

WAITANGI TRIBUNAL

Wai 2472

CONCERNING

the Treaty of Waitangi Act 1975

AND

an application for an urgent hearing by Joel McVay, Rhys Warren, Hinemanu Ngaronoa, Sandra Wilde and Marisa Matthews

DECISION OF THE DEPUTY CHAIRPERSON ON URGENCY

1. The Tribunal received an application for an urgent hearing on 10 July 2014 from Joel McVay, Rhys Warren, Hinemanu Ngaronoa, Sandra Wilde and Marisa Matthews concerning the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 and the imminent general election (Wai 2472, #3.1.1).
2. I directed the Crown and any interested parties to provide submissions and evidence in response to this application by 1 August 2014 (Wai 2471, #2.5.1). The Crown's submissions in response were received on this date (Wai 2472, #3.1.2).

The Claim and Application for Urgency

3. The claimants allege that the Crown has breached the principles of the Treaty of Waitangi by:
 - 3.1. Failing to include any reference to the Treaty of Waitangi or its principles in the Electoral Act 1993;
 - 3.2. Allowing the enactment of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, which removes prisoner voting rights to an even greater extent than before;
 - 3.3. Allowing this Act to disproportionately affect Māori in a negative way due to the high Māori prison population;
 - 3.4. Effectively limiting Māori voting rights; and
 - 3.5. Failing to actively protect Māori representation in Parliament.
4. The claimants seek the following:
 - 4.1. A finding that the Amendment Act is in breach of and/or inconsistent with the principles of the Treaty of Waitangi;
 - 4.2. A finding that the claim is well founded and urgent declarations are necessary;
 - 4.3. Compensation to the extent that the Tribunal considers appropriate; and
 - 4.4. Such further relief that the Tribunal deems appropriate.

5. The claimants sought an urgent hearing of their claim. They submitted that they and Māori generally are likely to have their rights irretrievably prejudiced or jeopardised if an urgent hearing is not scheduled before the general election on 20 September 2014. Further, the claimants submitted that if there is no consideration and/or adjudication of the claimants voting rights under the Treaty of Waitangi, then there is no alternative remedy to redress the fundamental right of self-determination.

Crown Response

6. In its response the Crown opposed the application for urgency on the basis that the grounds for an urgent inquiry have not been made out. Specifically, the Crown submitted that:
 - 6.1. Although the applicants contend that the imminent general election gives rise to the need for an urgent inquiry, the application is belated, it was filed on 10 July 2014 in respect of legislation that has been in effect since 16 December 2010;
 - 6.2. In any event, urgency does not facilitate the applicants' ultimate goal of legislative change as this cannot realistically occur before the general election;
 - 6.3. The applicants are presently pursuing an alternative remedy through the High Court; and
 - 6.4. The applicants have not demonstrated that there will be significant and irreversible prejudice if the claim is not heard urgently.

Urgency Criteria

7. The *Guide to Practice and Procedure of the Waitangi Tribunal* sets out the criteria it will consider in determining whether or not to grant an application for an urgent hearing. Of particular importance are the following:
 - the claimants must be able to demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
 - that there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
 - that the claimants can demonstrate that they are ready to proceed to an urgent hearing.
8. The Tribunal may also consider the following factors:
 - whether the claim or claims challenge an important current or pending Crown action or policy;
 - whether an injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
 - whether there are any other grounds justifying urgency.
9. The Tribunal has stated on a number of occasions that it will only grant an urgent hearing in exceptional cases and where it is satisfied that adequate grounds for urgency have been made out. The applicant must establish that there is an exceptional case that warrants the diversion of the Tribunal's resources from other inquiries and priorities to conduct an urgent inquiry into their claim.

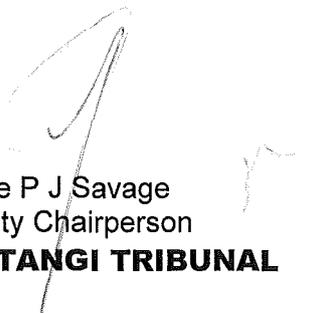
Tribunal Decision

10. The applicants are effectively seeking legislative change prior to the imminent general election on 20 September 2014. I tend to agree with the Crown that an urgent hearing of the applicants' claim will not facilitate their ultimate goal of legislative change prior to this date. The House of Representatives rose on 31 July 2014 and Parliament will be dissolved on 14 August 2014.

11. However, the claim raises very important issues that should be inquired into by the Tribunal as a matter of some urgency. I am aware that the same issue for prisoners in general is a live one in a number of western democracies. Māori form a large proportion of the New Zealand prison population. It is important that consideration be given to the Treaty implications of the present legislation.
12. So far as the Crown's contention that the matter ought not be given urgency on the basis that the claimants, or some of them, are pursuing a remedy in the High Court is concerned, I do not believe that that should impede this claim. I understand the proposition before the High Court to be that the legislation in question is contrary to the terms of the New Zealand Bill of Rights Act 1990. That is a quite different question to whether the legislation is consistent with Treaty principles.
13. I therefore give priority to this claim. A Tribunal will be empanelled to inquire into the Wai 2472, Electoral (Disqualification of Sentenced Prisoners) Amendment Act Claim. The intention is that the Panel will hear this claim in mid-2015 and be in a position to report so that that report can be considered and if appropriate, acted upon prior to the next general election.
14. I suspect that the hearings will not involve issues of fact and could be quite quickly concluded but that remains to be seen. So that better planning of the way forward can be achieved I direct that a teleconference be held at a date to be fixed in November of this year.

The Registrar is to send a copy of this direction to counsel for the applicants, Crown counsel and those on the notification list for Wai 2472, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act Claim.

DATED at Rotorua this 7th day of August 2014



Judge P J Savage
Deputy Chairperson

WAITANGI TRIBUNAL