

2 March 2009

The Committee Clerk  
Government Administration Committee  
Executive Wing  
Parliament Buildings  
Wellington

**SUBMISSION TO THE GOVERNMENT ADMINISTRATION COMMITTEE  
ON THE CULTURAL PROPERTY (PROTECTION IN ARMED CONFLICT)  
BILL**

- 1 This submission is from the Legislation Advisory Committee (LAC).
- 2 The LAC was established in February 1986 by the Minister of Justice. It is serviced by the Ministry of Justice, and generally meets every six weeks. The terms of reference of the LAC are:
  - (a) to provide advice to departments on the development of legislative proposals and on drafting instructions to the Parliamentary Counsel Office;
  - (b) to report to the Minister of Justice and the Legislation Committee of Cabinet on the public law aspects of proposals that the Minister or that Committee refers to it;
  - (c) to advise the Minister of Justice on any other topics and matters in the field of public law that the Minister from time to time refers to it;
  - (d) to scrutinise and make submissions to the appropriate body or person on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
  - (e) to help improve the quality of law making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.
- 3 The current members of the LAC are:

Sir Geoffrey Palmer, Chairperson and President of the Law Commission  
Sir Ivor Richardson, Former President of the Court of Appeal  
Graeme Buchanan, Deputy Secretary, Legal, Department of Labour

Professor John Farrar, Dean of Law, Waikato University  
 Andrew Geddis, Senior Law Lecturer, Otago University  
 Ivan Kwok, Treasury Solicitor  
 Mary Scholtens QC, Wellington Barrister  
 Dr John Yeabsley, Senior Fellow, New Zealand Institute of Economic Research  
 Guy Beatson, Counsellor (Economic), New Zealand High Commission  
 Professor John Burrows, Commissioner  
 Jack Hodder, Partner, Chapman Tripp  
 Grant Liddell, Director, Serious Fraud Office  
 Dr Warren Young, Deputy President of the Law Commission  
 Hon Justice Robertson, Judge of the Court of Appeal  
 George Tanner QC, Commissioner  
 Jeff Orr, Chief Legal Counsel, Ministry of Justice

## **Introduction**

- 4 The LAC has reviewed the Bill and wishes to raise a number of issues with the Committee. The LAC considers that the Bill is generally appropriate to achieve the objective of meeting New Zealand's obligations required before acceding to the First and Second Protocols to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict. The LAC appreciates that the key objective of the Bill and the Convention is to prevent the attack on or stealing of, cultural property in time of armed conflict, and enable the return of the smuggled property to its rightful owner. However, there are two specific areas where the LAC has concerns that the means may be somewhat disproportionate to this key objective of the Bill. One is the timing of forfeiture of smuggled property, and the other is compensation for a bona fide purchaser for value.

## **Forfeiture of alleged smuggled property immediately upon seizure**

- 5 Clause 19 provides that smuggled property in New Zealand is "liable to forfeiture" but clause 19(2) provides that title in the property passes to the Crown upon seizure. In view of the important international objectives of the Bill, seizure seems reasonable, but immediate forfeiture does not. Immediate forfeiture upon seizure of the smuggled property may not be the most appropriate means of achieving the policy objective. It might be fairer to give a bona fide purchaser a chance to claim BEFORE being divested of title.
- 6 The alleged smuggled property could still be detained (see clause 31) in the custody of the state while claims are made by a possible bona fide purchaser - but not detained "as forfeit". This would be consistent with: (1) the 1954 Convention, (2) the Law Commission's recommendations in NZLC R 91 "Forfeiture under the Customs and Excise Act 1996" (2006), (3) the English Draft Cultural Property (Armed Conflicts) Bill 2008, and (4) the Canadian Cultural Property Export and Import Act 1985.
- (1) The protocols to the 1954 Hague Convention do not mention "forfeiture" but provide (in schedule 2 of First Protocol) that each High Contracting Party undertakes to "take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory". Detention

upon seizure (without forfeiture) should be sufficient compliance with this undertaking.

- (2) The Law Commission, in NZLC R 91 "Forfeiture under the Customs and Excise Act 1996", considered that there was no justification for automatic forfeiture upon seizure. It may be necessary and reasonable to seize and detain alleged smuggled property, but then an innocent owner should be given an opportunity to contest such seizure and detention. The alleged smuggled property can be "liable to forfeiture", but the property need not be actually forfeited upon seizure - this should not be necessary to achieve the aims of the legislation. However, we note that the Customs and Excise Act 1996 has not been amended in accordance with the Law Commission's recommendations.
  - (3) The English Draft Cultural Property (Armed Conflicts) Bill 2008, schedule 5, deals with forfeiture processes. The burden is on the person who has custody of the property seized to notify any person who (to the custodian's knowledge) owned the property at the time it was seized - unless the property was seized in the presence of the owner. The person with custody (most likely a representative of the state) must then apply to court for a forfeiture order in respect of the property seized, within 4 months. If a court proposes to make a forfeiture order, the court may assess an amount to be paid by way of compensation to the person who has acquired a bona fide interest in the property since it was unlawfully exported. If such assessment is made, the forfeiture order does not take effect until the compensation is paid - and will lapse if compensation is not paid within 4 months. There can be interim orders made about safekeeping of the property. The Secretary of State must arrange to return forfeited property pursuant to the First Protocol; if the property is not forfeited, the property must be returned to the owner as soon as reasonably possible.
  - (4) The Cultural Property Export and Import Act 1985 (Canada) provides for court action before recovery of cultural property - if the Government of a State Party so requests. Notice must be given to all persons interested so that all may have an opportunity of being heard, and compensation (to the amount that the court considers just), is to be paid by the relevant State Party, if the court is satisfied there has been an export or import contravention, and that there is a bona fide purchaser for value, or a person with a valid title in the property. Thus the burden is on the state to take proceedings before recovery of alleged cultural smuggled property, unlike in the New Zealand Bill. The Canadian Act does not cover serious violation offences (per art 15 of the Second Protocol).
- 7 The English draft provisions or, even more so, the Canadian Act would be in accordance with the Law Commission's recommendation in NZLC R 91 "Forfeiture under the Customs and Excise Act 1996" .

- 8 Because part 14 of the Customs and Excise Act 1996 has generally been incorporated into the draft Bill (pursuant to clause 20), for consistency with that Act, and to enable the appeal provisions of that Act to apply to smuggled cultural property, it is necessary for forfeiture to operate on seizure. However, the LAC suggests that the Cultural Property (Protection in Armed Conflict) Bill has its own detention and forfeiture regime modelled on the English or Canadian provisions.

### **Compensation**

- 9 Schedule 2 of the First Protocol of the Convention provides that the High Contracting Party, whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned.
- 10 Compensation for forfeited property where there is a good faith purchaser (who became the possessor of the property after it became smuggled property) is covered in clauses 32-34 of the Bill. Application for assessment of compensation is to the High Court, which will be costly and we are concerned that there could well be delays. The LAC queries whether this is a matter for which the District Court could have jurisdiction up to a certain monetary value.
- 11 We note that pursuant to the Bill at present seizure might be disallowed (under sections 231 and 232 of the Customs and Excise Act 1996) in which case a bona fide purchaser might obtain compensation for any depreciation in value of the goods: the District Court has jurisdiction regarding this compensation.
- 12 In addition, compensation seems to be entirely in the discretion of the High Court; we suggest that there should be guidelines, and further legislative timeframes to prevent delay.

Thank you for your consideration of this submission.

**Sir Geoffrey Palmer**  
**Chair, Legislation Advisory Committee**