationship of descent" exists will determine whether a whāngai is eligible to receive Māori land interests.

    - Whether there is a 'relationship of descent' will be determined in accordance with the tikanga of the relevant iwi or hapū.

    Our members are in support of this change, but we note that it will be interesting to see it in practice, particularly the application of tikanga.

31. Spouses and partners – The Bill amends the current law to provide that spouses and partners of deceased Māori land owners have the right to continue to occupy the principal family home if it is on Māori land, and to receive income or discretionary grants relating to their partner's Māori land interests. This right ends upon the spouse/partner remarrying or entering into a new civil union or de facto relationship. Full beneficial interests in the deceased's estate will otherwise vest immediately in their successors, who will be recorded on the land title, rather than having to wait until the spouse/partner passes away, remarries or renounces their interest, as is currently the case.

    Our members are in support of this change, as it means that Māori Land owners can immediately participate in decision making for their whenua. We do foresee a process issue, that it would appear that we would somewhere have to keep a note of separate list of spousal rights to income for each title. We would also need to somehow inform and continuously educate Māori Land trusts on this matter. It could prove quite difficult to maintain, and it is likely that the wrong persons will be paid dividends due to this.

[9] Delivering for Māori and the whenua, 24 May 2019. https://www.beehive.govt.nz/release/delivering-m%C4%81ori-and-whenua
[10] https://www.tpk.govt.nz/documents/download/5985/regulatory-impact-analysis-te-ture-whenua-Māori-amendment-bill.pdf

32. Appointment of expert members - The Bill gives the Court the power to appoint additional members with expertise in tikanga Māori and/or whakapapa to sit alongside a Judge. These members will determine the matter before the Court alongside the Judge.

    Our members are supportive of this change. We note it can be particularly useful for determining whāngai entitlements, particularly if the sitting Judge is not from that rohe.

33. Family Protection and Testamentary Promises orders - The Bill amends the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 to give the Māori Land Court the power to make determinations under these Acts in relation to Māori freehold land. This will mean that the Māori Land Court can hear claims from family members who believe they have been unfairly left out of their parent, grandparent or partner's will (a Family Protection claim); or from anyone who claims that a deceased landowner promised them an interest in their land prior to passing (a Testamentary Promises claim). These claims can currently be heard in the High Court, but not the Māori Land Court.

    Our members are supportive of this change. We note that the court fees will be substantially lower for our Māori Land owners than if the parties were to litigate in the High Court. We can foresee that it may lead to more mediation under part 3A, but that may be a more beneficial experience for Māori than High Court litigation.

34. Māori reservations - The Bill makes a number of amendments to the current law regarding Māori reservations, including that Māori reservations are created by a Court order, rather than requiring a recommendation to the Minister of Māori Development.

    Our members are in support of these changes. We particularly note that the current reservation recommendation process from court sitting to gazettal can take several months, while our customers wait for an inter-departmental bureaucratic exercise. Māori reservations (and any variations therein) created by order of the Court will be welcomed by Māori land owners.

Conclusion

Whatungarongaro te tangata, toitū te whenua
As people disappear from sight, the land remains

35. When we asked our members whether they felt sufficiently informed about the new bill, about half said yes and half said no. This is of particular concern, as the proposed changes are due to take place in less than a year. Our hoamahi in the Whenua Māori programme have done a great job with sending communications to staff, but it appears that staff are so busy with their current workloads to keep up with the reading. Some noted that they were informed about the bill on social media. It is also apparent that even the well-informed staff cannot see the logistics of how it all works and where they fit in. We recommend that staff workshops happen soon so that staff can have buy-in to the process. Staff need to be proactive and informed for this legislation to meet its aims. We as PSA are happy to engage with Māori Land Court management to help facilitate these workshops to make them meaningful and valuable for staff.

36. While we as PSA agree with the reforms, we can see some technical issues that may occur. To resolve these, there will need to be opportunities for early interventions, where staff have the ability to collaborate with management about solutions.

37. We as PSA believe that the continued funding of the Māori Land Court will ensure its success. And any funding cuts, as we have seen in the lack of MLIS development and the 2017 restructure, will result in the failure to provide quality services to Māori Land owners.

38. We as PSA recommend that the role of Deputy Registrar is job sized to appropriately recognise and remunerate staff who will be taking on new and quasi-judicial responsibilities under these amendments.

39. Our Māori Land Court members want to do their best and be proud of their mahi and the services they provide to Māori. We asked them the question "How do you think we as current Māori Land Court staff will give effect to these changes?" While the responses were not entirely positive, they show the willingness of the staff to achieve at all costs. The staff culture at Māori Land Court has always been: He waka eke noa – We are all in this together.

    "Like we always do...with a smile and a Tēnā koutou katoa"

    "We will take it in our stride and we have done before."

    "I honestly think without the current MLC staff who else is there to give effect to these changes? Who else will provide a quality service that is already built in us all? What will it take to build a new work force from scratch?"

    "With good planning, a willingness to embrace change ... these changes should provide a better service to clients and give us the opportunity to move forward as a unit using improved standardised work processes. This may seem naive but I struggle to see how it can be worse than what we currently work with. I know it will be hard work but I also see that it could be very rewarding intrinsically."

    "Plenty resources; plenty training; and awesome leadership is the key. Its inevitable changes are going to happen to benefit our Māori Land owners. The changes are only as good as the service and processes that go alongside them."

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